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**NEW TRIAL - NO ABUSE OF DISCRETION IN  
GRANTING PLAINTIFF'S MOTION FOR NEW TRIAL - ERROR  
TO ENTER SUMMARY JUDGMENT ON ISSUE OF AGENCY RELATIONSHIP**

*Sears Roebuck and Company v. Williams*, 29 Fla. L. Weekly D779  
(Fla. 3d DCA March 31, 2004)

There were no facts provided in this opinion. This case involved an appeal from an order granting plaintiff's motion for new trial and from an order granting partial summary judgment which held that Sears Roebuck and Company was vicariously liable for the acts of a co-defendant, Diamond Exteriors, Inc.

The 3d DCA affirmed the order granting a new trial. The appellate court noted that its standard of review was that an order granting a motion for new trial should not be disturbed absent a clear showing of abuse of discretion.

On the other hand, the 3d DCA reversed the trial courts' order granting summary judgment on the issue of vicarious liability. The 3d DCA noted that the question of agency and/or apparent agency is generally a question of fact which must be determined by the jury. In the present case, the appellate court

noted that because the record noted different factual inferences concerning the issue of agency, summary judgment was improper.

**PIP - COMPANY WHICH OWNS  
PORTABLE DIAGNOSTIC TESTING EQUIPMENT AND  
TAKES ITS EQUIPMENT TO OFFICES OF HEALTH CARE  
PROVIDERS TO PERFORM DIAGNOSTIC TESTS ON PATIENTS IS  
NOT A "CLINIC" REQUIRED TO REGISTER UNDER F.S. § 456.0375**

*Diagnostic Services of South Florida v. State Farm Mutual Automobile Insurance Company*, 29 Fla. L. Weekly D783 (Fla. 3d DCA March 31, 2004)

This matter came before the 3d DCA pursuant to two certified questions of great public importance from the Miami-Dade County Court. The county court certified the following questions of great public importance:

- (1) Is a mobile diagnostic healthcare facility required to register with the Department of Health pursuant to F.S. § 456.0375; and
- (2) If "yes" is an automobile insurance carrier relieved of its obligation to pay for such services if such services were rendered when the facility was not so registered?

The company at issue, Diagnostic Services of South Florida (hereinafter referred to as "Diagnostic") owned portable diagnostic testing equipment. At the request of a health care provider, Diagnostic would take its equipment to the health care provider's office to perform a diagnostic test on a patient. Such tests would include comparative muscle testing, grip and pinch tests and range of motion testing.

After completion of the tests, Diagnostic would return to its office to enter the test data into a computer program. Diagnostic would then prepare a report, which was reviewed by a chiropractor, and then provided the report to the ordering physician. Diagnostic has an office but performed no patient examinations therein.

Both cases on appeal involved individuals who were injured in automobile accidents. The injured parties received diagnostic tests performed by Diagnostic. In each case, State Farm refused to pay the claim on the basis that at the time the services were

rendered, Diagnostic was a clinic which had not registered with the Department of Health pursuant to F.S. § 456.0375.

Florida Statute Section 456.0375(1)(a) defines a "clinic" as follows:

As used in this section, the term "clinic" means a business operating in a single structure or facility, or in a group of adjacent structures or facilities operating under the same business name or management, at which healthcare services are provided to individuals and which tender charges for reimbursement for such services.

Florida Statute Section 456.0375(4)(a) provides that charges made by, or on behalf of, a clinic that is required to be registered but that is not are deemed to be unlawful charges and, therefore, non-compensable and unenforceable.

The 3d DCA held that Diagnostic was not a "clinic" as defined under the statute because Diagnostic did not operate in a single structure or single facility. Additionally, the 3d DCA held that the Diagnostic tests were performed at various doctors' offices and not at Diagnostic's home office.

Accordingly, the 3d DCA held that Allstate was in error in refusing to pay for the services rendered.

**CONTRACTS - ERROR TO ENTER SUMMARY JUDGMENT WHERE  
CERTAIN PROVISIONS IN PARTIES' CONTRACT ARE DISPUTED  
AND REASONABLY SUSCEPTIBLE TO MORE THAN ONE CONSTRUCTION**

***CEM Enterprises, Inc. v. State of Florida***, 29 Fla. L. Weekly D789  
(Fla. 1st DCA March 31, 2004)

The were no facts provided in this opinion. The trial court had granted the State's motion for summary judgement. The 1st DCA reversed and held that because certain provisions in the parties' contract were disputed and were susceptible to more than one construction, an issue of fact remained in the case. As such, the trial court erred in entering summary judgement.

