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IN THE SUPREME COURT OF FLORIDA
Case No. SC13-____

**In the matter of Standard Jury
Instructions (Civil),**

Committee Report 13-02

**Subsequent injuries caused by
medical treatment (*Stuart v. Hertz Corp.*,
351 So. 2d 703 (Fla. 1977)).**

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REPORT (NO. 13-02) OF THE
COMMITTEE ON STANDARD
JURY INSTRUCTIONS (CIVIL)

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July 15, 2013

**To the Chief Justice and Justices of
the Supreme Court of Florida:**

The Committee on Standard Jury Instructions in Civil Cases requests that this Court approve for publication and use proposed Instruction 501.5(c), which addresses subsequent injuries caused by medical treatment. This proposed instruction is set forth in Appendix A. This Report is filed pursuant to article V, section 2(a), of the Florida Constitution.

I. INTRODUCTION AND PROCEDURAL NOTE

Prompted by Judge Farmer's special concurrence in *Nason v. Shafranski*, 33 So. 3d 117 (Fla. 4th DCA 2010), the Negligence Subcommittee, in July 2010, reported to the Committee that there was a general consensus that a standard instruction based upon *Stuart v. Hertz*, 351 So. 2d 703 (Fla. 1977), was needed. No such standard instruction currently exists.

In his special concurrence in *Nason*, Judge Farmer recounted that “the law considers the treating doctor's negligence in rendering medical care to the victim for the initial injuries as part of the consequences caused by the original actor's negligence that required the medical treatment. *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977).” 33 So. 3d at 123. He concluded that “the FSJI needs a specific instruction for this complex legal subject.” *Id.* at 124.

Judge Farmer provided a suggestion for such a *Stuart v. Hertz* instruction, as

follows:

I [] offer the following draft of a JI for this subject until a standard one can be approved:

The next issue for your consideration is the claim that (defendant) is liable for the negligence of (doctor) (hospital) (nurse) in treating (claimant) for injuries he claims to have suffered in (event). A person responsible for negligently injuring another may also be further liable for the ensuing negligence of any health care provider treating the injured party if:

1. injuries caused by the negligence of (defendant) reasonably required medical care or treatment by a health care provider;

2. a health care provider gave (claimant) medical care or treatment for injuries caused by (defendant) in (event); and

3. (Claimant) did not unreasonably fail to comply with that health care provider's medical advice and instructions.

Id. at 123-124. The Negligence Subcommittee used this suggestion as the starting point for its discussions. It refined drafts of a proposed instruction, which were discussed with the whole Committee at eight (8) separate meetings between July 2010 and March 2013. The final proposed instruction is now ready to be submitted to this Court.

II. DESCRIPTION OF APPENDICES

The following appendices are attached to this Report:

<u>Appendix A:</u>	Proposed instruction.
<u>Appendix B:</u>	October 1, 2011, <i>Florida Bar News</i> notice.
<u>Appendix C:</u>	Comments received by the Committee in response to the publications.
<u>Appendix D:</u>	Relevant excerpts from the Committee's minutes.
<u>Appendix E:</u>	Committee materials relevant to this proposal.
<u>Appendix F:</u>	June 28, 2010, Elizabeth Russo Memorandum.

III. THE PROPOSED INSTRUCTION

The Committee extensively examined this area of law and developed various drafts of possible instructions. Having reached the end of that thorough process, the Committee recommends the following proposal to this Court for publication and inclusion in the reorganized book as a standard jury instruction for civil cases.

501.5 OTHER CONTRIBUTING CAUSES OF DAMAGES

. . . .

c. Subsequent injuries caused by medical treatment:

If you find that (defendant(s)) caused [loss] [injury] [or] [damage] to (claimant), then (defendant(s)) [is] [are] also responsible for any additional [loss] [injury] [or] [damage] caused by medical care or treatment reasonably obtained by (claimant).

NOTE ON USE FOR 501.5c

This instruction is intended for use in cases involving additional injury caused by subsequent medical treatment. See, e.g., *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977); *Pedro v. Baber*, 83 So.3d 912 (Fla. 2d DCA 2012); *Tucker v. Korpita*, 77 So.3d 716, 720 (Fla. 4th DCA 2011); *Nason v. Shafranski*, 33 So.3d 117 (Fla. 4th DCA 2010); *Dungan v. Ford*, 632 So.2d 159 (Fla. 1st DCA 1994).

The proposed instruction is also set forth in Appendix A to this report.

IV. DISSENTING VIEWS FROM THE COMMITTEE

The Committee is in agreement that this proposed instruction should be submitted to the Court at this time. Further discussion within the Negligence Subcommittee or the Committee at large would not be fruitful.

During the drafting of this proposed instruction, disagreements arose. The instruction was revised numerous times, over the course of nearly three years, in response to feedback from the Committee's members. The areas of disagreement were narrowed through this diligent and time-consuming process. At a point, it became clear that total unanimity would not be achieved on this proposed instruction. Although a large majority of the Committee agrees that this proposed instruction is necessary and accurate, there are some Committee members who do

not agree. The final vote on this proposed instruction was 14-6, with two abstentions.

