

PUBLICATION PROVIDED BY:

**RISSMAN, WEISBERG, BARRETT,
HURT, DONAHUE & McLAIN, P.A.**

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**STANDARD JURY INSTRUCTIONS - CIVIL CASES - AMENDMENTS -
PRODUCT LIABILITY - STRICT LIABILITY - MANUFACTURING DEFECT**

Standard Jury Instructions - Civil Cases (No. 02-2), 29 Fla. L. Weekly S145
(Fla. Sup. Ct. April 1, 2004)

The Supreme Court Committee on standard jury instructions in civil cases petitioned the Supreme Court to consider amendments to the Florida Standard Jury Instructions in Civil Cases regarding product liability. Specifically, a proposed revision to PL 4, "strict liability (manufacturing flaw)," sought to strike the term "manufacturing flaw" and utilize the phrase "manufacturing defect" to reflect a generally accepted concept that has been applied in decisions in Florida and in accordance with the format of existing PL 5.

Additionally, the amendments proposed revisions through two "Notes on Use", "Comment 2" and "Comment 5." The proposed amend-ments to these sections clarified that the instructions do not contain negligence instructions and that a negligence instruction could be found in charge 3.5, "Negligence Issues", as illustrated in Model Charge 8.

The proposed amendments to Comment 2 updated the case law cited for the definitions of the term "unreasonably dangerous" and provided a cautionary statement regarding potential two-issue rule problems that could arise if a jury is instructed under PL 5 on both the consumer-expectation test and the risk-utility test. *See Zimmer, Inc. v. Birnbaum*, 758 So. 2d 714 (Fla. 4th DCA 2000).

Lastly, the proposal to "Comment 5" struck the references to the concept of contributory negligence. Alternatively, the amendment provided for the term "comparative negligence" and corrected a reference to appropriate model charge numbers.

Ultimately, the Florida Supreme Court authorized publication and use of the revised instructions, as summarized above. In so doing, however, the Court cautioned that the instructions reflect only the opinion of the Committee and accordingly are not necessarily indicative of the views of the Court.

**WRONGFUL DEATH - DROWNING - SUDDEN
DROP-OFF IN MAN-MADE LAKE IS CHARACTERISTIC
OF CONDITIONS EXISTING IN NATURAL LAKES AND NOT
DANGEROUS CONDITION CONSTITUTING TRAP - HOMEOWNERS
ASSOCIATION'S SUPERIOR KNOWLEDGE OF STEEP DROP BY VIRTUE
OF PRIOR LITIGATION DID NOT GIVE RISE TO DUTY TO WARN AS
SHARP CHANGE IN WATER'S DEPTH DID NOT CONSTITUTE CONCEALED DANGEROUS CONDITION
- NO ERROR IN DISMISSING WRONGFUL DEATH CLAIM**

Longmore v. Saga Bay Property Owners Association, Inc., 29 Fla. L. Weekly D698 (Fla. 3d DCA March 24, 2004)

The Longmores, parents of a 16-year-old drowning victim, brought a wrongful death action against the Miami-Dade County School Board, two teachers employed by the child's school, and the Saga Bay Property Owners Association, Inc., the owner of the man-made lake, after the drowning occurred. The Longmores alleged that Saga Bay knew that its lake had a precipitous drop-off, yet negligently failed to warn or provide life guards to protect children from this "exceptionally dangerous concealed peril." Specifically, the Longmores claimed that by virtue of prior litigation involving Saga Bay and the steep drop-off in the man-made lake, the homeowner's association had a duty to warn.

The trial court dismissed the complaint relying on *Saga Bay Property Owners Association v. Askew*, 513 So. 2d 691 (Fla. 3d DCA 1987), (Saga Bay I). In that case the 3d DCA rejected a notation that a sudden drop-off could constitute a dangerous condition or trap. The 3d DCA further noted that there was no evidence that the lake contained a dangerous condition constituting a trap.

In so ruling, the appellate court cited to *Navarro v. Country Village Homeowner's Association*, 654 So. 2d 167 (Fla. 3d DCA 1995), in which it held "under Florida law, the general rule is that the owner of an artificial body of water is not guilty of actionable negligence for drownings therein unless it is so constructed as to constitute a trap or unless there is some unusual element of danger lurking about it no existent in ponds generally."

