

FROM THE DESK OF  
JENNINGS L. HURT III

MEDICAL MALPRACTICE CASE LAW

JULY 1, 2008 THROUGH SEPTEMBER 30, 2008

---

APPELLATE COURT OPINIONS

MEDICAL MALPRACTICE - TRIAL COURT  
DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW IN DENYING  
DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO COMPLY WITH  
STATUTORY PRESUIT SCREENING REQUIREMENTS WITHOUT DETERMINING  
WHETHER PLAINTIFF CONDUCTED GOOD FAITH INVESTIGATION  
AND WHETHER CLAIM RESTED ON REASONABLE BASIS - PLAINTIFF  
NOT REQUIRED TO PROVIDE CORROBORATING EXPERT'S AFFIDAVIT AS  
HOSPITAL DID NOT PROVIDE PLAINTIFF'S RECORDS WITHIN 10 DAYS

*Martin Memorial Medical Center, Inc. v. Herber*, 33 Fla. L. Weekly  
D1642 (Fla. 4th DCA June 25, 2008)

Martin Memorial Medical Center filed a petition for writ of certiorari seeking review of an order denying its motion to

## **MEDICAL MALPRACTICE CASE LAW**

July 1, 2008 through September 30, 2008

Page 2

dismiss for plaintiff's failure to comply with the statutory presuit screening requirements under F.S. §§ 766.203 and 766.206 (2004). The case arose out of a claim for medical malpractice allegedly committed upon Dorothy Herber by Martin Memorial in February 2002. As part of the statutory presuit screening process, plaintiff's attorney requested medical records from Martin Memorial on January 7, 2005. Although originally sent to the incorrect address, the written request was received by Martin Memorial on January 17, 2005. The records were sent to plaintiff's attorney on February 1, 2005.

Four days later, Ms. Herber's attorney sent Martin Memorial a notice of intent to initiate litigation for medical malpractice. The notice of intent did not contain a statutorily mandated verified written medical expert opinion corroborating the claim of medical negligence and one was never provided. The time for Martin Memorial to conduct its presuit screening was extended until November 1, 2005. After conducting an investigation, Martin Memorial rejected Herber's claim pursuant to F.S. § 766.203(3).

On March 6, 2006, Ms. Herber served her amended complaint for medical negligence on the hospital. Martin Memorial filed a motion to dismiss the amended complaint on the grounds that Ms. Herber failed to conduct a good faith investigation and provide a corroborating affidavit. By failing to conduct a good faith investigation, Martin Memorial argued that there was no reasonable basis for the claim.

Ms. Herber responded that she had conducted a good faith investigation prior to receipt of the requested medical records and that she was not required to provide a corroborating affidavit because Martin Memorial had failed to timely provide copies of her medical records pursuant to F.S. § 766.204(1). The trial court did not determine whether plaintiff conducted a good faith investigation, or reach a conclusion as to whether there was a reasonable basis for the claim.

The first issue before the 4th DCA was whether the failure of the trial court to determine if plaintiff's claim rested on a reasonable basis was a departure from the essential requirements of law. In **Duffy v. Brooker**, 614 So. 2d 539 (Fla. 1st DCA 1993), the 1st DCA concluded that "[w]hen one of the parties files a motion under F.S. § 766.206, the trial court *must* determine whether the opposing party's claim ... `rests on a reasonable basis' and whether the notice of intent to sue ... is 'in compliance with the reasonable investigation requirements of ss 766.201-766.212.'" If the greater weight of the evidence

**MEDICAL MALPRACTICE CASE LAW**

July 1, 2008 through September 30, 2008

Page 3

establishes that the non-moving party did not conduct a "reasonable investigation" and that its notice of intent to sue ... does not 'rest on a reasonable basis,' the motion will be granted." *Id.* at 544-45.

The 4th DCA held that the order denying Martin Memorial's motion to dismiss was a departure from the essential requirements of the law from which Martin Memorial would suffer irreparable harm which could not be cured on plenary appeal. The petition was granted and the order quashed.

The second issue was whether, under F.S. § 766.204(2), Ms. Herber was excused from providing a corroborating affidavit because Martin Memorial had failed to provide the requested medical records within ten business days from the date of the request.

