Medical Malpractice

Agency

Luebbert v. Adventist Health System / Sunbelt, Inc., 311 So. 3d 334 (Fla, 5th DCA 2021)

Luebbert went to Florida Hospital's Emergency Department where he was diagnosed with appendicitis. At approximately 4:00 a.m., he met Dr. Malik who was the on-call general surgeon. Dr. Malik wore a white coat that included his name and the words "general surgeon" along with a Florida Hospital badge. Something about Dr. Malik caused Luebbert to feel uneasy and he asked about the availability of another surgeon. Luebbert was advised that the next available surgeon would not be in until 9:00 a.m. and not willing to wait 5 hours, he opted to "take his chances" with Dr. Malik. Prior to the surgery, Luebbert requested to be given antibiotics but Dr. Malik assured him that they were unnecessary. Luebbert then suffered a significant post-operative abdominal infection. Luebbert sued Dr. Malik and Florida Hospital. Luebbert claimed that Malik was either an employee, actual agent or an apparent agent of Florida Hospital.

Florida Hospital moved for summary judgment arguing that Malik was neither an employee nor an agent of the hospital, but rather was an independent contractor as evidenced by a written agreement between the hospital and Dr. Malik. They also relied upon Dr. Malik's testimony which included that he was not paid by Florida Hospital, he billed insurance companies directly, Florida Hospital did not influence his treatment decisions, and he considered himself an independent contractor.

In opposing summary judgment, Luebbert also relied on portions of Malik's deposition testimony in which he acknowledged that he maintained staff privileges at Florida Hospital, virtually all of the medical care he provided was rendered at Florida Hospital, and he maintained a private office at the hospital where in fact he met with Luebbert following the surgery. The trial court entered summary judgment and the Fifth District affirmed that portion of the summary judgment finding that Malik was neither an employee nor an actual agent of Florida Hospital; however, they reversed on the claim of apparent agency.

In doing so, they noted that Luebbert acknowledged and signed a consent agreement which stated:

> "I understand that not all of the services rendered at the hospital are services offered directly by the hospital or an employee of the hospital. Many physicians and care providers utilizing the facilities and equipment at the hospital are independent contractors and engage in the business of rendering services at the hospital for their own benefit. Physicians and care providers who provide services at the hospital as independent contractors, are not employed by, nor are they agents of, the Hospital. This may include, but is not limited to, emergency room physicians, radiologists, pathologists, anesthesiologists, surgeons, cardiologists, pulmonologists, and neonatologists. This means that the Hospital is not responsible for, and does not agree to accept the liability for, services provided to me by independent contractor physicians and or care providers."

The Agreement did not specifically state that Dr. Malik, or even more generally, the on-call surgeon, was neither an employee nor agent of Florida Hospital. The agreement did not specify which services in particular were in fact independent from the hospital and thus, the Fifth District concluded that it was unclear whether Florida Hospital expressly disavowed an agency relationship as to Dr. Malik.

Further, even if the hospital did not make representations to the patients concerning the physician's employment status, it could still be liable on the theory of apparent agency where there is a lack of choice on the part of the patient. This element of reliance is met where a patient relies on the hospital to provide healthcare services rather than relying upon a specific physician while merely looking to the hospital as a "conduit" through which the patient receives medical care." Here, Luebbert relied upon Florida Hospital to provide him with a physician.

Negligence versus malpractice

Torres v. Kendall Healthcare Group Limited, 326 So. 3d 224 (Fla. 3d DCA 2021)

The Plaintiff was admitted as a patient to the hospital where he underwent diagnostic imaging. After the imaging was complete, he attempted to transfer from the exam table to his wheelchair, but he fell and injured himself when the wheelchair rolled away because his attendant failed to properly secure its brakes. The trial court dismissed the action finding that it was one for medical malpractice rather than ordinary negligence and because Torres failed to bring the action within the statute

of limitations and failed to comply with the mandatory pre-suit requirements of Florida Chapter 766. The Third District reversed, finding that the Plaintiff alleged sufficient facts to plead his action as one sounding in ordinary negligence and as such a dismissal with prejudice was unwarranted at this juncture of the proceedings.

