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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2010

JAMES NASON and CLAUDIA NASON,
Appellants,

v.

DARREL SHAFRANSKI, NEIL SHAFRANSKI and MARIE SHAFRANSKI,
Appellees.

No. 4D08-4293

[April 28, 2010]

TAYLOR, J.

Plaintiff, James Nason, and his wife, Claudia Nason, appeal a jury verdict which awarded them only a small portion of the damages they sought as a result of injuries plaintiff sustained in a car accident. The defendants admitted negligence in causing the accident but disputed the amount of damages claimed by plaintiff. On appeal, plaintiff contends that the trial court erred by allowing defendants to present expert medical testimony regarding unnecessary surgeries and thereby shift the blame for plaintiff's damages from defendants to plaintiff's treating physician. Plaintiff argues that the trial court compounded the error by refusing to give plaintiff's requested jury instruction that the defendants were responsible for any damages resulting from any negligent or improper medical treatment. We agree that the trial court's refusal to give such an instruction was reversible error.

After the accident, the plaintiff complained of pain in his neck and back. He was referred to Dr. Charles Theofilos, a board certified neurological surgeon who specializes in the spine and reconstructive surgery. Dr. Theofilos testified that the plaintiff's MRIs showed disc herniations in both his cervical and lumbar regions. He began his treatment with epidural injections to plaintiff's lumbar spine. He later performed a discogram and nucleoplasty, which helped plaintiff but did not cure the lumbar problem. Dr. Theofilos then removed herniated discs from plaintiff's neck and performed two fusions.

Thereafter, plaintiff continued to have low back and neck pain, and he also complained of headaches. He was referred to a pain management

specialist and seen by a psychologist due to his depression and anxiety. Dr. Theofilos testified that if the plaintiff's low back symptoms continued or worsened, he would eventually need either an intradiscal decompression procedure or a two-level disc replacement.

The plaintiff testified that his medical bills to date totaled \$340,687.45. His economist, Dr. Bernard Pettingill, estimated that plaintiff's economic damages (including medical care), both past and future, amounted to \$733,853.

The defense called Dr. Schumacher, a board certified neurosurgeon. Dr. Schumacher testified that he reviewed the MRI scans of plaintiff's neck and lumbar region. He saw that plaintiff had a few discs that slightly bulged, "like all of us do," at C4-5 and C5-6, but he did not see any nerve compression on the plaintiff's MRIs. He disagreed with the MRI report's conclusion that the herniated material was encroaching on the spinal cord. According to Dr. Schumacher, the bulging discs on the MRIs were consistent with degenerative changes only. Moreover, plaintiff's low back appeared normal to him. In his opinion, plaintiff just suffered a sprain in the crash, which should have been treated with medication, rest, or physical therapy; surgery should have been the last option. He testified that he had never done a discogram and nucleoplasty and that he was not surprised that the procedures offered plaintiff no relief. Over plaintiff's objection, he testified that he would not have recommended that plaintiff undergo reconstructive surgery.

During the charge conference, plaintiff complained that throughout the trial, beginning with opening statement, the defendants presented a defense that Dr. Theofilos was negligent in performing unnecessary surgeries and that he caused plaintiff to suffer physical injury and depression, which were not caused by the collision. Consequently, plaintiff requested the following jury instruction:

When a person has suffered injuries by reason of the negligence of another and exercising reasonable care in securing the services of a competent physician, and in following his advice and instructions his injuries are aggravated or increased by the negligence, mistake or lack of skill of such physician, the law regards the negligence of the wrongdoer in causing the original injury.

Defense counsel countered that the defendants were not claiming that Dr. Theofilos was negligent; their position was that the plaintiff's injuries did not result from the accident but, instead, from the plaintiff's decision

to undergo unnecessary surgery performed by Dr. Theofilos. The trial court declined to give the requested instruction, commenting, "I don't think anything has risen to the point of negligence, mistake or lack of skill."

During closing argument, plaintiff's counsel asked the jury to award total damages of \$3 to \$4 million. Defense counsel argued as follows:

And I know some folks wrote down interestingly after the surgeries Theofilos said he's got a 60 to 70 percent loss of motion in his spine. After I did what I did, he's got a 60 to 70 percent loss of motion in his spine. After three surgeries he's made him this worse off.