**CONTRACTS - COVENANT NOT TO  
COMPETE -INJUNCTION - LIFE INSURANCE AGENT  
PROPERLY FOUND TO BE IN VIOLATION OF AGREEMENT IN  
WHICH HE AGREED NOT TO SOLICIT FORMER EMPLOYER'S CUSTOMERS**

***Scarbrough v. Liberty National Life Insurance Company***, 29 Fla. L. Weekly D791 (Fla. 1st DCA March 31, 2004)

The trial court entered an order temporarily enjoining Scarbrough from soliciting the sale of insurance to customers of Liberty National Life Insurance Company, Scarbrough's former employer.

Scarbrough had signed a non-compete contract with Liberty wherein he agreed not to solicit replacement insurance coverage with Liberty's customers for 18 months after termination of his employment. Scarbrough argued that he did not violate the terms of his non-compete because his former Liberty customers first approached him regarding a change in insurance coverage. The trial court concluded that even if the former client had initiated the contact with Scarbrough a solicitation occurred.

The 1st DCA affirmed the temporary injunction. The appellate court noted that its standard of review concerning orders granting temporary injunctions is whether the trial court abused its discretion. In the present case, the 1st DCA found that the trial court did not abuse its discretion.

**WRONGFUL DEATH - TRIAL COURT  
ERRED IN REQUIRING FUNERAL EXPENSES  
BE PAID FROM SURVIVORS' WRONGFUL DEATH  
RECOVERY - ESTATE DEBTS CANNOT BE RECOVERED  
FROM WRONGFUL DEATH PROCEEDS RECOVERED FOR SURVIVORS**

***Scott v. The Estate of Todd Myers***, 29 Fla. L. Weekly D791 (Fla. 1st DCA March 31, 2004)

Todd Myers and his friend, Michael Gruver, both died in an automobile accident in a vehicle driven by Mr. Gruver in which Mr. Myers was a passenger. Mr. Myers' will named Mr. Gruver beneficiary, and Gruver's daughter, Courtney Gruver, a contingent beneficiary, if Gruver failed to survive Myers. Myers will made no provision for any other person, including his mother, Annette Scott.

Ms. Scott appealed from the trial court's order requiring portions of estate administrative costs, in particular payment of funeral expenses, to be paid from the survivor's wrongful death action. The 1st DCA reversed.

Ms. Scott paid her son's funeral expenses and filed a claim for the expenses against her son's estate. No objection to this claim was made. The only liquid assets in Mr. Myers' estate was a bank account containing approximately \$126,000, \$25,000 of which derived from the policy limits of his UM policy, and \$100,000 of which derived from Mr. Gruver's UM policy which Gruver's insured tendered without litigation.

Ms. Scott filed a wrongful death suit against Gruver's estate. After investigation, she determined the Gruver estate had no additional assets to justify expenditure of additional Myers estate assets to pursue the survivor's wrongful death claim.

The personal representative of Myer's estate tendered the \$125,000 proceeds from both UM policies to Myers' parents, the sole survivors under the wrongful death statute, and proposed to settle the wrongful death action against the Gruver estate without further action. Ms. Scott objected to terminating the wrongful death action and demanded the personal representative to continue to pursue the survivors claim. Ms. Scott also sought to have the personal representative removed. The dispute centered on the likelihood of recovering additional compensation for the survivors whether or not the survivors had additional uncompensated damages.

The trial court ultimately satisfied Ms. Scott's claim against the estate for funeral expenses by allocating a portion of the wrongful death proceeds already tendered as survivors benefits as estate satisfaction of the funeral expense claim. The 1st DCA held that by ordering satisfaction of the funeral expenses claim to be paid from the survivors wrongful death proceeds, the trial court erred.

The 1st DCA noted that in a wrongful death action, the personal representative has an obligation to recover damages sustained by both the survivors and the estate. Proceeds from a wrongful death action are not for the benefit of the estate and are not subject to estates claims. Rather, they are the property of the survivors in compensation for their loss. Accordingly, estate debts cannot be recovered from wrongful death proceeds recovered for survivors. Under the Wrongful Death Act, one form of damages a survivor may recover are funeral expenses paid by the survivor.

