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Florida Supreme Court Approved Amendments to
Standard Civil Jury Instructions

The Florida Supreme Court recently authorized proposed amendments and modifications to the Florida Standard Jury Instructions in civil cases. The following is a summary of both the reorganization of the jury instructions and an analysis of the additions, changes, and modifications to the language of the instructions.

In 2006, the Florida Supreme Court Committee on standard jury instructions in civil cases began a comprehensive review and evaluation of the jury instructions' organization and language. Prior to the 2006 review, the Committee maintained the original numbering system commonly used in civil cases since 1967 and only added new instructions to the "miscellaneous section."

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Following years of review, the Committee proposed a reorganization of the standard civil jury instructions and amendments limiting the instructions to **plain English modifications**¹, thus making the instructions easier for jurors to understand. The Committee further submitted a number of reports that extended beyond mere reorganization and rewording of instructions, and sought amendments to substantive aspects of the language of the jury instructions within the reorganized format. With only one major exception, the Supreme Court authorized the Committee's proposed changes.²

Reorganized and Updated Language

The new jury instructions have been reorganized to delineate separate sections, including: oaths, preliminary instructions, evidence instructions, substantive instructions, damages, general instructions, closing instructions and supplemental matters. The Committee used a basic template in reorganizing the substantive law instructions.³

The template includes a summary of the case instruction, definitions of the burdens of proof, causation, and defense issues. Organizing all substantive instructions for particular causes of action into single sections is intended to substantially improve the ease of the use of the instructions for jurors. For example, the instructions for medical malpractice actions, which previously might have appeared in

¹ The amendments used plain language modifications changing terminology from non-essential legalese to plain English. Examples include the use of the following: "before/after" for "prior/subsequent"; and "was caused by" for "chargeable to."

² The only proposed modification that the Florida Supreme Court rejected was the Committee's proposed change to the definition of "greater weight of the evidence." The Supreme Court's reluctance to accept any change to the language of the standard "greater weight of the evidence" stems from the Supreme Court's concern that any change to the language of that instruction could be interpreted as a change in what the burden actually requires.

³ Substantive areas for instructions include general areas such as general negligence, professional negligence, professional liability, bad faith, malicious prosecution, false imprisonment, defamation, and PIP.

several different locations throughout the jury instructions, are now all contained within Section 402.

1. Timing of Instructions

Under the amended instructions, the trial court may choose to instruct a jury at the beginning of the case as to substantive matters, prior to the introduction of any evidence. To that end, the Supreme Court authorized introductory instructions under Section 200 of the reorganized instructions and initial instructions for each of the various substantive sections.

The Committee recommends that the judge give a brief explanation of the case prior to *voir dire*. Once a jury is selected, before opening statements, it is recommended that the judge give jury instructions on the case.⁴

In addition to the new introductory instructions, the amendments now allow for final instructions to be given before closing arguments. Indeed, **Florida Rule of Civil Procedure** 1.470(b) provides that instructions may be given during the trial and either before or after the final arguments, though the Supreme Court reiterated that the timing of such instructions is still within the trial judge's discretion.

2. Reorganization

As stated generally above, the instructions are organized into sections that are intended to reconcile any disjointedness in the old instructions. Below is a brief description of the new organization of the jury instructions broken down by section.

Section 100 contains standard oaths that may be necessary to be read to jurors before and during trial.

⁴ The Committee notes, that there will be instances where some instructions depend on the admission of certain evidence or rulings from the court and as such it would not be possible to give a complete set of instructions at that early juncture of a case. In such instances, the Committee recommends giving a set of instructions as complete as possible to the jury.

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Section 200 contains all preliminary instructions that will be read to a jury by the judge during jury selection and after the jury has been selected and sworn. Instructions read after the jury has been selected include the duties and conduct expected of jurors.

Section 300 contains evidentiary instructions detailing how the jury is to address and deal with various pieces of evidence, witness testimony, and how to interpret court's rulings.

Section 400 addresses the substantive issues of the case to be resolved by the jury and the legal framework that governs the resolution of those issues.

Section 500 addresses damages and how the various elements of damages must be considered.

Section 600 addresses general substantive instructions such as how the jury is to appropriately weigh evidence.

Section 700 includes closing instructions and Section 800 addresses any supplemental matters on which the jury may need to be instructed on a particular case.