On appeal, the 3d DCA held in accordance with *Saga Bay I* and *Navarro* that despite the homeowner's association's superior knowledge of the drop-off, the sharp change in the water's depth "did not constitute a concealed dangerous condition." As such, the Longmore's attempts to distinguish their case from *Saga Bay I* were ruled ineffective.

Likewise, the appellate court held that Section 342 of the Restatement (Second) of Torts (1965) was inapplicable, despite the Longmore's attempt to apply this Section which requires a "condition...that... involves an unreasonable risk of harm," to produce a different result. Thus, the trial court's ruling was affirmed.

**TORTS - ELECTRIC UTILITIES -
UTILITY'S ALLEGED NEGLIGENT INSPECTION,
REPAIR AND/OR MAINTENANCE OF NON-OPERATIVE STREET
LIGHT NEAR METERED PARKING SPACES CAUSED TRIP AND FALL
DUE TO INADEQUATE LIGHTING - WHETHER FAILURE INCREASED
RISK OF HARM TO PLAINTIFF AMOUNTED TO GENUINE ISSUE OF
MATERIAL FACT - SUMMARY JUDGMENT IN FAVOR OF UTILITY IMPROPER**

Felsen v. Florida Power & Light Company, 29 Fla. L. Weekly D699 (Fla. 3d DCA March 24, 2004)

Felsen filed suit against Florida Power & Light Company (FPL) alleging that the utility company was involved with supplying and maintaining the overhead lighting on a wooden FPL pole over the first row of a parking area located in a metered parking lot. Felsen further alleged that FPL negligently inspected, repaired and/or maintained the light so as to cause her to trip and fall due to inadequate lighting and the creation of a dark and dangerous condition. It was further alleged that FPL had a duty which extended to the users of the aforementioned area to maintain the lighting in good working and operative condition.

FPL admitted that it provided lighting for the parking area located in the metered parking lot but denied the remainder of Felsen's allegations. It also alleged plaintiff's contributory negligence and the negligence of other third parties.

FPL then filed a motion for summary judgment stating that the subject streetlight was installed in 1951 by the utility company; however, FPL had no involvement in the lighting design, placement, fixture, wattage or illumination

of the streetlight. FPL further argued that the streetlight is situated with a directional arm facing away from the parking lot in order illuminate an adjacent alleyway; that although the streetlight was owned and maintained by FPL it was placed in that position by the City of Miami Beach's request; and that the subject parking lot was not installed until sometime after 1963.

According to FPL it was entitled to summary judgment based on the 3d DCA's opinion in *Martinez v. Florida Power & Light Company*, 785 So. 2d 1251 (Fla. 3d DCA 2001). In that case, the court held that an electric company under contract to make repairs and maintain streetlights had no common law duty to third persons who were injured. Accordingly, the trial court granted final summary judgment relying on *Martinez*.

On appeal, the 3d DCA noted that during the pendency of the subject appeal, the Florida Supreme Court quashed *Martinez* because it expressly and directly conflicted with *Clay Electric Cooperative, Inc. v. Johnson*, 2003 WL 2296277 (Fla. December 18, 2003). As such, Felsen argued that the court must reverse the trial court's summary judgment on that basis.

In contrast, FPL argued that under the analysis dictated by *Clay Electric*, it did not assume any duty to the plaintiff as a matter of law. In reviewing *Clay Electric*, the 3d DCA summarized the Florida Supreme Court's analysis of the "undertaker's doctrine" by noting that a party assumes a duty to act carefully and to not put another at an undue risk of harm when it undertakes to provide a service to others, whether gratuitously or by contract.

The "undertaker's doctrine" was further noted to apply to both governmental and non-governmental entities and not just to parties in privity with one another, but also to third parties. Moreover, pursuant to the Florida Supreme Court's adoption of Section 324A of the Restatement (Second) of Torts in *Clay Electric* genuine issues of material fact remained for a jury to determine. Accordingly, the 3d DCA reversed and remanded the case for further proceedings.

