Medical Malpractice

Amendment 7

Charles v. Southern Baptist Hospital of Florida, Inc., 209 So. 3d 1199 (Fla. 2017)

Article X Section 25 of the Florida Constitution (Amendment 7) is not preempted by the Federal Patient Safety and Quality Improvement Act. More specifically, adverse incident medical reports are not patient safety work product nor does the Federal Act preempt the state constitution.

Edwards v. Thomas, 229 So. 3d 277 (Fla.2017)

In a 5-2 decision, the Florida Supreme Court held that external peer review reports which may have been requested by the hospital in anticipation of litigation are not protected from discovery under Amendment 7. In so doing, the Supreme Court noted that because the hospital was statutorily required to maintain similar adverse medical incident reports as the ones outsourced to an external peer review committee, it was logical to conclude that these sorts of reports are maintained in the ordinary course of business. Although they did not directly address the issue, it appears as though the current Florida Supreme Court would also find that such records are not protected by the opinion work product privilege or the attorney/client privilege.

Arbitration

DiLorenzo v. Lam, 209 So. 3d 649 (Fla. 2d DCA 2017)

The Second District reversed an Order compelling arbitration of a medical malpractice claim based upon an arbitration agreement in effect between the doctor and his patient. The Second District reversed and found that the agreement was unenforceable because it sought to enjoy the benefits of the arbitration provisions under the Medical Malpractice Act without adopting all of its provisions. Specifically, the agreement incorporated the statutory cap on damages without also adopting the concession of liability provision of the statute.

Attorney's fees

Searcy, Denney, et al. v. State of Florida, 209 So. 3d 1181 (Fla. 2017)

Following a judgment against Lee Memorial for $28,300,000, the family obtained a claims bill from the legislature directing Lee Memorial to pay $10,000,000 with an additional $5,000,000 to be paid in installments of $1,000,000 to the guardianship of the injured child. The claims bill further stated that payment of fees and costs from the funds awarded in the claims bill shall not exceed $100,000 and no funds were awarded in the claims bill for the parents despite a jury award of $2,340,000.

After the first payment of $10,000,000, the Searcy, Denney law firm, with the full support of the family, petitioned the guardianship court to approve a closing statement allowing $2,500,000 for attorney's fees and costs. The requested amount was based upon the contract that existed with the family as limited by the provisions of Florida Statute 768.28(8). The petition to approve the closing statement also contended that the limit on fees contained in the claims bill was unconstitutional. The guardianship court and the Fourth District ultimately rejected the request for fees.

The Supreme Court held that it was unconstitutional for the Florida legislature to limit the amount of attorney's fees paid from a guardianship trust established by a legislative claims bill and that the fee limitation of $100,000 pursuant to a limited waiver of sovereign immunity constituted an unconstitutional impairment of the attorney's contact with the Plaintiffs. As such, the trial court concluded that attorney's fees of up to 25% could be awarded when judgment was recovered by way of a claims bill.

Grossman Roth, P.A. v. Mellen, 221 So. 3d 683 (Fla. 4th DCA 2017)

A hospital which had sovereign immunity agreed to settle a medical malpractice claim for $3,000,000 and to support the passage of a Claims Bill by the legislature. Pursuant to the agreement, the trial court entered a consent final judgment for $3,000,000 against the hospital and ordered the hospital to tender the statutory limits of $200,000. It also entered an order approving the settlement including the payment of an attorney's fee of "25% pursuant to contract" and costs. The law firm then pursued and obtained a Claims Bill on Mellen's behalf. The legislature awarded the remaining $2,800,000 to Mellen and limited attorney's fees to 15% of the first $1,000,000 and 10% of the second $1,000,000 and 5% of the

remainder awarded under the act for a total of $290,000 and also added the taxable costs could additionally be recovered. The law firm disputed the propriety of the legislatively imposed fee limitation and the Plaintiff agreed to the law firm holding an additional $410,000 in escrow pending settlement of the fee dispute. Mellen then brought an action for a declaratory judgment seeking an award of the escrow balance and the law firm counterclaimed for a declaratory judgment pronouncing the fee limitation provision of the claims bill unconstitutional. The trial court entered judgment in favor of Mellen and the Fourth District reversed based upon the Florida Supreme Court's recent opinion in *Searcy Denney v. State*, 209 So. 3d 1181 (Fla. 2017) ruling that the legislative claim bill's fee limitation pursuant to limited waiver of sovereign immunity statute constituted an unconstitutional impairment of the attorney's contract with the Plaintiffs.