Lifestream Behavioral Center v. Allerton, 327 So. 3d 914 (Fla. 5th DCA 2021)

The Plaintiff alleged that a man suffering from mental illness was admitted to the Defendant's facility and that during the admission he was a suicide risk and should have been under constant visual observation to ensure that he did not commit suicide. The Estate sued the facility alleging that the decedent wrongfully died as a direct and proximate result of the facility's negligence. The facility moved to dismiss the Complaint, alleging that the suit actually sounded in medical malpractice because the observation and evaluation at issue involved medical diagnosis, treatment, and care. As a result, the Estate's failure to comply with presuit requirements should have resulted in dismissal. The Appellate Court refused to grant certiorari and it agreed with the trial court that the Estate's Complaint sounded in general negligence rather than medical malpractice. It then helpfully noted that any doubt as to whether a claim is for ordinary negligence or medical malpractice should generally be resolved in favor of the Claimant.

Nursing home arbitration agreements

Quinn v. CCRC OPCO FREEDOM SQUARE LLC, 320 So. 3d 300 (Fla. 2d DCA 2021)

The decedent was a resident at an Assisted Living Facility (ALF). After she passed away, her Estate sued the ALF alleging negligence and wrongful death. Relying upon the terms of its residency agreement, the ALF moved to compel arbitration. The agreement provided that the parties had 20 days after a demand for arbitration to either agree on a solo arbitrator or to each choose a nominator who would thereafter choose the sole arbitrator. Near the end of the selection period, the Estate proposed two potential arbitrators. On the last day of the selection, the ALF responded, rejected both of the Estate's proposed arbitrators and suggested three others to serve as the lone arbitrator. Before the close of business on the same day, the Estate replied rejecting the ALF's three suggestions and selected one person to serve as arbitrator pursuant to the agreement. The ALF did not respond until the following day; after the expiration of the selection period.

Months later, the ALF moved to compel the Estate to select an arbitrator contending that "although each counsel timely suggested proposed arbitrators, they could not agree on the selection of the sole arbitrator." Without specifying when, the ALF also asserted that it had already identified its chosen nominator but represented that the Estate had yet to complete the selection process. The Estate responded and asserted that it timely selected its arbitrator under the agreement and that it was the ALF that did not select their arbitrator within the 20-day period. As such, it contended that the ALF had forfeited its right to select any arbitrator.

At the hearing on the ALFs Motion to Compel the Estate to select an arbitrator, the ALF conceded that its Motion to Compel arbitration had constituted a demand for arbitration that "started the 20-day process" and it also conceded that it did not select an arbitrator within the period whereas the Estate had done so. Nonetheless, the ALF asserted that because the parties had not reasonably exhausted discussions of selecting a lone arbitrator by the deadline, the trial court should require the Estate to propose another nominator.

The trial court focused on the fact that the Estate's correspondence selecting its arbitrator was transmitted at 4:40 p.m. on the day of the deadline. The court criticized the Estate for sending the correspondence at that time on the day when they were tasked with coming to an agreement or not. The trial court then gave the ALF the unilateral choice between either selecting a nominator or letting the court pick an arbitrator. After the ALF stated that it preferred to pick a nominator, the trial court entered an order directing the parties to each select a nominator. The Second District concluded that the trial court departed from the essential requirements of the law in re-writing the parties' agreement in the Defendants favor by allowing the Defendant to choose a nominator despite having forfeited its right by missing the express deadline in its own residency agreement. It further noted that the trial court's conclusion that the Plaintiff's arbitrator selection was somehow impermissible because it was transmitted near the end of the business day on the day it was due was not supported by the agreement or any legal authority. That said, the Second District denied certiorari finding that the Plaintiff could not establish irreparable harm because the Plaintiff will be able to challenge the eventual arbitration award on appeal.

Gordon v. DOS of Crystal River, ALF, LLC, 323 So. 3d 8151 (Fla. 5th DCA 2021)

The nursing home admission agreement contained an arbitration provision stating that each party would bear its own attorney's fees and costs. The Adult Protective Services Act contains a provision that entitled prevailing parties to

recover attorney's fees pursuant to Florida Statute §415.1111. Thus, the agreement's requirement that each party bear its own fees was an improper attempt to limit the statutory remedy of prevailing party's attorney's fees. The Fifth District found that this provision violated the law; however, it also found that the offending provision was severable from the remainder of the agreement because it did not go to the "essence" of the agreement. As such, the Fifth District struck the fees provision but found that the claim was still subject to arbitration.