In the present case, the personal representative made no attempt to allocate any part of the recovered wrongful death proceeds to Myers' estates to pay estate expenses. The personal representative concluded no part of the wrongful death proceeds should go to the estate and determine the \$125,000 payout of the combined UM policies should go to the survivors as partial compensation for their loss.

Thus, a partial unallocated recovery was made on behalf of the survivors. The 1st DCA held that the trial court may not take the unallocated proceeds from a partial recovery and allocate them in a way to satisfy some elements of damage and leave all other elements unsatisfied.

**CIVIL PROCEDURE - NEW TRIAL -  
MOTION FOR NEW TRIAL WHICH WAS SERVED  
WITHIN TEN DAYS AFTER FINAL JUDGMENT TIMELY UNDER  
RULE 1.530(b) ALTHOUGH ORIGINAL NOT FILED WITH COURT**

*Poulsen v. Lenzi*, 29 Fla. L. Weekly D806 (Fla. 4th DCA March 31, 2004)

The trial court denied Poulsen's motion for new trial as being untimely. F.R.C.P. 1.530(b) provides that motions for new trial and rehearing shall be **served** no later than ten days after the return of the verdict in a jury action or the date of filing of the judgment in a non-jury action. It is service of the motion, not filing with the court, that must take place within ten days.

In the present case, the motion for new trial was never filed with the clerk, although Lenzi concedes that it was timely served within the ten day time period.

The 4th DCA held that the trial court abused its discretion in denying Poulsen's motion for new trial. The matter was reversed and remanded for reconsideration of the motion for new trial.

**ARBITRATION - FOLLOWING NON-BINDING  
ARBITRATION WHERE NO REQUEST MADE FOR  
TRIAL, COURT REQUIRED TO ENTER JUDGMENT ON  
AWARD - MANDAMUS AVAILABLE REMEDY TO DIRECT ENTRY  
OF JUDGMENT PURSUANT TO NON-BINDING ARBITRATION STATUTE**

*Broward Yachts, Inc. v. Denison*, 29 Fla. L. Weekly D810 (Fla. 4th DCA March 31, 2004)

Broward Yachts sought a writ of mandamus to compel the trial court to enter a final judgment for damages awarded in a non-binding arbitration. Following the arbitration, Denison did not request a trial, therefore, the trial court was required by statute to enter a judgment.

F.S. § 44.103 authorizes trial courts to refer civil actions to non-binding arbitration. The statute provides that a party dissatisfied with the results of arbitration may, within 20 days of service of the arbitration decision, file a motion for trial, If a motion for trial is not filed, the trial court shall enter a judgment. This is a non-discretionary, mandatory, duty.

In the present case, there were two counts in Broward Yachts' complaint subject to the arbitration. The first claim concerned a line of credit agreement and promissory note. Broward Yachts prevailed on that claim. The second claim involved a different agreement which required Denison to make certain payments contingent upon future events. Broward Yachts did not prevail in arbitration on the second claim.

Neither side moved for a trial on the first claim. However, Broward Yachts moved for a trial on the second claim. Broward Yachts then sought a money judgment on the first claim which the trial court denied. The petition for writ of mandamus asked the 4th DCA to order that the judgment be entered on the first claim.

The 4th DCA held that because the two claims pursuant to arbitration were separate and distinct by statute, the trial court was required to enter judgment on the award of the first claim for which Denison did not seek a trial.

In a dissenting opinion, Justice Stone argued that the two matters subject to arbitration were interrelated and, therefore, the trial court had discretion to deny partial enforcement of the award.

**TORTS - FEDERAL PREEMPTION -  
STATE COURT ACTION PREEMPTED BY FEDERAL  
INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT**

*E.I. Du Pont De Nemours and Company v. Aquamar S.A.*, 29 Fla. L. Weekly D811 (Fla. 4th DCA March 31, 2004)

Du Pont manufactured Benlate fungicide that was applied to banana plants in Ecuador to prevent the spread of a disease called "black sigatoka." Aquamar owned a shrimp farm in close proximity to the banana farm. After application of the Benlate, the shrimp farm began to experience massive shrimp mortalities. Suit was filed against Du Pont in the circuit court in Miami-Dade County. The jury found that Du Pont was negligent in the distribution of Benlate. Damages were awarded in excess of \$12 million.

Du Pont appealed asserting that Aquamar's tort claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act. Du Pont also claimed on appeal that the trial court made a number of erroneous evidentiary rulings. The 4th DCA found merit in the preemption argument and reversed.