Substantive Amendments

The Committee proposed a number of substantive changes to the standard civil jury instructions, including: changes to current instructions dealing with certain specific medical negligence issues such as foreign bodies and failure to maintain records; the "greater weight of the evidence" standard; and, burden of proof on defense issues such as comparative negligence.⁵

⁵ See *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).

1. General Negligence

A. **Negligence - 401.4**

The changes to the jury instruction⁶ on general negligence are largely stylistic. However, the notes on use had a number of substantive changes, including:

a. That no instruction be given to suggest that negligence may be inferred by the mere happening of an accident.⁷ Obviously, such a note is a defense friendly addition to the jury instructions. On the other hand, the new notes on use also recommend that no instruction be given on the subject of "unavoidable accident," as this is a more appropriate subject for argument by counsel.

b. That no instruction be given that one acted with reasonable care for his own safety.

c. That there is no difference between a "sudden emergency" and any other situation, as the standard remains "reasonable care under the circumstances." Further, the committee added notes on use recommending that no instruction be given on the following subjects: (a) duty to keep lookout; (b) duty to inspect vehicle or to maintain vehicle in safe condition; or (c) the supposed "range of vision" rule, because **"negligence is properly and completely defined as the failure to use that**

⁶ Jury instruction 401.4 reads as follows:

"Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances."

Former Jury Instruction 4.1 reads as follows:

"Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances."

⁷ This recommendation is based on *Belden v. Lynch*, 126 So. 2d 578, 581 (Fla. 2d DCA 1961).

degree of care which a reasonable person would use under like circumstances."⁸

As such, many of the instructions that were embodied in the old standard instructions 4.7 through 4.14 should no longer be used. Instead, the Supreme Court has adopted the Committee's recommendations for a more streamlined approach to the jury instructions dealing with general negligence, requiring that the standard simply be defined as the failure to use the degree of care that a reasonable person would use in similar circumstances.

2. Medical Malpractice

A. **Medical Negligence Defined - 402.4a**

Jury instruction 402.4a provides only stylistic changes to the older jury instruction 4.2. It should be noted that the new instruction is taken directly from Section 766.102(1), ***Florida Statutes***, and is intended to embody the "prevailing professional standard of care" without actually using that language that could potentially be considered confusing.

402.4a reads in relevant part as follows:

Negligence is the failure to use reasonable care. Reasonable care on the part of a physician, hospital, or health care provider is that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably careful physicians and health care providers. Negligence on the part of a physician, hospital, and health care provider is doing something that

⁸ This standard is also sufficient to make obsolete the need for jury instructions on the following: (a) the supposed duty of a pedestrian or motorist to "yield the right of way" to an approaching train; (b) reciprocal duties at railroad crossings; or (c) the "standing train" doctrine. Negligence is properly and completely defined as the failure to use that degree of care which a reasonable person would use under like circumstances.

a reasonably careful physician, hospital, or health care provider would not do under like circumstances or failing to do something that a reasonably careful physician, hospital, or health care provider would do under like circumstances.

B. Medical Malpractice Insurer's Bad Faith to Settle Claim - 404.5

New instruction 404.5 lists all factors and circumstances that a jury *shall* consider in determining whether defendant acted in bad faith. The Committee notes on this new instruction indicate that because of the "shall consider" language, the court should instruct the jury on all the factors listed within this instruction, as the absence of a particular factor may be relevant for the jury's consideration. The factors for a juror's consideration when determining whether a medical malpractice insurer acted in bad faith by failing to settle a claim include:

1. Defendant's willingness to negotiate with the plaintiff;
2. The propriety of defendant's methods of investigation and evaluation of claim;
3. Whether defendant timely informed insured of an offer to settle within limits;
4. Whether the insured denied liability or requested that the case be defended;
5. Whether the plaintiff imposed any condition, other than the tender of policy limits on the settlement of the claim;
6. Whether the plaintiff provided relevant information to the defendant on a timely basis;
7. Whether/when other defendants in the case settled or were dismissed;

8. Whether there were multiple claimants seeking compensation in excess of policy limits;

9. Whether the insured misrepresented material facts to defendant insurer; and

10. Any such additional factors that the court may determine to be relevant.

The above-listed jury instruction implements Section 766.1185(2), **Florida Statutes**, and obviously is only applicable in actions for bad faith claims against medical malpractice insurers. Florida Statute 766.1185 has been in existence since 2003, so the factors now outlined in Jury Instruction 404.5 are not new concepts; rather simply follow the language of the Statute.