F.S. § 766.204(1) and (2) provide:

- (1) Copies of any medical record relevant to any litigation of a medical negligence claim or defense shall be provided to a claimant or a defendant, or to the attorney thereof, at a reasonable charge within 10 business days of a request for copies ... It shall not be grounds to refuse copies of such medical records that they are not yet completed or that a medical bill is still owing.
- (2) Failure to provide copies of such medical records ... shall constitute evidence of failure of that party to comply with good faith discovery requirements and shall waive the requirement of written medical corroboration by the requesting party.

F.S. § 766.204(1)-(2).

The 4th DCA cited to one of its previous decisions in which it held that the failure to provide medical records as required under F.S. § 766.204 (1) obviates the necessity of providing a corroborating affidavit under section (2). The appellate court found that Martin Memorial, by its own admission, had received the request for records on January 17, 2005 and mailed the records on February 1, 2005; thirteen business days later. The 4th DCA held that because Martin Memorial had not provided the records within ten days, the statute provided that Ms. Herber was under no

**MEDICAL MALPRACTICE CASE LAW**

July 1, 2008 through September 30, 2008

Page 4

obligation to furnish a corroborating affidavit with her notice of intent or any time thereafter.

The 4th DCA interpreted the statute to require a good faith investigation by plaintiff even when records are not furnished within the ten days. The 4th DCA believed the issue for the trial court was whether or not Ms. Herber could establish that she had conducted a good faith investigation and had a reasonable claim without a corroborating affidavit.

**MEDICAL MALPRACTICE -  
DAMAGES - SETOFF APPROPRIATE WHERE PLAINTIFF SETTLES WITH  
HMO EVEN THOUGH HMO ALLEGED TO HAVE BEEN ACTIVELY NEGLIGENT**

*Coopersmith v. McCormick*, 33 Fla. L. Weekly D1730 (Fla. 4th DCA July 9, 2008)

The deceased patient's estate sued several doctors and the patient's health maintenance organization (HMO), alleging that they were responsible for the patient's death. Before trial, plaintiff settled with the patient's HMO. Plaintiff went forward with trial against the remaining physicians and their respective professional associations. Though the jury returned a verdict in favor of plaintiff, that verdict was less than the amount for which plaintiff had settled with the patient's HMO. Defendants filed a motion for setoff which the trial court denied. The defendants appealed this decision to the 4th DCA.

The 4th DCA reversed the trial court's decision. In doing so, it examined both F.S. § 768.81, and another 4th DCA case, *Grobman v. Posey*, 863 So. 2d 1230 (Fla. 4th DCA 2003). In *Grobman*, the 4th DCA considered a similar situation in which an HMO had been a party defendant. In that case, the 4th DCA pointed out that F.S. § 768.81 requires the apportionment of non-economic damages in cases involving joint tortfeasors whose independent acts cause a single injury. In situations where a defendant has settled, F.S. § 768.81 requires apportionment of liability with the settling defendant if that defendant is the type that could have been added as a *Fabre* defendant on the verdict form.

In *Grobman* the 4th DCA noted that the HMO was derivatively liable because it had chosen and employed the negligent health care provider and was therefore liable to the same extent as if the HMO had done the doctor's work itself. In the instant matter, plaintiff argued that *Grobman* was not applicable because plaintiff's theory of liability against the patient's HMO was one

**MEDICAL MALPRACTICE CASE LAW**

July 1, 2008 through September 30, 2008

Page 5

of active negligence to the extent that the HMO was authorized to examine both the patient and the services being provided to the patient and, if those services were not satisfactory, to render the correct services itself. In short, plaintiff alleged that the HMO had failed to rectify the negligence of the provider it had chosen. Plaintiff asserted that this theory of liability was different and distinct from that asserted against the HMO in *Grobman* and that, therefore, denial of the setoff was proper.

The 4th DCA disagreed with plaintiff's theory of liability in the instant matter, pointing out that it was basically the same as the one asserted against the HMO in *Grobman*. Specifically, plaintiff's theory of liability in the instant matter was that the HMO would not be derivatively liable because it failed to do what its contract authorized it to; the 4th DCA asserted that this was another way of saying that the HMO was liable to the injured plaintiff because it failed to render appropriate care, though authorized to do so. The 4th DCA therefore reversed the trial court's decision and indicated that a setoff, based upon the plaintiff's settlement with HMO, was appropriate.

