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**SUPREME COURT COMMITTEE ON  
STANDARD JURY INSTRUCTIONS (CIVIL)**

**MINUTES  
Orlando, FL  
Orange County Courthouse**

July 8, 2010 (1:00 p.m. to 5:00 p.m.)

July 9, 2010 (8:30 a.m. to noon)

**1. NEGLIGENCE**

Russo reported there is a general consensus that a *Stuart v. Hertz* instruction is needed. The Committee began its analysis by reviewing Judge Farmer's concurrence in *Nason v. Shafranski*, 4D08-4293, found in the materials at page 19. The subcommittee's proposed instruction is found on page 27 of the materials.

Roth agrees the instruction is necessary, although he expressed concerns with subsection (3) and whether that provision correctly reflects the law. The Committee discussed whether subsection (3) is comparative fault as opposed to a "cutting off" of the chain of responsibility.

Gunn questioned what the current status of the law is, and whether this instruction is even necessary. The Committee agreed it is. However, Rosenbloum expressed concern about telling the jury that an intervening tortfeasor is liable for a healthcare provider's negligence. The Committee discussed taking out any reference to the negligence of the health care provider, so that the plaintiff is not forced to prove a medical malpractice case.

Bailey pointed out she sees two different issues: (1) whether the lack of necessity of the treatment breaks the chain of causation and (2) damages. The Committee then discussed whether this even is a jury issue to begin with, as well as whether it should instead be given as a preemptive charge.

The Committee discussed whether proposing a *Stuart v. Hertz* instruction is taking a position on section 768.81. The Committee also discussed whether the issue of "reasonably and necessary" should be included in the instruction.

The Committee ultimately agreed that a *Stuart v. Hertz* instruction probably is necessary, and that it should be given as a preemptive charge.

**The subcommittee will circulate a proposed draft instruction for the October meeting where this will be discussed in further detail. If the Committee ultimately decides an instruction is not necessary, then no further work will be necessary. Roth and Wagner will join the subcommittee. If the subcommittee has a draft finished prior to the October meeting, the draft should be circulated**

so the entire Committee can make an initial review.

**SUPREME COURT COMMITTEE ON  
STANDARD JURY INSTRUCTIONS (CIVIL)**

**MINUTES**

**West Palm Beach, FL**

**Palm Beach County Courthouse**

October 21, 2010 (1:00 p.m. to 5:00 p.m.)

October 22, 2010 (8:30 a.m. to noon)

**1. NEGLIGENCE:**

Lytal lead the discussion of the proposed *Stuart v. Hertz*, 351 So. 2d 703 (Fla. 1977) instruction on page 17 of the materials. Lytal informed the Committee that since *Stuart*, there has been development in other case law holding that it is error to introduce evidence that surgery or treatment was unnecessary.

The Committee discussed the instruction on page 17 and the accompanying note on use, beginning with whether the instruction is necessary.

Roth expressed concern with the language “selecting medical providers” and “following medical instructions.” The cases using this language came from out of *Hertz*, but are very dated and from other states.

The Committee then discussed whether there really are two separate issues to be addressed - - (1) the *Stuart v. Hertz* issue and (2) the “voodoo” medicine issue of unreasonable/unnecessary medical treatment. As to a *Stuart v. Hertz* situation, the Committee agreed that to warrant that instruction, the treatment or surgery must make the claimant’s injury/injuries/condition worse.

The Committee turned to and discussed the modified proposal suggested by Rosenbloum on page 24 of the materials. Although there was no consensus as to a proposed instruction among the subcommittee, this proposal on page 24 was the closest.

Ingram questioned whether the words “loss” and “damage” really are necessary. The Committee discussed, and decided to leave those words in the instruction.

Griffin pointed out the last phrase, “reasonably obtained by the claimant,” uses the passive voice. **It should be rephrased in the active voice to read: “claimant reasonably obtained.”** Gunn agreed.

**The Committee further agreed to remove the words “and necessary” as**

**proposed by Rosenblum on page 24. This instruction will be considered the Committee consensus.**

Barton stated he would like to see a subcommittee proposal based off of the instruction on page 24 of the materials. He also noted there also needs to be some discussion about where this instruction will be located in the book. He proposed 501.5(c) as one possibility. Rosenblum suggested this instruction might be more akin to a causation instruction.

Gunn questioned whether a note on use should be added to clarify that the *Stuart v. Hertz* instruction should be given regardless of whether the subsequent medical care/treatment was negligent. The Committee also discussed adding a note on use stating that the instruction may need to be modified if there could be evidence about whether the subsequent medical care/treatment was negligent.

