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November 30, 2012

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**RE: *David J. Abbey, Esq.'s Commentary in Opposition to Proposed Jury Instruction
Concerning "Subsequent Injuries Caused by Medical Treatments"***

Dear Committee Members:

This afternoon I was greeted with an email sent on behalf of Jeff Bigman, FDLA President, with the above-stated subject boldly emblazoned on my computer screen. Just two (2) short weeks ago I sat, case law in hand, formulating my argument in opposition to a proposed "Stuart" instruction in a personal injury suit I was defending. Opposing counsel, after citing to *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977) and *Dungan v. Ford*, 632 So.2d 159 (Fla. 1st DCA 1994), proposed a special instruction titled "Proximate Cause of Damages Flowing from Later Negligent, Unskillful, or Unsuccessful Treatment." Said proposed instruction closely

paralleled the Standard Civil Jury Instruction Committee's proposed jury instruction titled "Subsequent Injuries Caused by Medical Treatment." The facts of the case at bar clearly did not warrant said instruction, and I was successfully in opposing the same based purely on the evidence presented at trial. However, what has become increasingly familiar is the broad brush with which certain counsel attempts to paint the "*Stuart*" picture and the ambiguity with which I believe the Committee's proposed instruction presents to the jury.

Upon opening the previously referenced email communication, I was pleased to discover the well-reasoned commentary in opposition to the Committee's proposed instruction (attached hereto) dated August 22, 2012, and drafted by Mr. David J. Abbey, Esq. Mr. Abbey's analysis by way of hypothetical is spot-on, in my humble opinion. I emphatically share in Mr. Abbey's conclusions and wholeheartedly support Mr. Abbey's own proposed jury instruction which I, with appropriate cite to Mr. Abbey, echo below:

If you find that (defendant) caused [loss] [injury] [or] [damage] to (claimant), then (defendant) [is] also responsible for any additional [loss] [injury] [or] [damage] caused by medical care or treatment reasonably obtained by (claimant) for the treatment of injuries resulting from (event).

Thank you for your consideration of this matter.

Sincerely,



CURTRIGHT C. TRUITT

CCT/mv

cc: David J. Abbey, Esq (via email: DAbbey@abbeyadams.com)

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August 22, 2012

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Re: Proposed Jury Instruction Concerning "Subsequent Injuries Caused by Medical Treatment"

Dear Committee Members:

On October 1, 2011, comments were invited by this Committee regarding various proposed jury instructions in civil cases. Among the proposals, was the addition of an instruction titled "Subsequent Injuries Caused by Medical Treatment." Our position and concerns regarding the suggested wording of the proposed jury instruction are best explained through the use of a hypothetical:

Smith was on his way home from a doctor who had scheduled a back surgery for the next week. He was rear-ended in a motor vehicle accident with minimal damage to the rear of his vehicle. Throughout records of subsequent medical treatment, there was no indication that Smith's back was injured or that his back condition was aggravated by the accident. However, for the first time, Smith began complaining of neck symptoms. One day after the accident, Plaintiff contacted Attorney Jones, whom Smith identified from a

ABBAY, ADAMS, BYELICK & MUELLER, L.L.P.

Honorable James M. Barton, II
Jodi Jennings
August 22, 2012
Page 2

billboard. A staff member at Attorney Jones's office suggested Smith consult Dr. Brown. Dr. Brown commenced treatment and, three months later, performed a back surgery upon Smith. The back surgery was negligently performed and left Smith a quadriplegic. Smith filed a lawsuit in which he attempted to attribute the negligent back surgery to the motor vehicle accident.

Since 1932, the Florida Supreme Court has pronounced "where one who has suffered personal injuries by reason of the negligence of another exercises reasonable care in securing the services of a competent physician or surgeon, and in following his advice and instructions, and his injuries are thereafter aggravated or increased by the negligence, mistake or lack of skill of such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskilled treatment thereof, and holds him liable therefore." *J. Ray Arnold Corp. v. Richardson*, 141 So. 133 (Fla. 1932) (emphasis added). This black letter rule of law was reinforced in *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977). Since that time, this rule of law has commonly been referred to as the "*Stuart v. Hertz* instruction." However, there has been no standard jury instruction addressing this situation. Instead, litigants have requested a special instruction regarding subsequent medical negligence crafted to incorporate the *Richardson/Stuart* principle of law. In the following cases, the Courts authorized use of a special jury instruction that tracked the *Richardson/Stuart* rule:

1. *Forina v. Zann*, 609 So. 2d 629 (Fla. 4th DCA 1992);
2. *Barrios v. Darrach*, 629 So. 2d 211 (Fla. 3d DCA 1993);
3. *Letzter v. Cephas*, 792 So. 2d 481 (Fla. 4th DCA 2001);
4. *Nason v. Shafranski*, 33 So. 3d 117 (Fla. 4th DCA 2010);
5. *Tucker v. Korpita*, 77 So. 3d 716 (Fla. 4th DCA 2011); and
6. *Pedro v. Baber*, 83 So. 3d 912 (Fla. 2d DCA 2012).