C. **Medical Negligence - Foreign bodies - 402.4c**

Jury instruction 402.4c substitutes plain English for the language in former jury instruction 4.2, and specifically addresses a claim for medical negligence based on the presence of a foreign body in a patient's body. The new jury instruction, 402.4c, is derived from the provisions of Section 766.102, **Florida Statutes**, and states in relevant part that "negligence is the failure to use reasonable care. The presence of a foreign body in a patient's body establishes negligence unless defendants prove by greater weight of the evidence that same was not negligence."

The notes for use on 402.4c state that the Committee used the definition of *prima facie* as used in Section 766.102(3), **Florida Statutes**, to mean "evidence sufficient to establish a fact unless and until it is rebutted." As such, this jury instruction is to be given in a medical malpractice case based on the presence of a foreign body in the patient once the court makes a finding that the foreign body is one that meets the statutory definition.⁹ Essentially, jury instruction 402.4c follows the legal principle that the presence of a foreign body

⁹ See **Kenyon v. Miller**, 756 So. 2d 133 (Fla. 2d DCA 2000).

in a patient's body in a medical malpractice case creates a rebuttable presumption that negligence occurred.

D. Medical Negligence - Record Keeping - 402.4d

Much like 402.4c, 402.4d is a new instruction which focuses on a claim for medical negligence for failure to maintain records. 402.4d instructs the jury that if a defendant health care provider fails to properly maintain records, then the jury "should presume" that those records contain evidence of negligence unless the defendant proves otherwise.

402.4d essentially instructs the jury on **Valcin** presumption¹⁰, and this instruction only applies when the court has ruled that the failure to locate certain records hinders a plaintiff's ability to establish a case.

E. Medical Malpractice - Risk Management - 402.11d

Jury instruction 402.11d provides an instruction for negligence based on the negligence of a health care facility for failure to ensure comprehensive risk management and the competence of its medical staff. This jury instruction is derived largely from the language of Section 766.11, **Florida Statutes**. Much like new instructions 402.4c and d, 402.11d is a new instruction that is allegedly intended to be a reflection of existing law. 402.11d instructs a jury to determine whether a health care facility failed to assure risk management and the competence of its staff and whether that failure caused harm.

¹⁰ "Valcin presumption" is a term used to refer to the rule of law established in **Public Health Trust of Dade County v. Valcin**, 507 So. 2d 596 (Fla. 1987), where the Supreme Court ruled that a jury "should presume" that a party's failure to locate or produce certain documents indicates that the documents contain evidence of negligence, unless otherwise proved.

3. Burden of Proof

A. **Greater Weight of the Evidence - 401.3**

As stated briefly above, proposed new Jury Instruction 401.3, formerly Jury Instruction 3.9, was the only proposed amendment to be rejected. The Supreme Court thought any proposed amendment to the Jury Instruction defining the standard greater weight of the evidence to be controversial, as it could be interpreted as "changing" the standard. Instead, the Supreme Court simply approved of the instruction being renumbered within the framework of the new standard instructions in its current form.

B. **Affirmative Defenses - 401.23**

Jury Instruction 401.23 was formerly embodied in multiple instructions including former Jury Instructions 3.7 and 3.8. The new instruction is intended to be a more adequate reflection of existing law.

401.23 now addresses multiple defenses¹¹, such as: when a defendant asserts a comparative negligence defense; an apportionment of liability to a non-party defense; or both.

Former instruction 3.7 simply asked the jury to determine whether the greater weight of the evidence supported the claim of the claimant or the defendant. If the jury found that the evidence supported the claim of the claimant and the defendant appropriately asserted affirmative defenses, those defenses were addressed in a separate jury instruction, such as 3.8.¹²

Under 401.23 the jury is first instructed to determine the threshold issue of whether a defense was established by the greater weight of the evidence. Once the jury determines that a defense issue exists, 401.23 addresses comparative fault by simply asking the jury to consider whether the evidence shows

¹¹ Defenses are only considered after a jury has already determined the threshold issue of the defendant's negligence.

¹² For example, Former Jury instruction 3.8 addressed defenses based in Comparative fault and apportionment of fault.

that both the claimant and the defendant were negligent, and if so, instructs the jurors to write on the verdict form what percentage of the total negligence of each party caused the harm.

Similarly, when the defense has asserted both a comparative negligence defense and an apportionment of fault defense, the jury is simply directed to consider the negligence of each party and attribute percentages onto the verdict form accordingly.