Du Pont acknowledged that Benlate is toxic to shrimp and that it never tested the effects of the chemical on the type of shrimp farmed at Aquamar's farm. Du Pont contended, however, that Benlate was not responsible for shrimp deaths and that Aquamar could not link the chemicals found in the shrimp to the Benlate. Ultimately, Du Pont argued that the cause of shrimp death was not a toxin but rather a new virus.

On the issue of Du Pont's negligence, Aquamar pursued three separate theories. First, that Du Pont had been negligent in failing to adequately test Benlate; secondly, that Du Pont had been negligent in failing to warn banana farmers of the run-off potential and products toxicity to shrimp; and thirdly, that Du Pont had been negligent in its distribution of Benlate because the advertising and instructions were insufficient.

The jury found in favor of Aquamar on the negligent distribution theory.

The 4th DCA held that the Federal Insecticide, Fungicide and Rodenticide Act provided a comprehensive scheme for pesticide labeling distribution in sales.

The trial court concluded that FIFRA, in its preemption provision, was inapplicable because Aquamar's claims arose from the use of pesticide in Ecuador. The 4th DCA found this to be in error. The 4th DCA concluded that Aquamar's negligent distribution claim was nothing more than a labeling claim, and as such, was pre-empted by FIFRA. Accordingly, the 4th DCA reversed the jury verdict and remanded for entry of judgment in favor of Du Pont.

**MEDICAL MALPRACTICE -  
INSURANCE COVERAGE - WHERE POLICY  
PROVIDED COVERAGE FOR ONLY ONE NAMED  
PHYSICIAN AND HER PROFESSIONAL ASSOCIATION,  
WHICH WAS ADDITIONAL INSURED, TRIAL COURT PROPERLY  
FOUND NO COVERAGE FOR P.A. FOR MALPRACTICE CLAIM AGAINST  
ANOTHER PHYSICIAN EMPLOYED BY P.A. - TRIAL COURT ERRED IN  
DENYING PROFESSIONAL ASSOCIATION'S MOTION TO AMEND PLEADINGS  
TO INCLUDE CLAIM THAT INSURER ESTOPPED FROM DENYING COVERAGE**

*Family Care Center, P.A. v. Truck Insurance Exchange*, 29 Fla. L. Weekly D815 (Fla. 4th DCA March 31, 2004)

Truck Insurance Exchange issued a medical malpractice insurance policy covering Dr. Dean and her employer, the Family Care Center, as an additional insured. Another physician employed by Family Care, Dr. Stine, was sued for medical malpractice. The trial court granted summary judgment in favor of the insurance company on the issue that Family Care was not an insured under the policy for the claim against Dr. Stine.

Dr. Stine was covered by a different insurance carrier which had previously settled with claimant. However, Dr. Stine claimed additional coverage under the Truck Insurance policy. During the pre-suit period, Truck Insurance provided a defense for Family Care. Soon after the termination of the pre-suit proceedings, however, Truck Insurance denied coverage and withdrew its defense. Family Care then entered into a consent judgment for \$1 million with the claimant which provided that the claimant would not seek to collect against Family Care Center. Claimant agreed to seek satisfaction only from Truck Insurance.

In interpreting the insurance policy, the 4th DCA affirmed the trial court's holding that the Truck Insurance policy, by its language, did not provide coverage to Family Care as an additional insured for the claim against Dr. Stine. The 4th DCA held that Family Care was an additional insured only for the medical treatment rendered by Dr. Dean.

The 4th DCA also addressed the estoppel issue. On the eve of the summary judgment hearing concerning the coverage issue, Family Care filed a motion to amend the pleadings to include a claim that Trust Insurance was estopped by denying coverage based on its conduct during the pre-suit. The trial court denied the motion to amend holding that the proposed amendment did not allege any facts which could constitute estoppel.

The 4th DCA held that the trial court erred in denying Family Care's motion to amend the complaint to add a claim for estoppel. Unfortunately, the opinion did not provide a factual description concerning the proposed facts that could give rise to a claim of estoppel. Nonetheless, the 4th DCA held that the amendment should have been permitted to allow Family Care to pursue an estoppel claim.