TORTS - PREMISES LIABILITY -
COUNSEL - DISQUALIFICATION - FACT THAT
LEGAL SECRETARY WHO WAS FORMERLY EMPLOYED
WITH PLAINTIFF COUNSEL'S LAW FIRM SUBSEQUENTLY
WORKED PART-TIME FOR DEFENSE COUNSEL'S LAW FIRM
AS INDEPENDENT CONTRACTOR IN NON-LEGAL CAPACITY DID
NOT REQUIRE DISQUALIFICATION OF DEFENSE COUNSEL - SUCH
BRIEF EMPLOYMENT REPRESENTED EXCEPTION TO RULE IN *KOULISIS*
v. RIVERS THAT LAW FIRM WHOSE DISQUALIFICATION IS SOUGHT DEMONSTRATE BY
GREATER WEIGHT OF EVIDENCE SECRETARY HAD NO
ACTUAL KNOWLEDGE OF ANY CONFIDENTIAL INFORMATION MATERIAL TO CASE

Eastrich No. 157 Corporation v. Gatto, 29 Fla. L. Weekly D707 (Fla. 4th DCA March 24, 2004)

Eastrich No. 157 Corporation sought relief from an order that disqualified its counsel from a law suit involving premises liability. The disqualification was ordered because a legal secretary was retained on a part-time basis by Eastrich's attorney's firm after being terminated from employment as a secretary with plaintiff's firm.

The facts, however, demonstrated that the independent contractor (secretary) only worked with the opposing firm for two days, and for five hours each day entering billing data into a computer. Moreover, the billing records did not even concern the underlying case.

The trial court looked to **Koulisis v. Rivers**, 730 So. 2d 289 (Fla. 4th DCA 1999), wherein the 4th DCA held that once a party moving for disqualification had established a prima facie case for attorney disqualification, the burden of proof shifted to the law firm whose disqualification was sought. **Koulisis** also held that the applicable standard was by the greater weight of the evidence to show that the secretary had no actual knowledge of any confidential information material to the case.

Pursuant to Eastrich's petition, the 4th DCA approved its prior ruling in **Koulisis**, but distinguished the instant case by noting that the subject employee was not hired as an employee or legal secretary by the opposing party's firm. Further, there was no dispute that during her employment with plaintiff's counsel's firm she was privy to privileged information. However, the court went on to note that her brief and completed employment in opposing counsel's firm, in a non-legal capacity, represented an exception to the rule in **Koulisis**. Consequently, the trial court's order was quashed.

**APPEALS - DISCOVERY ORDER - ORDER
STRIKING DEFENSES IS NON-FINAL, NON-APPEALABLE ORDER**

Embry, Inc. v. LaSalle National Bank, 29 Fla. L. Weekly D710 (Fla. 4th DCA March 24, 2004)

This was a per curium opinion and accordingly there were no facts. Ultimately, the 4th DCA affirmed the dismissal order and ruled that it was without jurisdiction to consider the order striking defenses and the discovery order, citing to **Brown County v. G.B.V. International, Ltd.**, 787 So. 2d 838 (Fla. 2001) (recognizing that a discovery order is a non-final, non-appealable order).

**TORTS - WHERE PLAINTIFF WAS INJURED ON
DEFENDANT RETAILER'S PREMISES WHEN STRUCK BY
STACK OF FALLING GARDEN HOSES AND SUBSEQUENTLY**

**INJURED IN CAR ACCIDENT WHERE DRIVER OF OTHER
CAR WAS UNINSURED MOTORIST - PLAINTIFF'S UNINSURED
MOTORIST CARRIER BECAME DEFENDANT IN SUIT PLAINTIFF
HAD ALREADY BROUGHT AGAINST RETAILER - IDENTIFYING
INSURER AS PARTY DEFENDANT WHO WAS INSURER AND LIABLE
FOR TORTFEASOR'S NEGLIGENCE DID NOT ADEQUATELY APPRISE
JURY OF INSURER'S SPECIFIC PARTY STATUS - NEW TRIAL REQUIRED**

Armstrong v. Wal-Mart Stores, Inc., 29 Fla. L. Weekly D712 (Fla. 4th DCA March 24, 2004)

The Armstrongs, husband and wife, appealed final judgment entered in favor of State Farm from which a separate final judgment had already been entered in favor of Wal-Mart, both arising from the same trial. The instant appeal only involved State Farm.

In May of 1997, the Armstrongs sued Wal-Mart as a result of an incident that occurred on May 2, 1995 when Mr. Armstrong was struck by a stack of falling garden hoses. On June 6, 1995, Mr. Armstrong was involved in a car accident. Due to the proximity of the two accidents, the Armstrongs alleged that the injuries could not be apportioned and, accordingly, the car accident became the subject of a negligence claim in the same lawsuit that had already been filed by the Armstrongs against Wal-Mart.