In reversing the denial of setoff, the 4th DCA affirmed the trial court's decision to submit the issue of punitive damages to the jury. The 4th DCA addressed this issue despite the jury's failure to award punitive damages because the record in question contained evidence which a jury might have concluded met the applicable threshold for punitive damages which amounted to a conscious neglect of the patient's condition. The 4th DCA therefore concluded that plaintiff presented a *prima facie* claim for the jury to consider punitive damages. The 4th DCA did not otherwise explain its reasoning in addressing the issue of punitive damages.

**MEDICAL MALPRACTICE -  
JUROR MISCONDUCT - TRIAL COURT DID NOT ERR IN  
DENYING MOTION FOR NEW TRIAL IN MEDICAL MALPRACTICE  
ACTION AS PLAINTIFF WAIVED JUROR MISCONDUCT ARGUMENT  
BY FAILING TO JOIN IN DOCTOR'S MOTION FOR MISTRIAL ON  
SAME GROUNDS - APPELLANT'S CONDUCT IN ATTEMPTING TO TAKE NO  
POSITION ON DOCTOR'S MOTION WHILE SIMULTANEOUSLY ARGUING  
AGAINST IT ON SUBSTANTIVE GROUNDS SUFFICIENT TO CONSTITUTE  
WAIVER OF ARGUMENT THAT JUROR MISCONDUCT NECESSITATED NEW TRIAL**

*Russ v. Silbiger*, 33 Fla. L. Weekly D1784 (Fla. 4th DCA July 16, 2008)

## **MEDICAL MALPRACTICE CASE LAW**

July 1, 2008 through September 30, 2008

Page 6

Plaintiff sued Dr. Silbiger alleging medical negligence. Following the presentation of plaintiff's case at trial, Dr. Silbiger's counsel learned that four jurors had failed to disclose prior injury and litigation histories, despite questionnaires and jury voir dire at trial instructing them to do so. During trial, Dr. Silbiger moved for a mistrial and to strike the four jurors.

Plaintiff opposed the motion, arguing that it was premature and that Dr. Silbiger could not satisfy the materiality prong of *De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995). The trial court denied the motion, and also noted that it would be a "tough sale" for appellant to oppose the motion for mistrial and then argue the same grounds in a motion for new trial in the event the jury returned a verdict unfavorable to appellant.

The jury returned a verdict in favor of Dr. Silbiger. Plaintiff then filed a motion for new trial alleging the same juror misconduct issues raised by Dr. Silbiger. The contention was that plaintiff's previous argument was based upon the fact that Dr. Silbiger's motion was premature.

Plaintiff stated that the parties were unaware that one of the civil cases in which a juror had failed to disclose involvement was a wrongful death claim the juror had brought as a personal representative of the estate. Dr. Silbiger countered that the parties were well aware of the case and had the case number at the time of the motion for mistrial. Dr. Silbiger did admit, however, that the full extent of the jurors' involvement was unknown at that time.

The trial court expressed concern that plaintiff had not previously joined in Dr. Silbiger's motion for mistrial as a trial tactic and believed the trial was going well for plaintiff. The trial court rendered a final judgment in accordance with the verdict and denied the motion for new trial.

The appellate court affirmed. As a general principle of law, the doctrine of waiver encompasses not only the intentional or voluntary relinquishment of a known right, but also conduct that warrants an inference of the relinquishment of a known right. The appellate court noted that although plaintiff had not known the full details of the litigation and injuries concealed by the jurors, plaintiff had sufficient information to join or oppose the motion on substantive grounds.

Plaintiff's conduct attempted to take no position on the defendant's motion while simultaneously arguing against it on

**MEDICAL MALPRACTICE CASE LAW**

July 1, 2008 through September 30, 2008

Page 7

substantive grounds. This was sufficient to constitute waiver of the argument that the jurors' conduct necessitated a new trial. Plaintiff should have joined the defendant's motion at the time if plaintiff agreed grounds for mistrial existed.