By his concurring opinion in *Nason*, Judge Farmer made the following comments concerning a proposed so-called "*Stuart*" instruction:

The jury instruction concerning defendant's liability for the doctor's negligence in treating plaintiff for injuries caused by defendant is a problem.

ABBEY, ADAMS, BYELICK & MUELLER, L.L.P.

Honorable James M. Barton, II
Jodi Jennings
August 22, 2012
Page 3

I assume this is either intervening or concurring causation or something of both. At any rate, I doubt that lay jurors easily pick up this complex legal concept. Truth be told, some lawyers have trouble with it.

The issue concerns whether the law recognizes the doctor treating the victim for an injury caused by another person as part of a connected chain of causation for the victim's set of injuries. Or, instead, is the treating doctor an entirely disconnected actor and any further injuries caused by the doctor a separate matter for which the first actor is not responsible?

. . . the answer is 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 . . .

Here is a subject begging for a good dose of plain English. In this case, the special jury instruction proposed by plaintiff [which directly tracked the black letter rule of law stated in *Stuart v. Hertz*] is hopelessly muddled. If you persist in digging through it, you can eventually discern a correct statement of law on concurring or intervening cause by a subsequent treating doctor somewhere within but I sure wouldn't want to try this one out on lay jurors. *Id.* at 123.

Hence, Judge Farmer proposed the following alternative instruction:

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 healthcare provider treating the injured party if:

ABBEY, ADAMS, BYELICK & MUELLER, L.L.P.

Honorable James M. Barton, II

Jodi Jennings

August 22, 2012

Page 4

- (1) Injuries caused by the negligence of (defendant) reasonably require medical care or treatment by a healthcare providers;
- (2) A healthcare 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 healthcare provider's medical advice and instructions. *Id.* at 123-124 (emphasis added).

For purposes of our hypothetical, both the black letter rule of law and Judge Farmer's proposed instruction clearly require that the medical malpractice arise from treatment of an injury caused by the accident. The *Stuart* rule of law specified:

Where one who has suffered personal injuries by reason of the negligence of another, exercises reasonable care in securing the services of a competent physician or surgeon and in following his advice and instructions, and his injuries are thereafter aggravated or increased by the negligence, mistake or lack of skill of such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskillful treatment thereof and holds him liable therefore.

The Committee's proposed jury instruction titled "Subsequent Injuries Caused by Medical Treatment" states:

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

ABBEY, ADAMS, BYELICK & MUELLER, L.L.P.

Honorable James M. Barton, II
Jodi Jennings
August 22, 2012
Page 5

Arguably, the proposed instruction is not a correct statement of the *Richardson/Stuart* principle as it contains no requirement that the negligent medical treatment be provided for an injury caused by the defendant. For example, the rule of law would not allow Smith to recover damages caused by Dr. Brown from Defendant Jones in our hypothetical; however, the proposed jury instruction might.

The risk that the instruction can be used in this manner was brought to our attention in a case currently pending before the Second District Court of Appeal, *Timmie Leigh Keyser et al., vs. Jim Coats in his official capacity as Sheriff of Pinellas County*, Case No.: 2D11-1835. Mrs. Timmie Keyser, a Sheriff's deputy, was allegedly injured as a passenger in her personal vehicle when it was rear-ended by a Sheriff's Office vehicle. Prior to the accident, Mrs. Keyser had a long history of neck pain and treatment. Three months after the accident, she underwent a neck surgery which left her a quadriplegic. The parties agreed Mrs. Keyser's quadriplegia was a product of malpractice by the surgeon. The primary issue was whether the accident caused the surgery. On her appeal of an unfavorable judgment, Mrs. Keyser cited the proposed jury instruction to support the argument that she was entitled to a partial directed verdict determining that her quadriplegia resulted from the accident *regardless* of whether the negligent treatment resulted from the accident. See footnote 6, page 14 of Appellants' Initial Brief, enclosed. In addition to the Initial Brief, enclosed please find copies of our Answer Brief, and Appellants' Reply Brief.

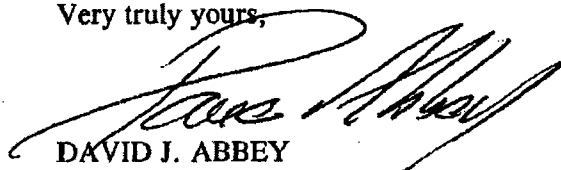
Thus, we suggest in order for the instruction to accurately reflect the law, it should use the following, or similar, language:

If you find that (defendant) caused [loss] [injury] [or] [damage] to (claimant),
then (defendant) [is] also responsible for any additional [loss] [injury] [or]
[damage] caused by medical care or treatment reasonably obtained by
(claimant) for the treatment of injuries resulting from (event).

We very much appreciate your consideration of this matter and will be pleased to further explain our position to the Committee if desired.

Thank you for your consideration of this matter.

Very truly yours,



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