The driver of the car involved in the auto accident was uninsured. Accordingly, State Farm, Armstrong's uninsured motorist carrier, became a defendant.

At the conclusion of the trial, the jury returned a verdict finding no negligence on the part of Wal-Mart; however, the driver of the other car involved in the auto accident was determined to be negligent and that such negligence was the legal cause of Mr. Armstrong's injury. Further, the jury found that Armstrong sustained \$6,901.70 in past medical expenses, but no future medical expenses, no past or future wage losses, and no permanent injury. State Farm then filed a motion for set-off which the trial court granted, thereby setting off the entire \$6,901.70 as duplicative benefits.

At issue on appeal was the ruling of the pre-trial motion in limine wherein the trial court prohibited State Farm from being identified as Armstrong's uninsured motorist carrier. The trial court, relied on ***Lamz v. Geico General Insurance Company***, 748 So. 2d 319 (Fla. 4th DCA 1999), which held that identification of the plaintiff's automobile insurance carrier in general was appropriate. However, after the trial of the instant case, the Florida Supreme Court reversed the ruling in the ***Lamz*** by noting, "failure to specifically identify the underinsured carrier as such leaves the jury to speculate about the exact role of the plaintiff's carrier in the law suit, perpetuating the 'charades in trials' denounced by this court..." ***Lamz v. Geico General Insurance Company***, 803 So. 2d 593 (Fla. 2001).

Accordingly, the 4th DCA reversed and remanded the case for new trial in accordance the Florida Supreme Court's ruling in *Lamz*.

**CIVIL PROCEDURE - COSTS - ERROR TO
TAX EXPERT WITNESS FEE WHEN WITNESS DID NOT
TESTIFY AT TRIAL AND DEPOSITION WAS NOT USED AT TRIAL**

Family Dollar Stores of Florida, Inc. v. Jones, 29 Fla. L. Weekly D713 (Fla. 4th DCA March 24, 2004)

This was a per curium opinion wherein the 4th DCA reversed the trial court's taxation of costs of a \$400 expert witness fee when the witness did not testify at trial and his deposition was not used at trial. The appellate court cited to *Thellman v. Tropical Acres Steakhouse, Inc.*, 557 So. 2d 683 (Fla. 4th DCA 1990), with approval. In *Thellman*, the court held it was not appropriate to tax as costs the fees of witnesses who are neither qualified as experts by the court nor testify at trial. Accordingly, the 4th DCA reversed and remanded for further proceedings consistent with its opinion.

**ATTORNEY-CLIENT PRIVILEGE -
DISCOVERY - DEPOSITIONS - RECORD FAILED
TO SHOW TRIAL COURT DEPARTED FROM ESSENTIAL
REQUIREMENTS OF LAW BY REQUIRING PLAINTIFF'S
PARENTS TO ANSWER QUESTIONS AT DEPOSITIONS AND
REQUIRING DISCLOSURE OF VIDEO TAPES PARENTS VIEWED IN
PREPARING FOR DEPOSITIONS - PREMATURE TO CONSIDER EXTENT
OF PLAINTIFF'S PARENTS' RIGHT TO ASSERT ATTORNEY-CLIENT
PRIVILEGE PRIOR TO EVIDENTIARY HEARING ON WHETHER VIDEO
TAPES VIEWED BY PARENTS PROTECTED BY WORK PRODUCT PRIVILEGE**

Falco v. Copeland, 29 Fla. L. Weekly D722 (Fla. 1st DCA March 23, 2004)

Falco filed a petition for writ of certiorari to review the order of the trial court requiring her parents to answer questions at their depositions and requiring the disclosure of the video tapes the parents viewed in preparation for the same. In fact, the court noted this was the second discovery dispute that it ruled upon in a certiorari proceeding involving the same parties. During the first, the 1st DCA held that the trial court erred in requiring the production of video tapes made in preparation for trial, citing the work product privilege. See *Falco v. North Shore Laboratories*, 29 Fla. L. Weekly D446 (Fla. 1st DCA February 19, 2004).