Essentially, 401.23 now instructs the jury on apportionment of a non-party defense, and further addresses situations in which comparative negligence and apportionment are both at issue.

4. Vicarious Liability Issues

A. **Vicarious liability (preliminary issues) - 402.9**

Jury instruction 402.9, formerly jury instruction 3.3b, addresses vicarious liability as it relates to employees, independent contractors, and agents of a defendant. The new instruction substantially reorganizes former instruction 3.3b for clarity, though substantively remains largely unchanged.

However, instruction 402.9 does include some new language pertaining to specific substantive issues that were not previously addressed in the old jury instructions, including a defendant's duty to use reasonable care to ensure that his agents or employees are competent to perform required services.¹³ Some of the relevant language reads in part that when hiring another to perform services, an employer must exercise due care to assure the individual's competence to perform the necessary services of the job. The new language further memorializes existing law that a person is responsible for the negligence of an independent contractor if, in hiring or retaining the contractor, the employer failed to use due care.

¹³ This instruction tracks the language of *Insignia v. LaBella*, 543 So. 2d 2009 (Fla. 1989).

Further, the jury is instructed to determine the status of an individual as an independent contractor on the basis of all of the circumstances of the parties' dealings with each other and not on the labels used by them.¹⁴

B. Intentional Tort Exception to Workers' Compensation (issues on claim) - 414.5

This instruction deals with the intentional tort exception to workers' compensation immunity, and applies only to causes of action accruing on or after October 1, 2003. Jury Instruction 414.5 incorporates the language of Section 440.11, **Florida Statutes**, and also incorporates the heightened "virtual certainty" standard.¹⁵

Jury instruction 414.5 instructs the jurors to consider whether:

1. The defendant deliberately intended to injure the plaintiff; or

2. Whether the defendant:

a. engaged in conduct the defendant knew was "virtually certain" to result in death or injury; and

b. plaintiff was not aware of the risk because danger was not apparent; and

c. defendant deliberately concealed or misrepresented the danger.

¹⁴ See **Carlisle v. Carnival Corp.**, 864 So.2d 1 (Fla. 3d DCA 2003); **Villazon v. Prudential Health Care Plan, Inc.**, 843 So.2d 842 (Fla. 2003).

¹⁵ "Virtual Certainty" standard is outlined in **Travelers Indemnity Co. v. PCR, Inc.**, 889 So. 2d 779 (Fla. 2004).

5. Punitive Damages

A. **Punitive Damages - Bifurcated Procedure - 503.1b(4)**

Jury Instruction 503.1b(4) is a new instruction pertaining to punitive damages and intended to cover two scenarios not addressed in the former punitive damage instructions.

These scenarios include situations in which the plaintiff seeks punitive damages from an employer under a theory of vicarious liability but the employee whose conduct is the basis for the claim is not sued individually, or a party to the action.

In such circumstances, punitive damages may be awarded if a jury finds by clear and convincing evidence (1) that the employee was personally guilty of intentional misconduct or gross negligence, (2) that such misconduct or gross negligence was a substantial cause of damage to the plaintiff and (3) that:

a. the employer actively and knowingly participated in the conduct; or

b. the employer knowingly condoned, ratified or consented to the conduct; or

c. the employer engaged in conduct that constituted gross negligence which contributed to the loss or damage.

Under Jury Instruction 503.1b(4), the definitions for "intentional misconduct" and "gross negligence" have not changed. Similarly, the remaining jury instructions addressing punitive damages continue to use substantially the same language as they did prior to these amendments; however, they have been renumbered and reorganized.

It should also be mentioned that in the notes on use for Jury Instruction 503.1, that instructions 503.1b(1) through b(4) are designed for use in most common law tort cases. However,

certain intentional torts may require a punitive damage charge appropriate to the particular tort.¹⁶

6. Miscellaneous

A. **Jury Deadlock - 801.3**

Essentially, Jury Instruction 801.3 both substitutes plain English for the language in the former jury instruction 7.3 and adds new language which permits jurors to make specific requests that a court reporter read back relevant portions of any witness's testimony. The former jury instruction 7.3 contained no such language.