Caps

North Broward Hospital District v. Kalitan, 219 So. 3d 49 (Fla. 2017)

The Supreme Court held that the caps on personal injury non-economic damages in medical negligence actions provided for in Florida Statutes §766.118 violated the Equal Protection Clause of the Florida Constitution and, therefore, are unconstitutional. They held that it violated equal protection under a rational basis test because the arbitrary reduction of compensation without regard to the severity of the injury does not bear a rational relationship to the legislature's stated interest in addressing the medical malpractice crisis.

Causation

Ruiz v. Tenet Hialeah Healthsystem, Inc., 224 So. 3d 828 (Fla. 3d DCA 2017)

The Third District affirmed the trial court's granting of a directed verdict in favor of an anesthesiologist who conducted a pre-anesthesia evaluation of the patient who died of exsanguination during surgery because there was no competent, substantial evidence that the anesthesiologist's behavior fell below the standard of care or that any breach of the standard of care more likely than not caused the patient's death.

Directed Verdict

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Equitable subrogation

Holmes Regional Medical Center v. Allstate Insurance Company, 225 So. 3d 780 (Fla. 2017)

Hintz sustained head injuries when his scooter collided with an automobile driven by an individual insured by Allstate. Hintz received medical treatment at Holmes Regional Medical Center where according to Allstate, his injuries were "exacerbated by medical negligence." Hintz filed suit against the operator and owner of the vehicle. The Plaintiff successfully argued that the Defendants could not present evidence that medical negligence was a contributing cause of the Plaintiff's injuries. The jury found the Defendants liable for the Plaintiff's injuries and a judgment in excess of $11,000,000 was entered. Thereafter, Allstate paid $1,100,000 which was its policy limit and the Defendants had not paid the remainder of this judgment.

Following the verdict, the Plaintiff filed a separate medical malpractice lawsuit against Holmes Regional Medical Center. Allstate and its insureds were granted leave to intervene in the lawsuit and both parties filed complaints claiming they were entitled to equitable subrogation from the medical providers. In response, the medical providers sought dismissal of the complaint because neither Allstate nor its insured had paid the Plaintiff's damages in full. The trial court agreed and dismissed that action. The Supreme Court upheld the trial court's decision and held that a party that has had judgement entered against it was not entitled to seek equitable subrogation from a subsequent tortfeasor when the judgment had not been fully satisfied.

***Ex parte* interviews**

Weaver v. Myers, 229 So. 3d 1118 (Fla. 2017)

In yet another 4-3 decision, the Florida Supreme Court held that the portion of the statutory authorization required under Florida Statutes §766.1065 which allows a potential Defendant to conduct *ex parte* interviews with the Claimant's healthcare provider and which allows the prospective Defendant to conduct the interviews without further notice to the Claimant if the Claimant's attorney fails to schedule an interview violates the patient's constitutional right of privacy and unconstitutionally conditions a Claimant's right of access to the courts based upon the waiver of the right to privacy.

The Supreme Court also held that, even though the patient in this case had died, the decedent's estate maintained a constitutional right to privacy concerning matters that occurred prior to death. In so doing, the Supreme Court acknowledged that while a Claimant may waive privacy rights to medical information that is relevant to a claim by filing an action, this does not amount to a waiver of privacy rights pertaining to all confidential health information that is not relevant to the claim. Lastly, the court struck the unconstitutional language from §766.106 and 766.1065 which authorized the *ex parte* interviews.