**NURSING HOMES - WRONGFUL DEATH - ARBITRATION - WHERE NURSING HOME ADMISSIONS PAPERWORK INCLUDED ARBITRATION AGREEMENT SEPARATE FROM REMAINDER OF PAPERWORK, PLAINTIFF NOT RUSHED INTO SIGNING ARBITRATION AGREEMENT, AND PLAINTIFF NOT PREVENTED FROM ASKING FOR ASSISTANCE FROM ADMISSIONS DIRECTOR BEFORE SHE SIGNED AGREEMENT, AGREEMENT NOT PROCEDURALLY UNCONSCIONABLE - PROVISIONS IN AGREEMENT WHICH ELIMINATED RIGHT TO PUNITIVE DAMAGES AND DIRECTED THAT ARBITRATION PROCEEDINGS BE CONDUCTED IN ACCORDANCE WITH AMERICAN HEALTH LAWYERS ASSOCIATION RULES OF PROCEDURE ARE SEVERABLE FROM REMAINDER OF ARBITRATION AGREEMENT - IF ARBITRATORS FIND ANY PORTION OF ARBITRATION CLAUSE TO BE UNENFORCEABLE OR INVALID, ARBITRATORS WILL HAVE ABILITY TO SEVER IMPROPER PROVISIONS FROM REMAINDER OF AGREEMENT**

*Shotts v. OP Winter Haven, Inc.*, 33 Fla. L. Weekly D1826 (Fla. 2d DCA June 18, 2008)

This was a corrected opinion issued by the 2d DCA. The original opinion was reported at 33 Fla. L. Weekly D3579 and was discussed in our summary of the June 27, 2008 Florida Law Weekly. There were no discernible differences in the opinions and the result was the same.

The personal representative appealed a non-final order granting the motion to compel binding arbitration filed by defendants.

The decedent was involved in a vehicular accident, sustained a brain injury and needed round-the-clock care. He was placed in a nursing home where he remained until he died. Ultimately the personal representative filed a claim against the defendants alleging negligence for breach of fiduciary duties in its care of the decedent. Defendant moved to compel arbitration.

Plaintiff argued that the agreement was not valid and enforceable because it was unconscionable and violated public policy. The trial court found no merit in the argument and granted the motion. The court concluded that the agreement was enforceable, not severable, and not repugnant to the public policy of the state of Florida.

## **MEDICAL MALPRACTICE CASE LAW**

July 1, 2008 through September 30, 2008

Page 8

The 2d DCA looked at the events surrounding the admission into the nursing home. At that time, the personal representative was provided with the admissions paperwork. The documentation included an arbitration agreement that was separate from the remainder of the admissions paperwork. The representative was not rushed into signing the arbitration agreement. Although the representative stated that she did not fully understand the meaning of the terms of the arbitration agreement, she was not prevented from asking for assistance from the admissions director before she signed the document.

In order to establish unconscionability, a party must prove both procedural and substantive unconscionability. The arbitration language here was "worded clearly, conspicuous and separate from other admissions documents." There was no evidence of procedural unconscionability. Because of that, the court found that there was no need to determine if there was also substantive unconscionability.

As for the argument that the agreement cannot be enforced because it is contrary to public policy, the plaintiff argued that the agreement eliminated the right to recover punitive damages and also directed that the arbitration proceeding shall be conducted in accordance with the American Health Lawyers Association Arbitration Rules of Procedure.

The 2d DCA noted that there was a similar 4th DCA decision which held that such a provision violated public policy because of the requirement of providing clear and convincing evidence of intentional or reckless misconduct before there can be a recover. That would in essence eliminate plaintiff's ability to recover for simple negligence pursuant to the applicable nursing home statute at F.S. § 400.023(2).

Notwithstanding, the 2d DCA looked at the severability issue. Although the trial court ruled that the agreement was not unconscionable, nor violative of public policy, it still ruled that the agreement was not severable. The appellate court noted that the trial court did not even have to address that.

The subject portion of the arbitration agreement, as found by the appellate court, was severable. Although the agreement anticipates the use of AHLA procedures, it specifies that damages "shall be determined in accordance with provisions of Florida law applicable to comparable civil action, except for punitive damages." The arbitrators could easily resolve this case using

**MEDICAL MALPRACTICE CASE LAW**

July 1, 2008 through September 30, 2008

Page 9

proper elements of damages under Florida law with the appropriate burden of proof.

Ultimately, if the arbitrators were to find any portion of the arbitration clause to be unenforceable or invalid, the arbitrators would have the ability to sever the improper provisions from the remaining provisions and enforce the remainder of the agreement

according to their terms. Thus, the 2d DCA affirmed the trial court's order granting the request for arbitration.

**NURSING HOMES - DEPRIVATION  
OF RIGHT TO REFUSE HEALTH CARE NOT LEGAL CAUSE OF DEATH**

***Scheible v. The Joseph L. Morse Geriatric Center, Inc.***, 33 Fla. L. Weekly D1873 (Fla. 4th DCA July 30, 2008)

The 4th affirmed the trial court's ruling that the deprivation of resident's right to refuse health care is not a legal cause of death triggering a cause of action for violation of a nursing home resident's rights.