Notwithstanding, the Committee as a whole believes its dissenting members raise serious points that warrant mention here. The major point of disagreement revolves around how the concept of necessity should be handled in this proposed instruction. A good and comprehensive review of the various points of view can be found in the e-mail threads among Negligence Subcommittee members found on pages 18-28 in the Committee's October 21-22, 2010, materials and on pages 108-120 in the Committee's February 10-11, 2011, materials, all found in Appendix E.

Simply put, the issue was stated this way by dissenting member Elizabeth

Russo:¹

But, what if the truth is that the treatment was unnecessary? Or what if there is evidence that the treatment was unnecessary? Why is that the defense trying to avoid something?

This aspect of the law was intended to hold an initial tortfeasor liable for complications from medical treatment of the injury he/she caused. Not to require an initial tortfeasor to pay for unnecessary treatment obtained to inflate the value of a lawsuit. Both situations exist in reality. Seems to me that neither should sweep the other under the rug. I know the mission is to come up with instructions that tell the jury the law without

¹ A memorandum on *Stuart v. Hertz* issues prepared by Elizabeth Russo is included in Appendix F.

creating any advantages or disadvantages for either plaintiffs or defendants.

....

The problem is that if the issue as to necessity of the treatment is not addressed somewhere, plaintiffs use the instruction - just as *Dungan v Ford* is now being used in the name of *Stuart v Hertz* itself - to say that *Stuart v Hertz* stands for the proposition that as a matter of law a tortfeasor is responsible for medical treatment obtained by the plaintiff, and that therefore as a matter of law the defendant is precluded from raising an issue at trial as to the necessity of the treatment.

But, *Stuart v Hertz* neither held nor intended to require a tortfeasor to pay for unnecessary treatment obtained to inflate the damages in the case.

The Subcommittee drafted and reviewed various formulations of an instruction including the concept of necessity. In the end, majorities of the Subcommittee and Committee concluded that inclusion of that concept in the proposed instruction risked creating (i) tension or conflict with *Dungan v. Ford*, 632 So. 2d 159 (Fla. 1st DCA 1994); (ii) redundancy with Instruction 501.2b (“The reasonable [value] [or] [expense] of [hospitalization and] medical [and nursing] care and treatment necessarily or reasonably obtained by (claimant) in the past [or to be so obtained in the future]”); and/or (iii) an incorrect statement of law.

The dissenting members also suggested addressing the necessity issue in the proposed Note on Use by either (i) including a sentence in the proposed Note on

Use saying, substantially, “[this proposed instruction] should not be used where there is an issue as to the necessity for the medical treatment;” or (ii) omitting citations to cases other than *Stuart v. Hertz*, as those other cases “address situations other than that for which *Stuart v. Hertz* was intended; and . . . are known to be put to the improper use of precluding defense evidence that medical treatment selected by a plaintiff and/or ‘treating’ physicians was unnecessary and was undertaken/prescribed solely for secondary gain purposes.” These suggestions were not accepted by the Committee because, *inter alia*, they pose the same risks listed in the foregoing paragraph. Also, the Committee believes that *Pedro v. Baber*, 83 So. 3d 912 (Fla. 2d DCA 2012), *Tucker v. Korpita*, 77 So. 3d 716, 720 (Fla. 4th DCA 2011), *Nason v. Shafranski*, 33 So. 3d 117 (Fla. 4th DCA 2010), and *Dungan v. Ford*, 632 So. 2d 159 (Fla. 1st DCA 1994), should be flagged for practitioners in the proposed Note on Use.

The large majority of the Committee believes that the proposed instruction will improve the jury’s understanding of the law it must follow and recommends its approval and publication.

V. COMMENTS RECEIVED AND ACTION TAKEN IN RESPONSE

This proposed instruction was published for comment in *The Florida Bar News* on October 1, ²2011. The publication notice is found in Appendix B to this report, with the actual proposal being located on page 15 of 53 in that Appendix. That publication generated no comments in the months immediately following its appearance. Many months later, on August 22, 2012, and November 30, 2012, the Committee received two comments. Both comments were directed at the same issue: the perceived failure of the proposed instruction to require that the subsequent medical treatment be provided for an injury caused by the defendant. Both comments suggested adding the clause “for the treatment of injuries resulting from (event)” to the end of the proposed instruction. *Shafranski*, 33 So. 3d 117 (Fla. 4th DCA 2010). Since the date of publication, the Committee has determined that references to *Pedro v. Baber*, 83 So. 3d 912 (Fla. 2d DCA 2012), *Tucker v. Korpita*, 77 So. 3d 716, 720 (Fla. 4th DCA 2011), and *Dungan v. Ford*, 632 So. 2d 159 (Fla. 1st DCA 1994), are also appropriate.

The Committee discussed the comments at its March 7-8, 2013, meeting. The minutes of that meeting contain a summary of the discussion. After full discussion, with various points of view fully espoused, the Committee voted not to change the current proposed instruction and to submit the current proposal to this Court for approval.

² The Note on Use that was published with the proposed instruction included citations to *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977), and *Nason v.*

The two comments received by the Committee are included in Appendix C for the Court's convenience.

VI. CONCLUSION

WHEREFORE, for the above reasons, the Committee respectfully requests that the Court approve this proposed instruction for publication and inclusion in the reorganized book as a standard jury instruction for civil cases.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this report complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

/s/Joseph Hagedorn Lang, Jr.
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