Pursuant to the court's review of the appendices as it pertained to the instant certiorari proceeding, it was unable to determine whether the trial court's order requiring the plaintiff's parents to answer questions in their deposition would violate the attorney-client privilege. Accordingly, the court was only able to rule that the plaintiff has not yet established a sufficient

factual basis supporting the parents' ability to assert the attorney-client privilege as acting agents for their daughter. *See Gerheiser v. Stephens*, 712 So. 2d 1252 (Fla. 4th DCA 1998). Prior to establishing such a factual basis, the court held that the plaintiff's parents would have to answer questions relating to the existence of the attorney-client privilege and proceed accordingly.

With regard to the applicability of the work product privilege as it pertains to the video tapes the parents viewed in preparation for their depositions, the court predicated its opinion upon the assumption that the subject video tapes were the same those at issue in the earlier case. As such, the court again highlighted that ruling on this matter would also be premature pending the outcome of the hearing on remand from the earlier case.

For example, if the trial court were to determine if the defendant's made a proper showing of need that is sufficient to overcome the work product privilege, it would be of no consequence as to whether the privilege was waived by the parents viewing of the video tapes. Alternatively, the trial court would simply consider the waiver issue.

Given the fact that the evidentiary hearing had yet to occur, the 1st DCA denied certiorari. The court further noted that depending upon the outcome of the evidentiary hearing, plaintiffs may still have an argument that the privilege continues to exist and that it has not been waived.

**ATTORNEY'S FEES - OFFER OF JUDGMENT -
LAW OF CASE - TRIAL COURT'S AWARD OF
ATTORNEY'S FEES UNDER OFFER OF JUDGMENT
STATUTE REVERSED WHERE PLAINTIFFS MADE OFFER
OF SETTLEMENT WHICH DID NOT DIFFERENTIATE BETWEEN
AMOUNT APPLICABLE TO PERSONAL INJURY CLAIM AND AMOUNT
APPLICABLE TO LOSS OF CONSORTIUM CLAIM - SUCH APPORTIONMENT
MUST BE MADE PURSUANT TO FLORIDA SUPREME COURT'S DETERMINATION**

Tiede v. Satterfield, 29 Fla. L. Weekly D732 (Fla. 2d DCA March 24, 2004)

The underlying cause of action stemmed from an incident in which Satterfield sustained injuries when his van was struck from the rear by a vehicle driven by Tiede. Satterfield then sued Tiede and Commercial Insurance Specialists, Inc., alleging that Commercial was vicariously liable because Tiede was driving within the scope of his employment. Reno Satterfield, plaintiff's wife, also filed a claim for loss of consortium.

During litigation, the Satterfields made a joint offer to settle the case with Tiede and Commercial for \$453,000. The offer, however, did not differentiate between the amount applicable to the consortium claim and the amount allocated for the injuries to Mr. Satterfield. The offer was not accepted and the matter went to trial. At the conclusion of the trial, the Satterfields were awarded \$1,300,796.36 in total damages.

Pursuant to F.S. ' 768.79, the offer of judgment statute, the Satterfields moved for attorney's fees and costs. Also at this time, Tiede and Commercial filed their notice of appeal. Accordingly, while the trial court determined that the Satterfields were entitled to the fees, it delayed in determining the amount until conclusion of the pending appeal. On appeal, the 2d DCA affirmed the jury's verdict and granted the Satterfields' motion for appellate attorney's fees.

The trial court then began to assess the fee issue. At this time, the Satterfields also filed a motion before the trial court seeking the application of a contingency fee risk multiplier. Ultimately, the trial court applied a multiplier of two and awarded total fees, after offsets, in the amount of \$327,011.92. Tiede and Commercial then appealed the final judgment awarding such fees.

On appeal, Tiede and Commercial first argued that the Satterfield's were not entitled to fees because the offer of judgment was insufficient under F.S. ' 768.79 because it did not apportion between the personal injury claim and the loss of consortium claim. Secondly, they challenged the trial court's use of the contingency risk multiplier.

The Satterfield's, however, argued that by awarding the appellate attorney's fees, the 2d DCA during the first appeal, determined that the offer of judgment was sufficient and that such determination was now the law of the case. **See Tiede v. Satter-field**, 785 So. 2d 490 (Fla. 2d DCA 2001).

After reviewing the controlling case law regarding the law of the case doctrine, the 2d DCA held that the prior award of appellate attorney's fees to the Satterfields established as the law of the case the sufficiency of the offer of judgment. **See Brunner Enters., Inc. v. Department of Revenue**, 452 So. 2d 550 (Fla. 1984) (cited with approval for the proposition that under the law of the case doctrine, all questions of law decided by an appellate court become the law of the case and, except in extra-ordinary circumstances, must be followed in subsequent proceedings in both the trial court and the appellate court.)