**Gunn directed the subcommittee to go back and, with the instruction on page 24 being considered the full Committee consensus as modified above, determine whether any introductory language is necessary; whether the instruction should be located in the book; what notes on use are needed; and whether any case citations should be added to the notes on use. The subcommittee should be prepared to present this at the February meeting.**

**SUPREME COURT COMMITTEE ON  
STANDARD JURY INSTRUCTIONS (CIVIL)**

**MINUTES**

**Tallahassee, FL**

**First District Court of Appeal**

February 10, 2011 (1:00 p.m. to 5:00 p.m.)

February 11, 2011 (8:30 a.m. to 12:00 p.m.)

a. Stuart v. Hertz:

Russo discussed the consensus instruction approved by the Committee in October 2010 concerning Stuart v. Hertz and the principles concerning liability for aggravated injuries from subsequent medical treatment. The consensus instruction is set forth in the Rosenblum memo (pp. 121-22 of the materials). The Negligence subcommittee was charged with (1) considering the consensus instruction and determining (2) whether introductory language is needed, (3) where the instruction should go in the reorganized book, (4) what Notes on Use are needed, and (5) what should be in those Notes.

Russo urged that the consensus instruction be revised to say “*negligent* medical care or treatment.” Rosenblum and Wagner advised Russo that this had been discussed and rejected at the last meeting. Rosenblum and Roth advocated for keeping “negligence” out of the instruction. Russo believed problems can arise without it.

She noted that the Hertz decision is being perverted by some to say that a doctor's negligence is irrelevant. She also noted the possibility of deliberate schemes to inflate the value of medical treatment. Rosenbloum and Farmer stated the consensus instruction's provision that the medical care or treatment be "reasonably obtained" resolves that issue. Barnett believes the instruction still implies everything is recoverable. Barton noted that the value of the treatment is still an issue for the jury. Ingram and Kest believed the possible scheme to defraud referenced by Russo can be addressed by a separate defense of fraud. Artigliere suggested that a Note on Use state that the instruction does not preclude an argument that the treatment was not reasonably necessary. Roth believed the standard damages instruction (501.2) addresses that issue and should be referenced. Hinkle emphasized the consensus instruction properly uses the phrase "reasonably obtained" and not "reasonably necessary."

Farmer stated that, pursuant to the Nason decision, there is entitlement to an instruction that the plaintiff can be charged with the doctor's negligence. Rosenbloum believes other instructions cover the situation.

Rosenbloum believed the second sentence in the consensus instruction Note on Use ("[This instruction] should not be used where there is an issue as to the necessity for the medical treatment.") is unnecessary. Russo believed a Note on Use is important to ensure the defendant can argue that the treatment was unnecessary. Wagner did not believe Notes on Use should address attorney arguments. Rosenbloum agreed there should be no notes on misuse and believed the consensus instruction does not allow perversion. Hinkle expressed concern about the Notes saying anything about what Hertz does or does not apply to.

**Barton noted that the respective positions on the language of the instruction and Note on Use appear to be crystallized and that the matter should now go back to the subcommittee.**

The Committee discussed the location of this instruction in the reorganized book – in the damages section (after aggravation) or in the causation section. Rosenbloum advocated for the damages section because adding it to the causation section may require it be included in multiple places. Barton believed it makes more sense in the legal cause section – 401.12d and others to be cited by the subcommittee.

Artigliere asked Campo if "then the" should be removed from consensus instruction. Campo believed that a "then" is required where preceded by an "if." Barton stated "the" should come out and "then" should stay in. **Rosenbloum and Russo will work with the subcommittee on these wording issues.**

**SUPREME COURT COMMITTEE ON  
STANDARD JURY INSTRUCTIONS (CIVIL)**

**MINUTES**

**Tampa, FL**

**George Edgecomb Courthouse**

July 14, 2011 (1:00 p.m. to 5:00 p.m.)

July 15, 2011 (8:30 a.m. to 12:00 p.m.)

**7. CONCURRENT AND INTERVENING CAUSE, *STUART V. HERTZ***

Rosenbloum directed the Committee to the consensus choice from the last meeting for a standard instruction on liability for subsequent injuries caused by medical treatment (p. 277 of the materials):

*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).

Rosenbloum stated the Subcommittee was tasked with drafting any necessary Notes on Use and recommending where in the book to place this instruction.

Lang stated that “loss, injury, or damage” should be bracketed in the proposed instruction, as they are in other standard instructions. Kest questioned whether “loss” is appropriate in this instruction. Since loss will be bracketed and is in all of the other damage instructions, the Committee decided to leave it in this instruction.