**CIVIL PROCEDURE - DISMISSAL OF  
COMPLAINT WITH PREJUDICE - SANCTIONS OTHER  
THAN DISMISSAL MORE APPROPRIATE IN SITUATIONS  
IN WHICH ATTORNEY, AND NOT CLIENT, IS RESPONSIBLE**

***American Express Company v. Hickey***, 29 Fla. L. Weekly D818 (Fla. 5th DCA April 2, 2004)

Following a series of missed deadlines and the failure of American Express' counsel to appear at a scheduled hearing, Judge Dorothy Russell of Orange County dismissed American Express' amended complaint with prejudice. The 5th DCA reversed holding that the sanction of dismissal of the amended complaint was too severe a sanction against the client.

The 5th DCA noted that in determining whether dismissal with prejudice is warranted, the trial court should consider the following factors:

- (1) Whether the attorney's disobedience was willful, deliberate, or contumacious rather than act of neglect or inexperience;
- (2) Whether the attorney had previously been sanctioned;
- (3) Whether the client was personally involved in the act of disobedience;
- (4) Whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in

some other faction;

- (5) Whether the attorney offered a reasonable justification for non-compliance; and
- (6) Whether the delay created significant problems of judicial administration.

The 5th DCA noted that if a less severe sanction than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative.

Accordingly, the 5th DCA held that the trial court had options available to it to fashion an appropriate sanction such as the imposition of fines, awarding of attorney's fees, finding counsel in contempt, or referring the matter to the Florida Bar.

**INJUNCTIONS - ERROR TO ENTER TEMPORARY  
INJUNCTION WITHOUT MAKING REQUISITE FINDINGS**

***Tutus v. Skills, Training, Analysis, Etc.***, 29 Fla. L. Weekly D819  
(Fla. 5th DCA April 2, 2004)

No facts were given with this opinion. A preliminary injunction is an extraordinary remedy which should be granted sparingly and which may be entered if the party seeking the injunction establishes the following criteria:

- (1) the likelihood of irreparable harm;
- (2) unavailability of an adequate remedy at law;
- (3) substantial likelihood of success on the merits; and
- (4) consideration of the public interest.

In entering an injunction, the trial court must strictly comply with F.R.C.P. 1.610(c) by specifying the reasons for the entry of the injunction and describing in reasonable detail the act restrained without reference to a pleading or other document.

Because the court failed to make the requisite findings, the injunction was quashed.

**MEDICAL MALPRACTICE - CONCURRING CAUSE - JURY  
INSTRUCTION - "BUT FOR" LANGUAGE OF INSTRUCTION ON LEGAL  
CAUSE MAY HAVE CONFUSED OR MISLED JURY - NEW TRIAL WARRANTED**

*Hadley v. Terwilleger*, 29 Fla. L. Weekly D826 (Fla. 5th DCA April 2, 2004)

Hadley appealed from an adverse final judgment and the denial of her motion for new trial in a medical malpractice case. Hadley had filed suit against Dr. Terwilleger and Dr. Parker for negligence in failing to diagnose and treat her minor daughter for tuberculosis meningitis and the resulting injuries suffered by the child caused by the disease. Hadley's appeal focused on the trial court's error in refusing to instruct the jury on Florida Standard Jury Instruction 5.1(b), concurring cause. The 5th DCA agreed and reversed for a new trial.

The 5th DCA held that where the facts of the case support the theory of Hadley's case, viewed most favorably towards Hadley, that when a defendant's negligence, operating in combination with the negligent act of another, or a natural cause such as a disease or pre-existing condition, results in injury or damage to another, a concurrent cause instruction should be given.

Florida Standard Jury Instruction 5.1(a) provides:

Negligence is a legal cause of loss, injury or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury or damage, so that it can reasonably be said that but for the negligence, the loss, injury or damage would not have occurred. (emphasis added)

Florida Standard Jury Instruction 5.1(b) provides:

In order to be regarded as the legal cause of loss, injury or damage, negligence must not be the only cause. Negligence may be a legal cause of loss, injury or damage even though it operates in combination with the act of another, some natural cause, or some other

cause if such other cause occurs at the same time as the negligence and if the negligence contributes substantially to producing such loss, injury or damage.

During the trial, Ms. Hadley testified that she took her daughter to the defendant's office on September 2, September 5 and September 7, 1995. The doctors diagnosed a viral infection but did not perform a lumbar puncture which could have led to an earlier diagnosis of meningitis.

After the third visit, on September 9, 1995, Ms. Hadley took her daughter to the emergency room at Volusia Medical Center when the child's symptoms continued to worsen. The treating doctor at that hospital also failed to suspect meningitis and discharged her.