...

Folks, he didn't need surgery. He didn't need this. . . .

[Schumacher] says exactly what Alvarez says. You don't jump into surgery on a guy like this. Not at all. There's nothing on the films that says that.

...

Schumacher says, Well, I'm a surgeon. I've looked at films and I've been in there and seen what they look like. And you look at a film, and you go in there and look at the disc, this man had no herniated disc that needed any type of surgery. And he says, What about the future stuff that's \$700,000 worth of stuff Theofilos wants to do? No way. Don't do it.

...

It's natural to feel some sympathy for the plaintiff here when you look at what Theofilos did.

After retiring to deliberate, the jury sent out a note that asked:

Judge Strickland, if the jury felt a provider of medical treatment to the plaintiff was unscrupulous, does that relieve the defendant under the law from liability for the consequences of that treatment?

Plaintiff's counsel urged the trial court to respond by giving the instruction he had previously requested regarding the defendants' liability for aggravation of injuries caused by subsequent medical treatment. The court again refused to give the instruction, and, instead, referred the jury to the instructions already given.

The jury returned a verdict awarding plaintiff \$150,000 in medical

expenses, \$38,000 in lost earnings, \$50,000 in future medical expenses, \$0 for future earnings, \$50,000 for past pain and suffering and \$50,000 for future pain and suffering, for a total damage award of \$338,000.

“Trial courts are accorded broad discretion in their decisions to give a particular jury instruction, and any such decision will not be reversed on appeal absent prejudicial error.” *Triple R Paving, Inc. v. Broward County*, 774 So. 2d 50, 56–57 (Fla. 4th DCA 2000). However, the “trial court is required to instruct the jury regarding the law applicable to the facts in evidence and the law of the case.” *Wransky v. Dalfo*, 801 So. 2d 239, 243 (Fla. 4th DCA 2001) (quoting *Lynch v. McGovern*, 270 So. 2d 770, 771 (Fla. 4th DCA 1972)).

As we explained in *Letzter v. Cephas*, 792 So. 2d 481, 485 (Fla. 4th DCA 2001):

Under traditional negligence principles, a tortfeasor is responsible for all reasonably foreseeable consequences of his or her actions. See, e.g., *Stark v. Holtzclaw*, 90 Fla. 207, 105 So. 330, 331 (1925); *Cole v. Leach*, 405 So.2d 449, 450 (Fla. 4th DCA 1981). An independent, unforeseeable intervening force, however, may serve to break the causal link and extinguish liability. See *Gibson v. Avis Rent-A-Car Sys., Inc.*, 386 So.2d 520, 522 (Fla.1980); *Bosket v. Broward County Hous. Auth.*, 676 So.2d 72, 74 (Fla. 4th DCA 1996). Typically, the question of whether an intervening cause is reasonably foreseeable is for the jury, but an exception exists when subsequent medical negligence in treating the initial injury is involved.

It has long been the law in Florida that when one who is negligent injures another causing him to seek medical treatment, negligence in the administration of that medical treatment is foreseeable and will not serve to break the chain of causation. And, in *Stuart v. Hertz Corp.*, the supreme court reiterated that

“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 therefor.”

351 So.2d at 707 (quoting *J. Ray Arnold Lumber Corp. of Olustee v. Richardson*, 105 Fla. 204, 141 So. 133, 135 (1932), quoting *Texas & Pacific Ry. Co. v. Hill*, 237 U.S. 208, 35 S.Ct. 575, 59 L.Ed. 918 (1915)). When the rule in *Stuart v. Hertz* applies, the initial tortfeasor’s remedy against the succeeding negligent health care provider lies in an action for subrogation. See *Underwriters at Lloyds v. City of Lauderdale Lakes*, 382 So.2d 702, 704 (Fla.1980).