Kest noted that an instruction already exists for aggravation of a preexisting injury. Rosenbloum stated this instruction is for the situation where the injury caused by the accident is aggravated by subsequent medical treatment.

Roth inquired whether the term “additional” was needed. Rosenbloum responded that Campo believed the term helped explain the issue to the jury. Kest stated its inclusion may create a new element. Rosenbloum believed the word “additional” was needed for 99% of the cases. Ingram and Costello believed some adjective was needed. Kest noted the word could be taken out by the trial judge if not appropriate for a particular case.

Rosenbloum next discussed the proposed Note on Use and its substance (pp. 277-78 of the materials). The previously proposed Note on Use was:

This instruction is intended for use in cases alleging aggravation of the initial injuries by subsequent medical treatment. *See, e.g., Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977); *Nason v. Shafranski*, 33 So. 3d 117 (Fla. 4th DCA 2010).

This instruction should not be used to instruct the jury on an issue involving the necessity for medical treatment.

Rosenblum asked if the Committee wanted to include the second sentence. Kest believed it should be included because the issue has been coming up in cases. Lytal believed it should be deleted and a citation should be added to *Dungan v. Ford*, 632 So. 2d 159 (Fla. 1st DCA 1994), which holds the defendant is responsible for care reasonably obtained by the plaintiff. Roth believed the standard damages instruction addresses the issue of necessary care. Kest stated that is why a Note on Use is needed. Lytal stated this is then broader than *Stuart v. Hertz*. Kest identified the issue of reasonable vs. necessary. Gertz inquired whether there should be a reference to the damages instruction, where necessity of treatment is covered. Roth believed that was not needed and neither was the last sentence of the draft Note on Use. Lytal reiterated his suggestion of adding a citation to *Dungan*. Rosenblum agreed that more than *Hertz* can be cited in the Note. Kest inquired if this instruction will be used when the issue of medical necessity is raised. Lytal said it should. Barton noted that *Dungan* says it is appropriate to look at the issue through the plaintiff's eyes. Kest believed the last sentence of the draft Note was needed. Roth stated cases can be cited and the last sentence removed. Hinkle and Rosenblum noted the merits of citing the *Nason* case.

Ingram stated that the word "aggravation of the initial injuries" in the draft Note on Use should be replaced by "additional injuries." The Committee agreed. Lytal suggested replacing "alleging" with "involving." The Committee agreed.

Ingram asked if *Stuart v. Hertz* was still good law after section 768.81, Florida Statutes. Lytal identified the issue as whether the defendant and doctor were joint tortfeasors. Ingram inquired whether it was appropriate to put the doctor on the verdict form as a *Fabre* defendant. Rosenblum stated that *Nason* noted that Ingram's question has been certified to the Supreme Court, but the Court has declined to answer it. Lang agreed this is an active and open issue. As such, Ingram asked if the Committee should say it has no recommendation on the issue when it puts out a *Stuart v. Hertz* instruction that says the original defendant is responsible. Lang believed that, since it is an active and open issue, comments will likely be received on it when a *Stuart v. Hertz* instruction is published. Barton stated the Committee may want to look at section 768.81 and the case law because this is a significant issue and a Note on Use may be needed. Roth asked if it was better to publish the instruction and wait to see what comments were received, as noted by Lang. Hinkle agreed with the idea of keeping the matter moving forward.

**The Committee's discussion resulted in the following instruction and Note on Use:**

***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:*

**This instruction is intended for use in cases involving additional injuries by subsequent medical treatment. See, e.g., *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977); *Nason v. Shafranski*, 33 So. 3d 117 (Fla. 4th DCA 2010). This instruction should not be used to instruct the jury on an issue involving the necessity for medical treatment.**

**Barton stated it should be published and submitted to the Supreme Court.**

Rosenbloum next discussed proper placement of the instruction in the book. Options were 401.12 (legal cause) and 501.5 (other contributing causes of damages). Rosenbloum stated that, although it is technically a causation issue, he believes it works better in the damages section. Lang agreed that it makes more sense to be near the aggravation instruction in the damages section. Rosenbloum further noted that, if it goes in legal cause, it will need to go in multiple places. **The Committee decided this instruction should be added as 501.5c.**