The meningitis progressed and on September 12, 1995 Ms. Hadley was called at work because her daughter looked dead. She was immediately admitted on an emergency basis to the intensive care unit at Arnold Palmer Hospital in a coma. On September 15, 1995 tuberculosis meningitis was suspected. Specific treatment began but tuberculosis meningitis was not officially diagnosed for ten more days.

The plaintiffs' experts testified that TB meningitis is a rare disease and difficult to diagnose. They both said the defendant doctor should have suspected meningitis and done a lumbar puncture on either September 5 or September 7. They based their opinions on Ms. Hadley's deposition testimony when she described the serious state of her child's medical condition. However, the medical records kept by the defendant's group did not substantiate such severe symptoms. Both plaintiff's experts agreed that if the defendant's medical records were accurate, then no deviation from the standard of care occurred.

Both plaintiff's experts testified that had the child been diagnosed in the earlier stages of the disease, she would have likely suffered no permanent injury. If diagnosed in the second stage, less damage would have resulted. Unfortunately, the child was in the third or final, and often fatal, stage of the disease when she was admitted to Arnold Palmer Hospital.

The 5th DCA noted that the credibility of Ms. Hadley as to having given the defendant doctors an accurate account of her daughter's symptoms was a decisive issue as it formed the basis for the plaintiff's expert testimony. However, the general verdict in the case did not disclose the basis for the jury's "no negli-gence" verdict on the part of the doctors. The 5th DCA

questioned whether the verdict was the jury's disbelief of Ms. Hadley or their confusion about the necessity for finding the defendant's negli-gence the sole cause of the injuries suffered by the child.

The 5th DCA held that the purpose of the concurring cause instruction is to negate the idea that a defendant is excused from the consequences of their negligence by reason of some other cause concurring in time and contributing to the same damage. The 5th DCA held that the instruction on legal cause given in this case, 5.1(a), may have confused or misled the jury. Under the circumstances, the appellate court held that the appellant was entitled to a new trial with the jury correctly instructed as to a concurring cause because in this case Hadley had established the classic concurring cause situation were her testimony accepted by the jury.

In his dissent, Justice Monaco argued that a concurrent cause instruction was not appropriate. He concluded that concurrent causes were two separate and distinct causes that operate contemporaneously to produce a single injury. He argued that in this case, had there been a proper diagnosis of tuberculosis meningitis, there would have been no injury. Both the plaintiff and the defendant were in complete agreement that Ms. Hadley's daughter was in the early stages of her disease when she saw the appellees, and all the evidence at trial indicated that the child would have had a complete recovery "but for" the negligence of the appellees in misdiagnosing the disease.

The disease had not taken a toll when she was seen by the appellees. Thus, the disease could not have been a concurrent cause of the injuries suffered by the child and the only standard instruction on causation was required to be given as there were not two or more separate causes that acted in combination to produce the injury.

**MEDICAL MALPRACTICE - EXTENSION OF  
STATUTE OF LIMITATIONS - TRIAL COURT ERRED IN  
DISMISSING PLAINTIFF'S SECOND AMENDED COMPLAINT WHICH  
SUFFICIENTLY PLED ALLEGATIONS OF DEFENDANT'S FRAUD AND  
CONCEALMENT OF INJURY SUSTAINED BY PLAINTIFF DURING OPERATION**

***Bryant v. Adventist Health Systems Sunbelt, Inc.***, 29 Fla. L. Weekly D832 (Fla. 5th DCA April 2, 2004)

On September 11, 1996, Bryant underwent surgery to repair a torn rotator cuff in his left shoulder. On December 11, 1998, Bryant sued his surgeon, the surgeon's professional association,

and the Department of Corrections for medical malpractice. Bryant alleged that his surgeon negligently performed the surgery injuring his brachial plexus thereby causing permanent injury. He alleged vicarious liability against the other parties.

Bryant deposed the surgeon on July 28, 2000. During the deposition, the surgeon testified that during the surgery Bryant's head slipped off its support at least one time. Based on this new information, Bryant filed a motion to amend the complaint on November 2, 2001. The first amended complaint was deemed filed on October 8, 2002. (No explanation for the timing of the filing was given in the opinion.)

The first amended complaint added defendant Nurse Hayes, defendant medical technician Lake, and their employer, Adventist Health Systems, Inc. The amended complaint alleged that Hayes and Lake negligently allowed Bryant's head to fall off the support causing injuries. The first amended complaint also alleged that none of the medical records in the case noted that plaintiff's head had fallen off the table during the surgical procedure.