In 1995, Madeline Neumann died at The Joseph L. Morse Geriatric Center. She had been admitted three years previously at the age of 89. Her admitting diagnosis was senile dementia and seizure disorder. Her granddaughter, the claimant in this matter as personal representative, provided Morse with a living will/advance directive setting forth that there was to be no life-prolonging treatment or resuscitative measures taken.

On October 17, 1995, Ms. Neumann was found unresponsive in her bed, 911 was called and EMS arrived. She was intubated, administered dopamine, and taken to the hospital. During transport, Ms. Neumann attempted to extubate herself and she was placed in physical restraints. She was extubated on October 19, 1995 and remained in the hospital until her death of October 23, 1995.

On behalf of Ms. Neumann, Ms. Scheible filed a complaint against Morse alleging willful disregard of the advanced directive, disregard of the federal patient self-determination act, battery and violation of the Nursing Home Resident's Rights Act. Unrelated to this appeal, Morse obtained summary judgment on the advanced directive count and the federal patient self-determination act count.

## **MEDICAL MALPRACTICE CASE LAW**

July 1, 2008 through September 30, 2008

Page 10

While this case was proceeding, the ***Beverly Enterprises-Fla., Inc. v. Knowles***, 766 So. 2d 335 (Fla. 4th DCA 2000) decision was issued, setting forth that a personal representative could only bring a cause of action for violation of a nursing home resident's rights when the deprivation or infringement of their rights caused the patient's death. Based upon the ***Knowles*** decision, Morse sought summary judgment, setting forth that plaintiff's claim could not succeed as there was no allegation that Morse had caused Ms. Neumann's death. Summary judgment was granted on that issue. The matter proceeded to trial on the battery, negligence, and breach of contract against two physicians. The jury found that Morse had breached its contract with Ms. Neumann and awarded \$150,000 in damages.

Following the jury verdict, Scheible moved for entry of judgment and requested prejudgment interest from the date of loss, claiming that such prejudgment interest was an element of pecuniary damage that attached to a verdict on a claim for breach of contract. The trial court denied the motion.

On appeal, Scheible argued that the claim was predicated upon the deprivation of rights claim which was wrongfully disposed of, arguing that Ms. Neumann's death was, in fact, the direct result of the nursing home's deprivation of her rights. The argument stated that, as a result of resuscitating her, she was allowed to live longer. Had she not been resuscitated, she would have died as a result of her medical complications. Therefore, because she was resuscitated from those complications, the ultimate complications from which she died only arose as a result of the fact that she had been resuscitated and allowed to live that long. The 4th DCA did not accept this argument and affirmed the trial court's ruling.

### **MEDICAL MALPRACTICE - IMPROPER TO LOOK BEYOND FOUR CORNERS OF COMPLAINT IN DISMISSING COMPLAINT**

***Stubbs v. Plantation General Hospital Limited Partnership***, 33 Fla. L. Weekly D1876 (Fla. 4th DCA July 30, 2008)

The 4th reversed the trial court's dismissal of the complaint finding that the trial court had gone outside of the four corners of the complaint in considering information that led to the dismissal.

**MEDICAL MALPRACTICE CASE LAW**

July 1, 2008 through September 30, 2008

Page 11

In the underlying action, Stubbs alleged injury as a result of Plantation's negligence. The injury was alleged to be the result of the acts of a hospital orderly directing Stubbs to move from a bed to a gurney without assistance despite Stubbs feeling nauseous and dizzy. Plantation filed a motion to dismiss for lack of subject matter jurisdiction, claiming that the Stubbs' claim (1) was based on professional negligence, not ordinary negligence, and was thus barred by the two year statute of limitations and (2) that it had not been submitted for pre-suit screening.

The trial court granted the dismissal, finding "as a matter of law that Lorenzo Rivera, R.N. was exercising his nursing judgment at all times material hereto ... "

Stubbs appealed, arguing that the trial court erred in going outside the four corners of the complaint in granting the motion. In reversing the trial court's dismissal, the 4th DCA found that it was inappropriate for the trial court to go outside the four corners. Further, the allegations within the four corners of the complaint, if taken as true, did not "clearly sound in medical negligence."