**SUPREME COURT COMMITTEE ON  
STANDARD JURY INSTRUCTIONS (CIVIL)**

**MINUTES**

**Orlando, FL**

**Orange County Courthouse**

**March 8, 2012 (1:00 p.m. to 5:00 p.m.)**

**March 9, 2012 (8:30 a.m. to 12:00 p.m.)**

**g. Instructions Published for Comment**

Barton noted the recent publication of the new proposed 201.2 Introduction of Parties (uninsured motorist addition) and 700 Closing Instructions. Barton noted the prior publication of proposals for 201.2 Introduction of Parties (pro se parties), 301.11 Spoliation, 401.20 Premises Liability, 801.2 Read Back of Testimony, 402.4 (*Stuart v. Hertz*), Punitive Damages, Model Instructions, and various Errors & Omissions. Lang believed the next report to the Supreme Court could include almost all of these pending proposals. Lang suggested sending up the E&O corrections soon, as comments repeatedly come in on those. Vargas noted the additional E&O issue on this meeting's agenda is critical and should go up soon. Sass noted the spoliation proposal is not ready to be sent up. **Barton directed that a report go up before next meeting; Lang agreed.**

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**e. *Stuart v. Hertz***

Russo noted that recent cases may result in the need to revisit the *Stuart v. Hertz* instruction the Committee has been working on. **The Negligence subcommittee will look into the new cases and how they affect the *Stuart v. Hertz* proposal, but Russo asked the Committee members to advise if there was anything specific they believed the subcommittee should focus on.**

Barton noted that the Committee's *Stuart v. Hertz* proposal has been published and no comments were received. But Barton believed it should not be sent up to Supreme Court until those cases are considered. Artigliere believed the *Tucker v. Korpita* case (pp. 40-43 of the materials) raised issues concerning application of such instructions. Barnett believed the judge will decide if the instruction is appropriate based on the evidence at trial. Barton inquired if cases should be added to the notes on use. Artigliere wondered if this will become similar to concurring cause, where the instruction is given when requested, so more guidance is needed for judges in notes on use.

## **SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)**

### **MINUTES**

**Tampa, FL**

**Hillsborough County Edgecomb Courthouse**

July 12, 2012 (1:00 p.m. to 5:00 p.m.)

July 13, 2012 (8:30 a.m. to 12:00 p.m.)

### ***Stuart v. Hertz***

Barnett directed the Committee to the current proposed *Stuart v. Hertz* instruction and Note on Use (p. 28 of the materials):

### **501.5 OTHER CONTRIBUTING CAUSES OF DAMAGES**

**[version published in the Florida Bar News October 1, 2011]**

**[underlined text added after 5/29/12 subcommittee conference call]**

\* \* \*

*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 subcommittee's debate concerned the Note on Use. Some subcommittee members felt more cases should be cited (as in the proposal above); some felt only *Stuart v. Hertz* should be cited. Artigliere asked if the law in this area is developing. Barnett said cases are being released construing and extending *Stuart*, and that is why she advocates (with Russo) for not citing any cases other than *Stuart*. Artigliere asked if the language of the proposed instruction is straight from *Stuart* or from the other cases cited. Barnett said the instruction is not from the language of *Stuart*.

Lytal noted that the law in this area is developing beyond medical malpractice and the proposed instruction covers the developing law and accurately states it. Dukes disagreed, stating the proposed instruction does not include negligence aspects of the subsequent treatment. Lytal does not believe negligence is required. Barnett cited *Dungan*, which she stated involved negligence in performing the subsequent surgery. But thereafter, Barnett stated, the cases do not appear to require negligence in the subsequent medical treatment. Lytal and Dukes noted that the key to *Stuart v. Hertz* is acting reasonably in obtaining treatment. The question is whether the subsequent medical treatment had to be negligent or just that it caused injury. Hinkle stated that the current instruction tracks the law and should be used until the Florida Supreme Court undertakes to review the situation.

Rosenbloum noted that this issue has been discussed numerous times. He does not believe the Committee should revisit the instruction. The only issue at hand is whether to add the additional cases to the Note that are underlined in the proposal. Barnett agreed that the only issue at hand is the Note on Use, but she also believed the instruction should be revisited because it is not accurate in her opinion. Dukes agreed. Roth noted the subcommittee addressed the issue again and voted to leave the instruction as is.

**Rosenbloum moved to include the additional citations to *Pedro*, *Tucker*, and *Dungan* in the Note; Fox seconded; the Committee approved by a 15 to 3 vote. A question was asked whether the revised Note would need to be republished. Jennings was unsure. Barton did not believe there was a need to republish the revised Note; the Committee agreed.**

Rosenbloum asked when the proposal will be submitted to the Florida Supreme Court. Committee members noted a current need for the instruction, as it is coming up in many contexts. **Lang said he will prepare a report to the Court, but he and Jennings noted there will likely be a need for a minority report. Jennings will send Lang an example of how a report would look with a minority position set forth in the report's narrative.** Artigliere sees value in setting forth the minority position for the Court. Barnett noted there are minority views on both the instruction and the Note on Use. Rosenbloum noted a minority view about the

need for a Note on Use that the instruction does not apply when the issue is the reasonableness of seeking out the treatment.