However, the 2d DCA further held that under exceptional circumstances, the law of the case may be altered. **See Strazzulla v. Hendrick**, 177 So. 2d 1, 4 (Fla. 1965) (wherein the Florida Supreme Court went on to say that an example of when an exception to the general rule could be considered is when an intervening decision is issued by a higher court that is contrary to the decision reached in the prior appeal).

As such, the 2d DCA noted that the Florida Supreme Court, subsequent to the first appeal of this case, determined that to invoke the provisions of the offer of judgment statute in the context of multiple plaintiffs, the offer must apportion the total amount of the offer among the plaintiffs to allow the

offeree the benefit of considering settlement with the individual offerors. **See Willis Shaw Express v. Hilyer Sod, Inc.**, 849 So. 2d 276 (Fla. 2003).

In accordance with **Willis Shaw**, and after fully reviewing the sufficiency of the Satterfields' offer of judgment for the first time, the 2d DCA reversed the trial court's ruling that the Satterfields were entitled to attorney's fees based on the offer of judgment statute. In so ruling, the court further noted that to rule otherwise would result in an awarding the attorney's fees on a basis that has been specifically rejected by the Florida Supreme Court.

**ATTORNEY'S FEES - FINDINGS - ERROR TO AWARD
ATTORNEY'S FEES WITHOUT SETTING FORTH FINDINGS
EXPLAINING HOW COURT ARRIVED AT AMOUNT OF FEES AWARDED**

Bayer v. Global Renaissance Arts, Inc., 29 Fla. L. Weekly D736 (Fla. 2d DCA March 26, 2004)

The 2d DCA reversed the supplemental final judgment awarding Bayer and Turra, husband and wife, attorney's fees because it failed to set forth findings explaining how the trial court arrived at the amount of the fees. **See Florida Patient's Compensation Fund v. Rowe**, 472 So. 2d 1145 (Fla. 1985). The case was remanded for further proceedings.

**MEDICAL MALPRACTICE - DAMAGES - SETOFF -
DEFENDANT ENTITLED TO SET OFF AGAINST ECONOMIC
DAMAGES PORTION OF AWARD AGAINST ONE TORTFEASOR IN
MEDICAL MALPRACTICE ACTION THE ECONOMIC DAMAGES PORTION OF
ANY SETTLEMENT RECOVERED FROM SETTLING TORTFEASOR FOR SAME
INCIDENT EVEN THOUGH SETTLING TORTFEASOR NOT ON VERDICT FORM**

Zambos v. Meier, 29 Fla. L. Weekly D741 (Fla. 5th DCA March 26, 2004)

Dr. Zambos appealed a final judgment rendered in favor of the Meiers in a suit for medical negligence, relying upon the Florida Supreme Court's decision in **D'Angelo v. Fitzmaurice**, 863 So. 2d 311 (Fla. 2003).

In **D'Angelo**, the Florida Supreme Court held that:

It is appropriate to set off against the economic damages portion of an award against one tortfeasor in a medical malpractice action the economic damages portion of any settlement recovered from a settling tortfeasor for the same incident causing the injury where the settling tortfeasor was not included on the verdict form.

The 5th DCA agreed with Dr. Zambos, holding that the instant matter was a "pipeline case" and he was entitled to the benefit of the *D'Angelo* decision. Accordingly, the case was remanded to the trial court for application of the set off and amendment to the final judgment.

**MEDICAL MALPRACTICE - WRONGFUL
DEATH - PRESUIT SCREENING REQUIREMENTS -
CORROBORATING MEDICAL OPINION - NURSE MAY PROVIDE
EXPERT OPINION REGARDING "CAUSATION" DURING PRESUIT**

Apostolico v. Orlando Regional Health Care System, Inc., 29 Fla. L. Weekly D750
(Fla. 5th DCA March 26, 2004)

Angela Apostolico, as personal representative of the estate of Virgil Apostolico, appealed a final order dismissing with prejudice her wrongful death medical malpractice complaint for failure to comply with the presuit screening requirement of Florida's Medical Malpractice Act, F.S. ' 766.201-212. The dismissal was based on the trial court's ruling that Apostolico's medical expert was not qualified to render an opinion that accompanied her notice of intent to initiate medical malpractice litigation.