Wick v. Orange Park Mgt., LLC, 327 So. 3d 369 (Fla. 1st DCA 2021)

After her mother died in a nursing home, Wick sued the nursing home and its agents for violation of her mother's statutory bill of rights. The Defendants moved to compel arbitration citing the arbitration clause in the nursing home's admission agreement. Wick opposed the motion arguing that the cost of arbitration was so expensive that it rendered the arbitration clause invalid. She also argued that the agreement was void as a matter of public policy. The nursing home countered that the agreement did not violate public policy and that the prohibitive cost of arbitration was not a stand-alone defense to arbitration. Rather, it was part of an unconscionability defense which required Wick to show that the arbitration clause was both substantively and procedurally unconscionable. Because Wick did not allege or prove procedural unconscionability, the nursing home asserted that the arbitration clause was enforceable. The trial court agreed and granted the Motion to Compel arbitration. The First District agreed with the trial court and affirmed.

Osprey Health Care Center, LLC v. Pascazi, 329 So. 3d 177 (Fla. 2d DCA 2021)

A year after a resident was admitted to Osprey Health Care Center, she sued alleging claims for negligence, breach of fiduciary duty and violation of §415.111. Osprey moved to compel arbitration which Plaintiff opposed containing that the agreement was invalid because it lacked specific terms regarding arbitration rules and procedures. Further, it was void against public policy because it contained a provision impermissibly shortening the statute of limitations and because the agreement was procedurally and substantively unconscionable. The Second District ruled that the trial court erred by denying the Defendant's Motion to Compel Arbitration on the grounds that the arbitration agreement was unconscionable or that the facts in the record were legally insufficient to establish procedural unconscionability. Further, the trial court's determination that the Plaintiff's substantiative unconscionability challenges were within the totality of the

circumstances and could buttress a finding of procedural unconscionability was also plainly erroneous. The District Court explained that the totality of the circumstances upon which the trial court could rely to find procedural unconscionability encompassed only matters pertinent to the execution of the arbitration agreement and not the challenges to its substance. Lastly, the District Court held that the provision of the agreement imposing a one-year statute of limitations for claims was inconsistent with the statute of limitations and was void and because the unenforceable provision did not go to the essence of the arbitration agreement, it could be severed.

Peer review

South Broward Hospital District v. Feldbaum, 321 So. 3d 828 (Fla. 4th DCA 2021)

Feldbaum held privileges at South Broward's hospitals. They similarly suspended his staff privileges following which Feldbaum agreed to attend a third-party fit-for-duty program at Acumen. He completed the evaluation and sought reinstatement of his privileges. South Broward's credential's committee and medical executive committee considered his application for reinstatement but upheld his suspension. He then sued South Broward for upholding his suspension for "economic motivations" rather than concern for patient safety. After filing suit, he served South Broward with a Request for Production for minutes of credentialing committees, recredentialing committees, medical executive committees and any other group relating to his suspension; correspondence between these committees and any third parties relating to the suspension; and communication between South Broward and Acumen. South Broward objected to each request arguing that the documents were protected by the statutory peer review and credentialing discovery immunities of Florida Statute §395.0193(8) and provided the documents to the trial court for an *in-camera* inspection. The trial court found that the documents were protected; however, it concluded that the privilege had been waived as to certain documents and ordered production of correspondence between Feldbaum and the hospital; the Acumen report along with peer review and credentialing documents provided to Acumen; and portions of South Broward's internal credentialing file. The Fourth District found that the trial court properly found that the documents were protected by Florida Statute §395 but had mistakenly concluded that South Broward had somehow waived the discovery immunity and that the fact that certain documents had already been provided to Feldbaum had no impact on the discovery immunity provided by §395.0191(8) and §395.0193(8). As such, the Fourth District held that the trial court departed from the essential requirements of law by requiring

the production of the protected documents and that loss of the statutory protection could not be remedied on direct appeal because use of the documents against the hospital could not then be cured.