By finding that Rivera was a registered nurse and was exercising his nursing judgment, the trial court had relied upon an affidavit that had been filed by Plantation. In so doing, the trial court had gone outside the four corners.

**MEDICAL MALPRACTICE - LIMITATION OF  
ACTIONS - HOSPITAL ALREADY ALLEGEDLY VICARIOUSLY LIABLE FOR  
TWO PHYSICIANS NOT ENTITLED TO SUMMARY JUDGMENT ON STATUTE OF  
LIMITATIONS GROUNDS FOR THIRD PHYSICIAN ADDED THROUGH AMENDED  
COMPLAINT WHERE AMENDED CLAIM AROSE OUT OF SAME OCCURRENCE**

***Maraj v. North Broward Hospital District***, 33 Fla. L. Weekly D1884  
(Fla. 4th DCA July 30, 2008)

The 4th DCA reversed the trial court's order granting summary final judgment for the defendant hospital. It held that a newly filed vicarious claim against a previously named vicarious tortfeasor related back to the plaintiff's initial complaint.

In the underlying action, Maraj was a patient in the emergency room at North Broward Medical District (NBMD). She was nine months pregnant and complaining of abdominal pains. As NBMD had no obstetrical unit, the emergency physician consulted with

## **MEDICAL MALPRACTICE CASE LAW**

July 1, 2008 through September 30, 2008

Page 12

the on-call obstetrician who ordered a biophysical ultrasound to be performed by a radiologist.

Maraj was discharged. Five days later she went to Broward General Medical Center with the same complaints. At Broward General it was determined that the fetus had died. A stillborn baby was delivered via cesarean section.

Maraj initially initiated pre-suit by filing notices of intent to two of the physicians (but not Dr. James, the radiologist) and NBMD. The allegations against NBMD were for vicarious negligence as a result of the alleged negligence of the two physicians.

The initial notices of intent did not include corroboration from an expert asserting reasonable grounds against the two physicians from a competent expert. Each of the defendants moved to dismiss the claims based on failure to comply with the statutory presuit requirements. The trial court initially denied those motions, but in an unrelated appeal, that ruling was reversed in *Paley v. Maraj*, 910 So. 2d 282 (Fla. 4th DCA 2005) which held that the action against the two emergency room physicians should have been dismissed as the pre-suit notification requirement had not been met before the statute of limitations expired.

Following the dismissal of the claim against the two physicians, the parties entered into a joint stipulation allowing the trial court to enter a final order of dismissal with prejudice. The trial court also granted NBMD's motion to dismiss the vicarious liability claim predicated upon the negligence of both doctors, but granted plaintiffs' motion or leave to file an amended complaint.

In the amended complaint, Maraj named Dr. James for the first time. Maraj claimed that she did not learn of Dr. James' involvement until she had taken statements from the two emergency room physicians. She amended her claim to allege vicarious liability against NBMD as to Dr. James. As a result, NBMD filed a motion for summary judgment, arguing that, as the statute of limitations had run as to the claim against Dr. James, Maraj could not maintain a claim against the hospital for vicarious liability of Dr. James. The trial court entered summary judgment in favor of NBMD resulting in this appeal.

On appeal, Maraj argued that her suit against NBMD had been timely filed and that it was immaterial whether the statute of limitations had run as to Dr. James. She argued that she was not

**MEDICAL MALPRACTICE CASE LAW**

July 1, 2008 through September 30, 2008

Page 13

precluded from amending her initial complaint against NBMD to include a vicarious liability claim based on Dr. James' negligence. NBMD argued that as the claim for Dr. James' negligence had not been brought until after the expiration of the statute of limitations, Maraj should not be permitted to add a vicarious liability claim based on Dr. James' action.

In reversing the trial court's order granting summary final judgment for NBMD, the 4th DCA determined that the plaintiff's claim against the hospital "related back" to her initial complaint which had been filed timely. In so doing, the 4th DCA relied upon *Lefebvre v. James*, 697 So. 2d 918 (Fla. 4th DCA 1997), asserting that an amendment which merely makes more specific what has already been alleged generally, or which changes the legal theory of the action, will relate back even though the statute of limitations has run in the interim.

As the amended complaint had not raised additional issues, but merely included additional information, Maraj should not have been precluded from bringing her action against NBMD for Dr. James' actions. Maraj had merely changed the name of the tortfeasor on whose negligence the vicarious liability against the hospital claim was based.