Foreign bodies

Dockswell v. Bethesda Memorial Hospital, 210 So. 3d 2101 (Fla. 2017)

In this case, the Florida Supreme Court quashed the decision of the Fourth District Court of Appeal on the interpretation of Florida Statute §766.102(3)(b) ruling that, in a medical malpractice case involving a foreign body left inside a patient's body, the burden of proof shifts to the Defendant to prove that no medical negligence occurred. In doing so, the Supreme Court ruled that the foreign body presumption of negligence is mandatory when a foreign body is found inside the patient's body, regardless of whether direct negligence exists of negligence or who the responsible party is for the foreign body's presence.

In this regard, they noted that the statutory foreign-body presumption differed from the common low doctrine of *Res Ipsa Loquitur* because the foreign-body presumption provides Plaintiffs with the presumption of negligence even if direct evidence of negligence exists. As such, they determined that the trial court's decision in failing to give Florida standard jury instruction 402.4c which states "negligence is the failure to use reasonable care. The presence of (name of foreign

body) in [patient] body establishes negligence unless (Defendant proves by the greater weight of the evidence) that it was not negligent" was in error and that the error was not harmless.

Injury in doctor's office not medical malpractice

Vance v. Okaloosa-Walton Urology, PA, 228 So. 3d 1199 (Fla. 1st DCA 2017)

The trial court dismissed an Amended Complaint in which it was alleged that the patient visited a urologist at his office in order to have a catheter removed. In the examination room, the doctor provided a step for the patient to use to get on to the examination table. The doctor then moved the step away and performed the procedure. After the procedure, the doctor told the patient to go to the front desk and schedule another appointment for the following week and then he left the examining room. The patient began to descend from the table, but because the step had been removed, she claims she fell on to the floor. The First District reversed finding that this was a case of ordinary negligence because jurors could use their common experiences to evaluate the act of placing and removing a step used by someone to get on and off a table. The District Court cautioned that their decision rested solely on the allegations of the Amended Complaint and it did not foreclose a later challenge should the case morph into a medical negligence claim.

Nursing home arbitration agreements

Moen v. Bradenton Counsel on Aging, 210 So. 3d 213 (Fla. 2d DCA 2017)

After the trial court ordered a binding arbitration pursuant to the nursing home housing agreement, the Second District reversed finding that an arbitration agreement executed by the resident's daughter in her capacity as a healthcare proxy is not enforceable. A healthcare proxy does not have the authority to waive the right to a jury trial and bind a nursing home resident to arbitrate claims because it is not a healthcare decision. Further, the resident and her estate were not bound by the agreement on the basis that the resident was a third-party beneficiary of the agreement.

Angels Senior Living at Connerton Court, LLC v. Gundry, 210 So. 3d 257 (Fla. 2d DCA 2017)

The trial court denied a Motion to Compel Arbitration because, amongst other things, the arbitration agreement required the parties to follow the American

Health Lawyers Association Rules which limited discovery to production of written documents and depositions of opposing parties, treating physicians and expert witnesses. The Second District found that this was in error and reversed and remanded for the trial court to compel arbitration.

Rockledge NH, LLC v. Miley, 219 So. 3d 246 (Fla. 5th DCA 2017)

The Fifth District ruled that the trial court erred in denying a Motion to Compel Arbitration of Claims against the nursing home on the grounds that the agreement was unenforceable because the attorney's fees provision of the agreement provided that each party would be responsible for their own fees and thus violated public policy by precluding application of the Adult Protective Services Act's prevailing party fee provision. The Fifth District held that the attorney's fees provision was severable under the express terms of the arbitration agreement's severability clause and because the attorney's fees provision did not go to the essence of the parties' agreement.

FI-Pompano Rehab, LLC v. Irving, 221 So. 3d 781(Fla. 4th DCA 2017)

34 days after a resident of a nursing home was admitted, her daughter and Power of Attorney signed a Resident Admission Agreement that contained an arbitration provision. After the resident died, her family filed suit against the nursing home whereupon the nursing home filed a Motion to Compel Arbitration. The trial court determined that the arbitration agreement was unenforceable based upon procedural unconscionability. The District Court found that the trial court erred because it relied only upon the argument that the agreement was procedurally unconscionable. On appeal, the resident's family argued substantive unconscionability because the agreement required the parties to share the cost of the arbitrator equally. The District Court ruled that this argument could not be raised for the first time on appeal and, further, found that the agreement was not substantively unconscionable and therefore remanded with directions to enter an order compelling arbitration.