On appeal, Apostolico argued that the trial court's dismissal was made in error because (1) her notice of intent to initiate litigation and corroborating affidavit sufficiently placed Orlando Regional Health Care System, Inc. ("ORMC") on notice of the allegations of the medical malpractice action; (2) the trial court employed the wrong standard in evaluating the presuit affidavit; and (3) there were other, less severe, sanctions available for any alleged violations of the presuit requirements.

Virgil Apostolico, 73, presented to ORMC's emergency room, complaining of chest pain. After being admitted to the telemetry room to rule out myocardial infarction, he was advised to have a Peripherally Inserted Central Catheter (PICC line), in order to receive antibiotics due to a urinary tract infection.

One day after the PICC line was inserted by a registered nurse of ORMC, it had to be repositioned because it was incorrectly placed. Thereafter, Virgil was transferred emergently to the coronary care unit where he died several days later.

Following Virgil's death, ORMC received a notice of intent to initiate medical malpractice litigation from Apostolico. An affidavit from Miriam Headley, a registered nurse, was provided to corroborate the medical negligence action in accordance with F.S. ' 766.203(2). In her affidavit, Nurse Headley offered opinions regarding standard of care **and causation**.

ORMC then notified Apostolico that it believed Nurse Headley lacked the requisite qualifications to render an opinion in accordance with the

allegations set forth in the notice of intent. Accordingly, at the conclusion of the ninety-day investigation period, ORMC rejected Apostolico's claim. In so doing, ORMC also provided its own corroborating expert affidavit from a board certified cardiologist refuting the allegations of the notice of intent.

Thereafter, Apostolico filed an action for wrongful death stemming from the alleged medical malpractice at ORMC. ORMC served its motion to dismiss arguing that Apostolico had failed to conduct a "reasonable investigation" of the claim as Apostolico's nursing expert was not qualified to render an opinion as to proximate cause. Further, ORMC argued that Apostolico failed to correct this deficiency despite receiving adequate notice of the same during the presuit period.

The trial court ultimately agreed with ORMC and dismissed Apostolico's cause of action with prejudice pursuant to F.S. ' 766.206(2). Specifically, the trial court concluded that the deficiency could not be rectified within the expired statute of limitations.

On appeal, the 5th DCA reviewed the trial court's ruling *de novo*. In so doing, the appellate court noted that had ORMC correctly cited to F.S. ' 766.203(2) in arguing that the provision of the Florida Medical Malpractice Act requires a claimant to establish both negligence **and** causation to support a claim for medical negligence.

The appellate court then observed that ORMC appeared to concede Nurse Headley's qualification to render an opinion regarding standard of care; however, ORMC further argued that Nurse Headley was not qualified to render an expert opinion as to causation. According to ORMC, because nurses cannot diagnose patients or prescribe treatment plans for their patients, they do not have the ability to determine a patient's cause of death.

In response to ORMC's arguments, the 5th DCA advised that while F.S. ' 766.203(2) does, in fact, direct a claimant to conduct an investigation to ascertain whether there are reasonable grounds to believe a defendant was negligent, it does not require the claimant to "establish" a defendant's negligence or "prove its case" during the presuit screening process. **See Maldonado v. EMSA, Ltd. P'ship**, 645 So. 2d 86 (Fla. 3d DCA 1994). Instead, F.S. ' 766.203(2) simply requires a corroborating opinion for a medical expert as defined in F.S. ' 766.202(5); and not a corroborating opinion from a medical expert as more narrowly defined in F.S. ' 766.102(6).

The 5th DCA then turned to the 1st DCA's opinion in **Fort Walton Beach Medical Center, Inc. v. Dingler**, 697 So. 2d 575 (Fla. 1st DCA 1997), for further analysis of the definition of a medical expert pursuant to F.S. ' 766.202(5). In **Dingler**, the 1st DCA commented that the legislature had provided two alternative means for qualifying a "medical expert." First, F.S.

' 766.202(5) reflects that a medical expert must be "a person duly and regularly engaged in the practice of his profession who holds a health care professional degree from a university or college and has had professional training and experience." Alternatively, the legislature, in F.S. ' 766.102(5), provides that an expert must be "possessed of special health care knowledge or skill about the subject upon which he is called to testify or provide an opinion."