Largo Medical Center, Inc. v. Kowalski, 46 FLWD 2447 (Fla. 2d DCA 11/17/21)

Kowalski held privileges at Largo Medical Center. On February 14, 2019, a precautionary suspension was issued to him due to his care of a patient. The following day, the hospital sent a letter advising that the suspension was pursuant to the Medical Staff Bylaws and was an interim step in the hospital's professional review activity of Dr. Kowalski. The letter also explained that any suspension or restriction lasting longer than 30 days must be reported to the National Practitioner Data Bank (NPDB).

On February 26, the Medical Executive Committee offered Dr. Kowalski a leave of absence which would terminate the suspension and thereby preventing a report of suspension to the NPDB. The following day, Dr. Kowalski elected to take the leave of absence. On August 7, he filed a Complaint and sought to maintain the leave of absence by obtaining an order granting injunctive relief. On September 10, the MEC sent Kowalski that it permanently revoked his clinical privileges. Kowalski then filed an Amended Complaint arguing that he was shut out of the peer review process and sought an injunction requiring the hospital to allow him to maintain his leave of absence and preclude it from submitting a report to the NPDB. He also sought damages due to his claim of lost earnings and loss of earning capacity resulting from his lack of privileges. Subsequently, the hospital moved to dismiss the Complaint and the trial court granted its motion with prejudice finding that Dr. Kowalski failed to exhaust his administrative remedies. The court also ordered attorney's fees and costs and the Second District affirmed finding that the hospital was the prevailing party under the statute and that it was entitled to an award of fees because Kowalski expressly challenged the peer review process conducted by the hospital.

Presuit screening

Dial 4 Care, Inc. v. Brinson, 319 So. 3d 111 (Fla. 3d DCA 2021)

Dial 4 Care provided home health care services to Brinson in 2016. On May 9, 2019, Brinson sent Dial 4 Care a records request pursuant to Florida Statutes §766.204. The very next day, Brinson served a Notice of Intent to initiate litigation. The notice contained a request for informal discovery and requested various

documents including the medical records. The Notice of Intent did not, however, include medical corroboration or evidence that a good faith investigation had occurred. Instead, the Notice stated that an expert affidavit would be forwarded under separate cover. No such affidavit was filed with the trial court or provided to Dial 4 Care. On May 29, 2019, Brinson sent an additional Request for Medical Records to Dial 4 Care.

In October 2019, Brinson filed a medical malpractice lawsuit against numerous parties, including Dial 4 Care. The Complaint contained several statements of compliance including one alleging that Brinson had complied with Florida Statutes §766.203 and that he had made a reasonable investigation as permitted by the circumstances. Dial 4 Care filed a Motion to Dismiss alleging that Brinson failed to comply with Chapter 766 by not conducting the statutorily mandated presuit investigation by failing to provide a corroborating affidavit from a medical expert.

The trial court denied the motion and the Third District granted certiorari noting that Dial 4 Care's Motion to Dismiss required the trial court to determine whether Brinson had complied with presuit requirements, and specifically, whether Brinson conducted a reasonable investigation prior to filing suit. Dial 4 Care also argued that the trial court departed from the essential requirements of the law by denying the Motion to Dismiss where it was undisputed that Brinson had failed to provide a corroborating expert affidavit.

Brinson argued that by failing to provide documents following the requests on May 9, May 10 and May 29, Dial 4 Care waived that requirement. Brinson cited numerous cases for the proposition that the failure to turn over documents within 10 days of a §766.204 request waives the Claimant's requirement to provide a corroborating affidavit. As the Third District pointed out, those cases involve medical providers that were afforded at least 10 days to respond, failed to respond, and were then sent Notices of Intent to initiate litigation. The District Court added that there was a difference between records requested under Florida Statute §766.204 which allow the Plaintiff to conduct a presuit investigation, and records requested in the Notice of Intent letter pursuant to informal discovery provisions of Florida Statute §766.106. As a result, the Third District quashed the trial court's order.

Torres v. Kendall Healthcare Group Limited, 326 So. 3d 224 (Fla. 3d DCA 2021)

The Plaintiff was admitted as a patient to the hospital where he underwent diagnostic imaging. After the imaging was complete, he attempted to transfer from the exam table to his wheelchair, but he fell and injured himself when the wheelchair

rolled away because his attendant failed to properly secure its brakes. The trial court dismissed the action finding that it was one for medical malpractice rather than ordinary negligence and because Torres failed to bring the action within the statute of limitations and failed to comply with the mandatory pre-suit requirements of Florida Chapter 766. The Third District reversed, finding that the Plaintiff alleged sufficient facts to plead his action as one sounding in ordinary negligence and as such a dismissal with prejudice was unwarranted at this juncture of the proceedings.