Out of state expert

PP Transition, LP v. Munson, 232 So. 3d 515 (2d DCA 2017)

The Plaintiff filed a medical malpractice action claiming damages as a result of the care that Munson received from the nursing staff at the hospital. During presuit, the Plaintiff submitted an Affidavit from a California-licensed neurologist who expressed opinions on the nursing standard of care in Florida. Following presuit, the Defendant filed a Motion to Dismiss for failure to plead a claim or for

an evidentiary hearing on the Plaintiffs' compliance with the presuit screening statute arguing, amongst other things, that the California-based witness was ineligible to offer opinions on the standard of care applicable to nurses in Florida. See §766.206(1), (2). After a non-evidentiary hearing, the trial court denied the motion and gave no explanation for its ruling either on the record or in the subsequent written order denying the motion.

The Defendant filed certiorari and the Second District granted same noting that the trial court failure to make findings as to the Plaintiffs' compliance with Chapter 766 resulted in a denial of the procedural safeguards of the Chapter for which certiorari relief was appropriate.

Podiatrist can't be an expert against orthopedic surgeon

Clare v. Lynch, 220 So. 3d 1258 (Fla. 2d DCA 2017)

The Second District held that a board-certified podiatrist was not qualified to serve as a corroborating expert in litigation against the Defendant who was a board-certified orthopedic surgeon. As such, the Second District held that the trial court erred in reinstating the Plaintiff's medical malpractice complaint against the Defendant because the expert affidavit submitted by the Plaintiff did not satisfy the statutory presuit requirements.

Presuit screening

St. Joseph's Hospital, Inc. v. Doe, 208 So. 3d 810 (Fla. 2d DCA 2017)

The Plaintiff was a mental health patient at St. Joseph's Hospital. She alleged that a mental health technician employed by the hospital sexually assaulted her in her room. She further alleged that, when she reported the incident to hospital officials, they tried to intimidate her and failed to investigate the allegation.

Count I of the Complaint was for negligence in which it was alleged that the hospital was aware or should have been aware of the prevalence of sexual assaults of patients by hospital employees and that the hospital breached its duty of care to the patient by failing to exercise reasonable care to prevent her from being assaulted.

The second count of the Complaint alleged that the hospital violated Florida Statute 766.110 and 395.0197 by failing to comply with its statutory duty to institute and maintain a risk management program concerning adverse incidents associated with medical intervention.

Despite finding that the Plaintiff's allegation of sexual assault did not meet the statutory definition of a "adverse incident" under the statute, the Second District found that the trial court departed from the essential requirements of the law in denying the Motion to Dismiss as to the second count of the Complaint. At the same time, the found that certiorari was not appropriate for Count I of the Complaint because it was not a medical malpractice action requiring presuit notice.

Bay County Board of County Commissioners v. Seeley, 217 So. 3d 228 (Fla. 1st DCA 2017)

In denying the Defendant's Petition for Certiorari, the First District held that where the Plaintiff had sent her Notice of Intent to Initiate Litigation via certified mail to the County one day before the expiration of the statute of limitations, she had complied with the presuit notice requirements even though it was not received by the County until two business days after. This decision is in conflict with the Second District's decision of *Bove v. Naples HMA, LLC***,** 196 So. 3rd 411 (Fla. 2d DCA 2016).

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PSO's

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Release in consent for surgery

Brooks v. Paul, 219 So. 3d 886 (Fla. 4th DCA 2017)

The Fourth District reversed a Summary Judgment in favor of a neurosurgeon finding that a release signed by the patient prior to surgery was ambiguous and uncertain. The release stated in its entirety the following:

> "As of January 1, 2003, Dr. Michael D. Paul and the Professional Corporation of MacMillan, Paul and Burkarth, P.A., also known as Treasure Coast Neurosurgery, will not carry any medical malpractice insurance. Being of sound mind and sound body, I hereby acknowledge this fact and agree not to sue Dr. Michael D. Paul, or the Professional Corporation of MacMillan, Paul and Burkarth, P.A. for any reason. My reason for doing this is that I realize that Dr. Michael D. Paul and his staff will do the very best to take care of me according to community medical standards."