As such, the 5th DCA concluded that the plain reading of F.S. ' 766.202(5) indicates that a nurse or any other medical professional with appropriate experience or training, may, **under the proper facts**, be qualified to provide corroboration about **medical causation for presuit purposes**. In so ruling, the appellate court further noted that complex medical and factual issues are involved in determining proximate cause in medical malpractice cases; however, under the circumstances of the case at bar, Nurse Headley's extensive training and experience appropriately qualified her as a medical expert. Therefore, the 5th DCA found her capable and qualified to render an opinion as to both the nursing staff's standard of care as well as the resulting death allegedly due to the nursing staff's negligence.

As further justification, the 5th DCA cited to the plain language of the Florida Medical Malpractice Act. Specifically, it noted that the pertinent statutes, in defining a medical expert, utilized the term "person" (not a physician), who holds a health care professional degree from a university or college (not a medical degree) or skill upon the subject about which he or she is asked to provide an opinion.

Given the appellate court's interpretation of the relevant statutory provisions, it ultimately held that the trial court had not used the correct legal principles in determining that Nurse Headley was not a qualified medical expert as defined by F.S. ' 766.202(5), and accordingly, the case was reversed and remanded.

**TORTS - AUTOMOBILE ACCIDENT -
VENUE - STATE AGENCY - HOME VENUE
PRIVILEGE - JOINT TORTFEASOR EXCEPTION TO COMMON
LAW HOME VENUE PRIVILEGE ESTABLISHED IN BOARD OF
COUNTY COMMISSIONERS OF MADISON COUNTY v. GRICE APPLIES
TO STATUTORY HOME VENUE PRIVILEGE - GRICE CONSIDERATIONS OF
"JUSTICE, FAIRNESS AND CONVENIENCE" APPLIED TO F.S. ' 24.110**

Florida State Lottery v. Woodfin, 29 Fla. L. Weekly D756 (Fla. 5th DCA March 26, 2004)

The Woodfins filed a complaint in Volusia County alleging that they were injured in a car accident with a vehicle owned by the Department of Lottery and driven by an employee in the course and scope of his employment or as a

permissive user of the vehicle. The complaint further alleged liability on the Department for negligent hiring of the driver.

After filing the complaint, the Department moved for a change of venue arguing that F.S. ' 24.110 clearly and unambiguously provided a "home venue" provision that stipulated all civil/ administrative actions against the Department were to be held in Leon County. On appeal, the 5th DCA acknowledged that such a "home venue" privilege should typically be given deference; however, the court further noted that exceptions to such a privilege exists, including the "joint tortfeasor" exception. *See Board of County Commissioners of Madison County v. Grice*, 438 So. 2d 392 (Fla. 1983); and also *see Florida Department of Children and Families v. Sun-Sentinel, Inc.*, 29 Fla. L. Weekly S55 (Fla. February 5, 2004). Both *Grice* and *Sun-Sentinel* involved exceptions to the common law venue privilege. However, *dicta* in *Grice* suggested that an exception would also apply to a statutory "home venue" provision.

Specifically, the *Grice* court, in reaching its decision, indicated that modern methods of communication and transportation undermined and weakened the policy reasons supporting a home county venue privilege. This, coupled with crowded court dockets, have further strengthened the policy reasons for avoiding duplicative litigation.

Applying the *dicta* and rationale from *Grice* to the case at bar, the 5th DCA held that the typical beneficial purpose of a home venue privilege, which is to promote orderly and uniform handling of state litigation and to minimize expenditures of public funds, is not achieved when the government defendant is sued as a joint tortfeasor. Instead, the ordering of severance of lawsuits that would normally be tried in a single proceeding results in an increased use of public resources. This, in turn, forces courts to weigh the benefit of money saved by such state agencies by not having to defend lawsuits filed outside of their home counties against the increased costs incurred by the operation of the courts.

Accordingly, the court ruled that the home venue privilege for government entities is not absolute and that a trial court has discretion to dispense with the privilege when a governmental body is sued as a joint tortfeasor. The exercise of this discretion must be guided by considerations of justice, fairness, and convenience under the circumstances of the case. The court further added, "the home venue privilege, although not absolute, should be given substantial consideration in this process along with the other circumstances presented in the interest of the other parties."

As such, the *Grice* considerations of "justice, fairness, and convenience" were held to apply to the facts of the case, as well as to F.S. ' 24.110. The trial court's denial of the Department's motion for change of venue was affirmed.