**MEDICAL MALPRACTICE - AUTOMATIC EXTENSION PROVIDED BY  
F.S. § 766.104(2) IS TACKED ON END OF LIMITATIONS PROVIDED  
IN F.S. § 766.106(4) - EXTENSIONS DO NOT RUN SIMULTANEOUSLY**

*Porumbescu v. Thompson*, 33 Fla. L. Weekly D2007 (Fla. 1st DCA August 20, 2008)

Dr. Thompson, M.D. operated on Aureliu Porumbescu on December 10 and 11, 1996, to remove a nephrostomy catheter and a stent that had been placed in his kidney by another doctor as part of an emergency treatment for a blocked kidney. Porumbescu alleged that during the removal of those devices Dr. Thompson inadvertently pulled two sutures into his kidney where they remained for over a year causing persistent kidney trouble.

Mr. Porumbescu became aware of the foreign body in his kidney in early December 1997. Dr. Thompson performed the surgery to remove the first suture on December 16, 1997. The symptoms persisted and a second suture was found months later, which Dr. Thompson removed on June 16, 1998.

After learning that the sutures were left in the kidney during the removal of the catheter and stent, and not part of the devices themselves, Porumbescu filed suit on March 24, 2000 against Dr. Thompson and Urology Associates of North Central Florida. The statute of limitations in a medical malpractice action runs two years from the time the injury is discovered, or should have been discovered with the exercise of due diligence.

There are two statutory extensions for this two-year period. The first is F.S. § 766.104(2), which provides that upon a petition to the clerk of the court where the suit will be filed and payment of a filing fee there is an automatic 90-day extension of the statute of limitations granted to allow a reasonable investigation as required by subsection (1) of that statute. That period is in addition to other tolling periods.

That extension is to be tacked on to the end of the statute of limitations and does not run simultaneous with the separate 90-day tolling period provided in F.S. § 766.106(4).

F.S. § 766.106(4) includes a tolling period following a notice of intent to initiate medical malpractice litigation. This section of the statute requires a notice before filing a claim and includes a 90-day tolling period during which the defendants must investigate and respond with either a denial, an offer for settlement, or an admission of liability with an offer to arbitrate damages.

The trial court credited Porumbescu with the 90-day extension from F.S. § 766.104(2), but made no mention of F.S. § 766.106.

The 1st DCA held that the trial court erred by not providing the 90-day tolling period following the notice of intent under F.S. § 766.106(4) in addition to the automatic 90-day extension petitioned for under F.S. § 766.104(2).

**NURSING HOMES -  
VIOLATION OF RESIDENT'S RIGHTS - ARBITRATION -  
TRIAL COURT ERRED IN DENYING MOTION TO COMPEL  
ARBITRATION FOR CLAIMS AGAINST NURSING HOME DEFENDANTS  
PURSUANT TO ARBITRATION CLAUSE CONTAINED IN AGREEMENT  
FOR CARE EXECUTED ON BEHALF OF RESIDENT BY PLAINTIFF, ACTING  
AS ATTORNEY-IN-FACT UNDER GENERAL POWER OF ATTORNEY WHICH  
AUTHORIZED ATTORNEY-IN-FACT TO CONDUCT ALL PRINCIPAL'S AFFAIRS  
AND TO EXERCISE ALL THE PRINCIPAL'S LEGAL RIGHTS AND POWERS**

**Jaylene, Inc. v. Moots**, 33 Fla. L. Weekly D2179 (Fla. 2d DCA September 19, 2008)

Ms. Moots' lawsuit asserted multiple claims against the defendants, including claims Jaylene had violated the rights of the decedent under F.S. § 400.022 (2000 and 2001). Jaylene filed a motion to compel arbitration in accordance with an arbitration clause in the Agreement for Care (the Agreement) that Ms. Moots had executed on May 11, 1999, as the decedent's attorney-in-fact under her durable power of attorney (the POA).

On review, the POA did not contain any provisions specifically granting the attorney-in-fact the power to consent to arbitration or to waive the decedent's right to a jury trial. However, the grant of authority under the POA was extremely broad and unambiguous. Moreover, the POA was titled, "General Power of Attorney." Although the agreement also included a comprehensive list of specific powers, the listing of those specific powers was not intended to be exhaustive as evidence by the following provision:

This power of attorney shall be construed broadly as a general power of attorney. The listing of specific powers was not intended to limit or restrict the general powers granted in this power of attorney in any manner.