The key case for this well-established principle is *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977). In that case, which also arose from a car accident, the defendants filed a third-party complaint against the treating physician, alleging that negligent treatment had caused all or part of the plaintiff’s injuries. *Id.* at 704. The Florida Supreme Court held that the third-party malpractice claim could not be tried as part of the main lawsuit over the plaintiff’s objection. *Id.* at 706. The court concluded that this holding was in conformity with the rule announced in *J. Ray Arnold Corp., etc. v. Richardson*, 141 So. 133 (1932), as quoted above. *Id.* at 707. It noted that other courts follow this same principle, quoting 57 Am. Jur. 2d *Negligence* section 149, at 507:

[T]he rule is well established that a wrongdoer is liable for the ultimate result, although the mistake or even negligence of the physician who treated the injury may have increased the damage which would otherwise have followed from the original wrong.

Id. (alteration in original). See also *Caccavella v. Silverman*, 814 So. 2d 1145, 1147 (Fla. 4th DCA 2002).¹

¹We have twice certified to the Florida Supreme Court the question of whether *Stuart v. Hertz* is still good law since the passage of the Tort Reform and Insurance Act of 1986, which made each tortfeasor liable only for his own negligence. See *Caccavella v. Silverman*, 814 So. 2d 1145 (Fla. 4th DCA 2002); *Letzter v. Cephys*, 792 So. 2d 481 (Fla. 4th DCA 2001). The Florida Supreme Court has declined to answer the certified questions in both cases.

The defendants argue that *Stuart v. Hertz* is inapposite because they were merely arguing below that the surgery was unnecessary, not that the physician committed medical malpractice. However, Florida law recognizes that “unnecessary surgery may constitute medical malpractice where it deviates from the standard of care.” *Edwards v. Simon*, 961 So. 2d 973, 975 (Fla. 4th DCA 2007). Although the defendants carefully avoided the term “malpractice” during trial, Dr. Schumacher’s testimony and the defendants’ closing argument clearly placed this issue before the jury.

In *Emory v. Florida Freedom Newspapers*, 687 So. 2d 846 (Fla. 4th DCA 1997), we addressed a similar challenge to the trial judge’s refusal to give an intervening cause instruction where testimony was admitted at trial regarding unnecessary medical treatment which allegedly worsened the plaintiff’s condition. There, we reversed the judgment for defendants, concluding that there was a reasonable possibility that the jury may have been misled by the combination of evidence of unnecessary medical treatment and the absence of an intervening cause instruction. *Id.* at 848. We stated:

Here, the jury was not instructed as to the effect of actions taken by a third party following the original negligence. Absent such an instruction, the jury may have erroneously concluded that the surgery was a substantial cause of Emory’s injuries which served to sever the causal link between Emory’s injuries and the automobile accident, for which Florida Freedom was admittedly responsible.

...

Similarly, during the trial below, the jury was presented with testimony regarding the “unnecessary” nature of Emory’s medical treatment. Despite Florida Freedom’s argument to the court that this testimony was only evidence that the cost of such treatment was unnecessary and, therefore, not compensable, the testimony also served to shift the blame for the injuries from Florida Freedom to Emory’s surgeon. The jury was then left without any instruction as to how to treat this evidence of subsequent injury. Therefore, in accordance with the result in *Dungan [v. Ford]*, 632 So. 2d 159 (Fla. 1st DCA 1994)], we find that the admission of this testimony, in the absence of a jury instruction addressing the issue, created a reasonable possibility that the jury was indeed misled. We, therefore, reverse the final judgment and remand for a new trial.

Id.

As did the defendants in *Emory* and *Dungan*, the defendants here argue that the reasonableness and necessity of medical expenses are always issues in a personal injury action, and that they merely contested those issues. See, e.g., *E.W. Karate Ass'n. v. Riquelme*, 638 So. 2d 604, 605 (Fla. 4th DCA 1994); *Irwin v. Blake*, 589 So. 2d 973, 974 (Fla. 4th DCA 1991).

In *Dungan*, the first district rejected arguments made by the defendants that their inquiry regarding the plaintiff's surgeries was directed to the reasonableness of the sums for medical expenses. Characterizing their contention as "somewhat disingenuous," the court stated:

Our review of Standard Civil Jury Instruction 6.2(c), and the cases construing the same satisfies us that the "necessarily or reasonably obtained" language used in the instruction relates simply to (1) whether the charges are for treatment the plaintiff sought for injuries at issue in a lawsuit, as opposed to treatment for some other condition, and (2) whether the charges are for a reasonable amount. Because the cases indicate that "reasonableness or necessity" can be established by lay testimony, it must involve a question of necessity from the perspective of the injured party, rather than from the perspective of a medical expert. See, *Garrett v. Morris Kirschman & Co.*, 336 So.2d 566 (Fla.1976), and *Albertson's, Inc. v. Brady*, 475 So.2d 986 (Fla. 2d DCA 1985), *rev. denied*, 486 So.2d 595 (Fla.1986).