The hospital filed a motion to dismiss based on the statute of limitations. The trial court granted the motion without prejudice to refile a second amended complaint.

On February 14, 2003, Bryant filed a second amended complaint. In addition to repeating the allegations that the medical records failed to disclose the intraoperative event, the second amended complaint also set forth allegations concerning the defendant's failure to disclose the events of the intraoperative procedure and concealment of the events. Once again, the trial, without a hearing, dismissed Bryant's claims against the defendants.

The 5th DCA reversed the dismissal based upon F.S. § 95.11(4)(b) which establishes the medical malpractice statute of limitations. This section provides, in pertinent part, that when it is shown that fraud, concealment or intentional misrepresentation of fact prevent the discovery of the injury within a four year period from the date of the incident, the period of limitations is extended two years from the time that the injury is discovered or should have been discovered with the exercise of due care, but in no event to exceed seven years from the date the incident giving rise to the injury occurred.

In the present case, the 5th DCA concluded that the second amended complaint sufficiently alleged concealment and intentional misrepresentation of fact which if proven would toll the statute of limitations.

The defendant argued that the allegations of concealment did not extend the statute of limitations because the concealment itself did not prevent the plaintiff from discovering his injury. However, the 5th DCA, quoting *Tanner v. Hartog*, 618 So. 2d 177 (Fla. 1993), held that fraudulent concealment by a defendant so as to prevent a plaintiff from discovering their cause of action where the physician has fraudulently concealed the facts showing negligence will toll the statute of limitations until facts of such fraudulent concealment can be discovered.

**MEDICAL MALPRACTICE - NICA - ADMINISTRATIVE  
LAW JUDGE HAS NO AUTHORITY TO DETERMINE ISSUES  
OF NOTICE IN DETERMINING WHETHER INJURY COMPENSABLE  
UNDER NICA - ADMINISTRATIVE LAW JUDGE'S RESPONSIBILITY  
IS TO DETERMINE WHETHER INJURY IS BIRTH-RELATED NEUROLOGICAL  
INJURY AND WHETHER DELIVERY PERFORMED BY PARTICIPATING PHYSICIAN**

*All Children's Hospital, Inc. and Florida Birth-Related Neurological Injury Compensation Association v. Ferguson*, 29 Fla. L. Weekly D841 (Fla. 2d DCA January 14, 2004)

The original opinion appeared at 29 Fla. L. Weekly D226 and was discussed in our summary of the January 23, 2004 Fla. L. Weekly. The only change in this opinion is that the 2d DCA certified conflict with the 5th DCA's opinion in *O'Leary v. Fla. Birth-Related Neurological Injury Comp. Ass'n.*, 757 So. 2d 624 (Fla. 5th DCA 2000), and *Behan v. Florida Birth-Related Neurological Injury Compensation Ass'n.*, 664 So. 2d 1173 (Fla. 4th DCA 1995), to the extent that these opinions held that the ALJ has no authority to determine issues related to notices in NICA proceedings.

**JURISDICTION - NON-RESIDENTS - FLORIDA LONG-ARM STATUTE**

*Waugh v. Philpot*, 29 Fla. L. Weekly D845 (Fla. 2d DCA April 2, 2004)

Appellees filed a class action complaint against a number of corporate entities as well as officers and/or employees of the corporate defendant. Appellees alleged that the individual defendants were involved in a conspiracy with the corporation to violate the Florida Deceptive and Unfair Trade Practices Act.

The individual defendants filed a motion to dismiss the complaint on the basis that the trial court lacked personal juris-

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diction. Attached to the motions were affidavits of the appellants asserting that they were residents of Illinois, had never resided in Florida, and had no personal involvement with the underlying cause of action.

The trial court denied appellants motion to dismiss for lack of personal jurisdiction. However, the 2d DCA reversed holding that once a defendant challenges personal jurisdiction by filing an affidavit that is legally sufficient to challenge the jurisdictional allegations of the complaint, the burden shifts to the plaintiff to prove by affidavit the basis for the long-arm jurisdiction.

In the present case, because the appellants filed such legally sufficient affidavits, and the appellees failed to file any sworn proof showing the basis of the long-arm jurisdiction over them, the trial court was obligated to grant appellants' motion to dismiss.

JLH/DRK/tsr/pas