Rhiner v. Koyama, 327 So. 3d 314 (Fla. 4th DCA 2021)

While in prison, Rhiner was attacked by other inmates which resulted in lacerations and a fractured jaw. He was brought to a hospital where his lacerations were sutured and stapled. Following the treatment, he was transferred to Lawnwood Regional Medical Center where Koyama performed oral surgery on his fractured jaw.

The Plaintiff filed a Complaint for medical malpractice against multiple Defendants including Lawnwood and Koyama. The Plaintiff alleged in his Complaint that he complied with the presuit notice requirements of Florida Statute §766.106. Koyama moved to dismiss the Complaint stating that he had not been served with the presuit notice within the two-year statute of limitations. Rhiner contended that he served the presuit notice on Lawnwood and argued that such service imputed notice to Koyama. Rhiner attached several exhibits to his response. One exhibit contained certified mail receipts which appeared to demonstrate that two presuit notices were mailed to Lawnwood's address; one directed to the hospital, and one directed to Koyama. Another exhibit depicted a completed authorization for release form that was directed to Koyama and listed his correct address.

At the hearing on the Motion to Dismiss, during which no evidence was taken, Koyama argued that the Complaint must be dismissed arguing that the presuit notice to Lawnwood did not impute notice to him because a legal relationship between the two did not exist. Specifically, Koyama asserted that he was not Lawnwood's employee but had merely been granted privileges at the hospital. Second, Koyama argued that the exhibits attached to Rhiner's response demonstrated that the pre-suit notice was not accompanied by the authorization for release of medical records and therefore the presuit notice must be deemed void. The trial court agreed with both arguments and dismissed the Complaint against Koyama with prejudice.

The Fourth District reversed noting that the trial court went beyond the four corners of the Complaint and made factual findings based upon assertions and exhibits attached to Rhiner's response. The factual question of whether a legal

relationship existed between Koyama and the hospital and whether the pre-suit notice accompanied the authorization for release of medical records were matters beyond the four corners of the Complaint which required submission of evidence.

Lifestream Behavioral Center v. Allerton, 327 So. 3d 914 (Fla. 5th DCA 2021)

The Plaintiff alleged that a man suffering from mental illness was admitted to the Defendant's facility and that during the admission he was a suicide risk and should have been under constant visual observation to ensure that he did not commit suicide. The Estate sued the facility alleging that the decedent wrongfully died as a direct and proximate result of the facility's negligence. The facility moved to dismiss the Complaint, alleging that the suit actually sounded in medical malpractice because the observation and evaluation at issue involved medical diagnosis, treatment, and care. As a result, the Estate's failure to comply with presuit requirements should have resulted in dismissal. The Appellate Court refused to grant certiorari and it agreed with the trial court that the Estate's Complaint sounded in general negligence rather than medical malpractice. It then helpfully noted that any doubt as to whether a claim is for ordinary negligence or medical malpractice should generally be resolved in favor of the Claimant.

University of Florida Board of Trustees v. Carmody, 331 So. 3d 236 (Fla. 1st DCA 2021)

The Plaintiff sued a Nurse Practitioner and her employer. The Defendant sought certiorari review arguing that the Plaintiff failed to comply with the pre-suit medical expert corroboration requirement and argued that the trial court should have dismissed this claim because the Plaintiff's medical doctor expert was unqualified to address the standard of care applicable to a Certified Nurse Practitioner who rendered the care. The First District concluded that because the Plaintiff submitted an affidavit and followed the statutory presuit process, certiorari to examine the qualifications of the expert was improper following the Supreme Court's decision in *Williams v. Oken*, 62 So. 3d 1129 (Fla. 2011). The First District recognized that its decision conflicted with cases in the Second District and Fifth District and certified conflict.

Powell v. Sampson, 46 FLWD 2293 (Fla. 3d DCA 10/20/21)

The trial court erred in granting a Motion to Dismiss based upon the Plaintiff's failure to comply with medical malpractice presuit requirements finding that the trial court should have afforded the parties an evidentiary hearing to see if there had been compliance.