That being said, notes on use for 801.3 caution that this instruction should be given only once and if after having received this instruction the jury announces for a second time that it is deadlocked, the jury cannot be sent back for further deliberations.¹⁷

B. **Probable cause in malicious prosecution and false imprisonment cases - 406.4 and 407.8**

Jury Instruction 406.4 addressing probable cause was formerly numbered as jury instruction MI5.1b and defines probable cause in a proceeding for malicious prosecution. Jury instruction 407.8 (formerly MI6.1g) defines probable cause in the context of a merchant's defense to the charge of false imprisonment. The revisions to each of these instructions are intended to harmonize the definitions of probable cause as used in these two instructions and do not substantively alter the standard for probable cause.

¹⁶ See *First Interstate Development Corp. v. Ablanedo*, 511 So. 2d 536 (Fla. 1987); *Metropolitan Life Insurance Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985).

¹⁷ *Tomlinson v. State*, 584 So. 2d 43 (Fla. 4th DCA 1991).

C. **Attorney Malpractice - 402.12**

Jury Instruction 402.12 is a new instruction and covers claims of attorney malpractice in civil context. The jury instruction directs jurors to determine whether the defendant attorney was negligent in his representation and if so whether the plaintiff would have obtained a more favorable outcome but for the negligence of the defendant attorney. The rule separately addresses plaintiff and defense attorneys and the notes on use for 402.12 advise that when a defendant's professional negligence deprives a party of a chance to resolve a contested claim or defense, that party may have to prove the value of his claim in the form of a "trial within a trial."¹⁸

Analysis

The stated purpose of the reorganization and updated language is to provide for greater ease of use for both jurors and practitioners alike. Unfortunately, our review of these changes suggests many of them will serve to broaden the scope of claims asserted by Plaintiffs.

Even in those sections where the Supreme Court approved the committee recommendations and changes where the committee has argued that they were not substantive changes in the law, the wording of the new instructions is more "Plaintiff friendly" in our view.

Specific instructions which were added concerning medical negligence claims are particularly concerning. A new instruction 402.4d provides a specific instruction creating a presumption of negligence when medical records are not available. Previously, a **Valcin** instruction was used in cases when it was determined that a party had failed to produce certain documents that satisfied the standard under the **Valcin** decision. That procedure had been in place since the Florida Supreme Court decided **Valcin** in 1987.

¹⁸ See **Freeman v. Rubin**, 318 So. 2d 540 (Fla. 3d DCA 1975).

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For some reason the committee decided to add a specific instruction concerning the recordkeeping with regard to medical negligence when it would appear the system has functioned for more than 20 years adequately without such an instruction.

Our concern with this instruction is that it is likely to be prostituted by Plaintiff's counsel. We can certainly foresee a situation in which a Plaintiff's attorney takes the position that the failure to document certain findings within a medical record (such as neuro checks, vital signs, etc.) amounts to the failure to maintain a medical record. Plaintiff will then argue that the failure to maintain a medical record concerning those findings requires the jury to "presume" that the records would have contained evidence reflecting negligence of the care providers. In other words the purpose of the **Valcin** instruction was more narrow than what we anticipate the Plaintiff will try to do with this new instruction.

Perhaps the most troubling new instruction from our point of view is the new jury instruction 402.11d. This instruction provides what appears to be a new cause of action. With this instruction, the jury is asked to determine whether a health care facility failed to assure adequate risk management in the competence of its staff which caused harm to the patient. Again, we can only envision the manner in which this would be used by Plaintiff's attorneys. In order to prove such a claim, Plaintiff's counsel will argue they are entitled to admit into evidence facts concerning prior negligence claims against a facility.

Plaintiff will argue that those claims are relevant to determine whether the risk management procedure in place at the health care facility was sufficient to assure management of risks in providing care to patients and the competence of its staff. Previously, claims for negligent credentialing have existed and certainly those would continue to exist under this new jury instruction. However, the manner in which it is drafted would suggest that issues pertaining to the competence of the staff used at a health care facility are no longer the only ones to be advanced against a facility in its risk management function. Rather, a Plaintiff can argue that if a health care facility has a substantial history of medical negligence claims

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being asserted that its risk management services must not be effective because they allowed an environment to exist which led to harm to their particular client.

Therefore, while the intended purpose of these instructions was to make them more easily understood by jurors and more organized for use by trial judges and trial attorneys, we do believe that they are more liberal in the manner in which they are written and that they will be used by Plaintiff's counsel to broaden the scope of claims being asserted against Defendants throughout the state.

As always, we are happy to answer any questions you may have. Please just let us know if you have any thoughts, questions, or comments about the new Standard Jury Instructions.

JLH/EFO/ns