Based on **Alterra Healthcare Corp. v. Bryant**, 937 So. 2d 263, 268 (Fla. 4th DCA 2006), the provisions of F.S. § 709.08 (1997), Florida's version of the Uniform Durable Power of Attorney Act, the 3d DCA held that the POA authorized Ms. Moots to agree to arbitrate claims arising out of the agreement. Consequently, the trial court's non-final order denying the motion to compel arbitration was reversed.

**MEDICAL MALPRACTICE - ACTION AGAINST HOSPITAL ALLEGING  
BREACH OF STATUTORY DUTY OF CARE BY HEALTHCARE PROVIDER  
TO VULNERABLE PERSON PURSUANT TO ADULT PROTECTIVE SERVICES  
ACT CONTAINED ALLEGATIONS THAT CONSTITUTED MEDICAL NEGLIGENCE -  
PRESUIT NOTICE WAS CONDITION PRECEDENT TO MAINTAINING ACTION**

**Tenet South Florida Health Systems v. Jackson**, 33 Fla. L. Weekly D2199 (Fla. 3d DCA September 17, 2008)

North Shore Medical Center sought a writ of certiorari to quash an order denying its motion to dismiss an action by Jackson,

the personal representative of his deceased mother's estate, for failure to comply with the medical malpractice presuit screening requirements of Chapter 766.

Jackson had brought an action against North Shore for breach of the statutory duty of care by a healthcare provider to a vulnerable person pursuant to the Adult Protective Services Act, F.S. §§ 415.101 and 415.113 ("the Act"). Based on the allegations of the complaint; however, the 3d DCA found that North Shore did not meet the required definition of a caregiver under the Act and that the complaint did not allege neglect as defined in the Act.

The complaint alleged that the decedent was admitted for the purpose of a surgical procedure and it did not allege any understanding that a caregiver role existed. Further, the appellate court held that even if the complaint had sufficiently alleged that North Shore was a caregiver, the claim was still one for medical malpractice and not for elder abuse because the complaint arose out of the rendering or failure to render medical care or services. Thus, Jackson was required to comply with presuit and the ninety day investigatory period set forth in F.S. § 766.106(2)(3) as conditions precedent to bringing suit.

The appellate court granted North Shore's petition and quashed the trial court's order denying North Shore's motion to dismiss.

**MEDICAL MALPRACTICE - TRIAL**  
**COURT ERRED IN OVERRULING HOSPITAL'S PEER REVIEW OBJECTIONS**  
**TO DISCOVERY WITHOUT ADEQUATE NOTICE AND OPPORTUNITY TO BE HEARD**

***North Broward Hospital District v. Durham***, 33 Fla. L. Weekly D2211  
(Fla. 4th DCA September 17, 2008)

Durham brought a medical malpractice action against North Broward Medical Center. The trial court denied a stay and directed North Broward to produce incident reports, investigative reports, and peer review records. The trial court then denied North Broward's motion for rehearing and clarification. North Broward sought a petition for writ of certiorari.

North Broward's objections to discovery were never noticed for hearing and Durham did not move to compel production. The 4th DCA found that the trial court's decision to entertain the discovery issues and rule on them without a hearing denied North Broward due process. The appellate court determined that the

**FLORIDA LAW WEEKLY**

August 29, 2008

Page 17

trial court had departed from the essential requirements of law causing material or irreparable harm in overruling North Broward's peer review objections to discovery without adequate notice and an opportunity to be heard.

North Broward's motion for stay requested the trial court to defer ruling on North Broward's objections to discovery until resolution of **Notami Hospital of Florida, Inc. v. Bowen**, 927 So. 2d 139 (Fla. 1st DCA 2006) and **Florida Hospital Waterman, Inc. v. Buster**, 932 So. 2d 344 (Fla. 5th DCA 2006). The Florida Supreme Court consolidated its decision on these cases in **Fla. Hosp. Waterman, Inc. v. Buster**, 984 So. 2d 478 (Fla. 2008) and that decision allowed the 4th DCA to lift its previous stay order in this case.

North Broward did not waive peer review, work product, or any other privilege by failing to file a privilege log before the hearing on its motion to stay. The issues raised in the motion for stay were threshold issues which had to be resolved before discovery objections could be considered by the trial court after notice to North Broward.

The 4th DCA granted North Broward's petition, quashed the trial court's order and remanded the case for further proceedings.

JLH/tsr