In finding that this release was ambiguous and uncertain, the court noted that this exculpatory provision appears in smaller type below a statutory notice regarding the doctor's decision not to carry malpractice insurance. The provision was not thorough or detailed. It did not expressly release any particular type of claim. Further, the court stated that the first two sentences, read in isolation, are

broad and arguably encompass a negligence claim; however, the third sentence qualifies the first two sentences and thereby creates an ambiguity.

Sovereign Immunity

Searcy, Denney, et al. v. State of Florida, 209 So. 3d 1181 (Fla. 2017)

Following a judgment against Lee Memorial for $28,300,000, the family obtained a claims bill from the legislature directing Lee Memorial to pay $10,000,000 with an additional $5,000,000 to be paid in installments of $1,000,000 to the guardianship of the injured child. The claims bill further stated that payment of fees and costs from the funds awarded in the claims bill shall not exceed $100,000 and no funds were awarded in the claims bill for the parents despite a jury award of $2,340,000.

After the first payment of $10,000,000, the Searcy, Denney law firm, with the full support of the family, petitioned the guardianship court to approve a closing statement allowing $2,500,000 for attorney's fees and costs. The requested amount was based upon the contract that existed with the family as limited by the provisions of Florida Statute 768.28(8). The petition to approve the closing statement also contended that the limit on fees contained in the claims bill was unconstitutional. The guardianship court and the Fourth District ultimately rejected the request for fees.

The Supreme Court held that it was unconstitutional for the Florida legislature to limit the amount of attorney's fees paid from a guardianship trust established by a legislative claims bill and that the fee limitation of $100,000 pursuant to a limited waiver of sovereign immunity constituted an unconstitutional impairment of the attorney's contact with the Plaintiffs. As such, the trial court concluded that attorney's fees of up to 25% could be awarded when judgment was recovered by way of a claims bill.

Grossman Roth, P.A. v. Mellen, 221 So. 3d 683 (Fla. 4th DCA 2017)

A hospital which had sovereign immunity agreed to settle a medical malpractice claim for $3,000,000 and to support the passage of a Claims Bill by the legislature. Pursuant to the agreement, the trial court entered a consent final judgment for $3,000,000 against the hospital and ordered the hospital to tender the statutory limits of $200,000. It also entered an order approving the settlement including the payment of an attorney's fee of "25% pursuant to contract" and costs.

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Spoliation of evidence

Wolicki-Gables v. Doctors Same Day Surgery Center, Ltd., 216 So. 3d 665 (Fla. 2d DCA 2017)

The Plaintiffs brought a third-party spoliation lawsuit against the Surgery Center. They claimed that if the Surgery Center had kept an allegedly defective pain-pump connector removed from the patient, the Plaintiffs could have maintained a civil action against Aero International, Inc. for first-party spoliation or a parallel claim for negligent design and/or manufacturer under Florida law. The trial court granted Summary Judgment and the Second District affirmed finding that any potential state law claim for negligent design or manufacturer against Aero was preempted by Federal law and because the Plaintiffs could not assert a "parallel claim" against Aero under Florida law.

Statute of Limitations

Martin v. Sowers, 231 So. 3d 559 (Fla. 3d DCA 2017)

In a 2-1 decision, the Third District ruled that the trial court should have granted the Plaintiff's summary judgment on the issue of the statute of limitations defense raised by the radiologist. In failing to do so, the majority believed that the jury was allowed to be misled into believing, that the claim against the radiologist was whether he was responsible for her initial diagnosis of breast cancer as

opposed to metastatic cancer which developed after the alleged delay of diagnosis. Interestingly, Judge Luck dissented and pointed out that the jury heard a lot of argument and testimony about the statute of limitations but never reached the issue because they only answered the first question on the verdict form finding that Dr. Sowers did not breach the standard of care nor cause or contribute to causing injury to the Plaintiff.