**SUPREME COURT COMMITTEE ON  
STANDARD JURY INSTRUCTIONS (CIVIL)**

**MINUTES**

**Jacksonville, FL**

**Duval County Courthouse**

October 25, 2012 (1:00 p.m. to 5:00 p.m.)

October 26, 2012 (8:30 a.m. to 12:00 p.m.)

**Instructions Published for Comment But Not Yet Filed**

Lang stated that the report on the Committee's *Stuart v. Hertz* proposal is written and ready to be reviewed by Barton and Jennings. It will then be filed. Reports on the Committee's proposals on spoliation and instructions 301.11, 402.4, 501.5, 501.7, and 502.7 are not ready yet.

Barton reported that attorney David Abbey (from St. Petersburg) had sent him a letter, with attachments, questioning whether the Committee should go forward with its *Stuart v. Hertz* proposal. **Barton will give Abbey's letter to Lang to review.** Abbey may possibly be told to address his comments to the Court. Lang noted the issues regarding this proposal have been well-vetted, and the proposal is ready to be sent up. But he said he will look at Abbey's comments. Lang stated that he receives emails often (2-3 times between each meeting) asking when the *Stuart v. Hertz* instruction will be ready. Lytal reported that he has spoken to a local judge, who said the issue is coming up with more and more frequency. He believes the Committee needs to finalize the proposal soon and get it submitted. Boyer asked if Abbey's letter could be sent up with the report. Barnett noted that the report should include a dissent position within the Committee on certain points. **Lang will send the draft *Stuart v. Hertz* report to Barnett when he sends it to Barton and Jennings, so that Barnett can see how the dissent has been framed in the report.**

**SUPREME COURT COMMITTEE ON  
STANDARD JURY INSTRUCTIONS (CIVIL)**

**MINUTES**

**Coral Gables, FL**

**Office of Kozyak Tropin & Throckmorton**

**(Hosted by Neal Roth)**

March 7, 2013 (1:00 p.m. to 5:00 p.m.)

March 8, 2013 (8:30 a.m. to 12:00 p.m.)

### ***Stuart v. Hertz***

Russo reported that David Abbey sent a letter to the Committee (p. 34 of the materials), and the same concern was echoed by Curtright Truitt (p. 32 of the materials), regarding the *Stuart v. Hertz* instruction. Their concern is that the instruction should also say “for the treatment of injuries resulting from the event” in addition to saying “reasonably obtained.” They have had cases in which there was medical treatment obtained that was not connected to the original accident. Russo sees no problem adding the phrase. Fox has concerns about “reasonably obtained.” Fox was concerned about a mini-trial on the issue of whether the treatment was “reasonably obtained.” Russo said that issue has been vetted. Lytal believes the new suggested addition is unnecessary if the treating doctor says the care provided was for the accident. Russo and Ingram noted that it can be a factual issue as to whether the treatment was for a preexisting condition or for the accident. Lytal agreed it is a jury question but does not believe defense experts should be allowed to “Monday morning quarterback” the treating doctor’s decision and opine that the treatment was not for a problem created by the accident. Hinkle noted that the instruction already says “additional loss, injury, or damage,” which covers it along with the other causation instructions. Ingram and Russo disagreed that that covers the issue, as it does not connect the treatment to the original incident. Lytal believes that if the treatment was reasonably obtained, that is enough. Ingram noted the issue is not whether the treatment was reasonable, it is whether it was related to the initial injury. Whitmore asked if there was a dispute as to whether the suggested additional language was a correct statement of the law. Lytal does not believe it is correct. Lytal believes the standard is whether the plaintiff was reasonable in obtaining the treatment. Roth believes the current instruction is a correct statement of law and the issue being discussed is covered by causation principles. **Hinkle moved to stick with current proposed *Stuart v. Hertz* instruction without the suggested additional language, Roth seconded, approved by a 14-6 vote (2 abstained).**

The report on the *Stuart v. Hertz* instruction will be sent up to the Supreme Court. Lang confirmed that the Committee will summarize the minority position within the report instead of having a separate minority report. Barton believed the dissenters will likely be submitting comments to the Supreme Court separately.

Whitmore asked for the downside to adding the proposed additional language. Lytal said it takes the focus away from the true issue of the plaintiff’s subjective belief in obtaining treatment and allows the defendant to bring in an expert to say that it was not reasonably obtained in an objective test. DeMahy disagrees. Lytal sees, as a practical matter, that plaintiffs will not prevail if they try to recover for treatment and injuries unrelated to the original injury, so there is no need for the additional language.