632 So. 2d at 163.

The court found that the defense medical expert clearly focused on the treating physician's lack of skill and judgment and poor results. It concluded that the admission of this expert testimony, coupled with the denial of a special instruction informing the jury how to handle evidence of negligent medical treatment, amounted to reversible error. *Id.* at 164.

In this case, the jury's confusion was apparent from the note it sent to the judge during deliberations. It sought guidance on how to handle the defendants' evidence that Dr. Theofilos was "unscrupulous." The judge's failure to dispel that confusion by granting plaintiff's request for the special instruction requires us to reverse and remand for a new trial.

Reversed and Remanded.

LEVENSON, JEFFREY R., Associate Judge, concurs.

FARMER, J., concurs specially with opinion.

FARMER, J., specially concurring.

I join in Judge Taylor's opinion without reservation and write only to add a thought to her cogent analysis.

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

As Judge Taylor shows, the answer is that the law considers the treating doctor's negligence² 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). This liability is not something erupting from nowhere because it is foreseeable by the first negligent actor.

Now, we all know that negligent people causing accidents don't go around before the event thinking about what might happen to a victim during medical treatment for injuries they accidentally cause. But the fiction is that, if they did think about it, they could reasonably anticipate a doctor treating such injuries might make them worse. You cannot injure a person and reasonably expect the victim not to seek medical treatment for the injuries you caused; doctors are human and sometimes make things worse. That is the legal principle the JI must teach. But in a way readily comprehensible by someone who did not spend three years in law school.

Which brings me thus. Here is a subject begging for a good dose of

² Here, a mistake in judgment amounting to medical negligence.

plain English. In this case the special JI proposed by plaintiff 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.

We do have a standard jury instruction (FSJI) which if adapted for this case might read:

Negligence may also be a legal cause of injury even though it operates in combination with the act of another occurring after the negligence occurs if such other cause was itself reasonably foreseeable and the negligence contributes substantially to producing such injury.

See Fla. Std. Jury Instr. (Civ.) 401.12c. This is a generic instruction for concurring or intervening negligence. From a plain English perspective, I don't think this FSJI is satisfactory in cases of liability for later negligent medical treatment. I therefore 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.**

Again, this is just a suggestion. But the FSJI needs a specific instruction for this complex legal subject.

* * *

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County; J. Tim Strickland, Judge; L.T. Case No. 2006-0515

CA 10.

Elwood T. Lippincott, Jr. of Elwood T. Lippincott, Jr., P.A., Coral Gables, John W. Gautier of Gautier Law Firm, P.A., Miami, and Bard D. Rockenbach and Andrew A. Harris of Burlington & Rockenbach, P.A., West Palm Beach, for appellants.

Charles W. Hall and Mark D. Winker of Banker Lopez Gassler P.A., St. Petersburg, for appellees.

Not final until disposition of timely filed motion for rehearing.

***Stuart v Hertz* Instruction**

If you determine that the Defendant's negligence was a legal cause of injury to the Plaintiff, then the Defendant is also liable for any additional injury resulting from medical treatment of the initial injury as long as the plaintiff used reasonable care in selecting medical providers and in following medical instructions.

Note on Use

This instruction is intended for use in cases like *Stuart v Hertz*, 351 So. 2d 703 (Fla. 1977). It should not be used where there is an issue as to the necessity for the medical treatment.

Compilation of Emails on Concurring and Intervening Cause

8/18/10

Dear Negligence Subcommittee Members-

During the July meeting, it was decided that we should assemble a draft jury instruction on the straight *Stuart v Hertz* principle, setting aside the unnecessary medical treatment issue currently covered by the damages instruction as to awarding costs of medical treatment reasonably and necessarily obtained by the plaintiff.

As Chair of the subcommittee, Judge Bailey asked me to circulate a draft that she and I put together during the last meeting. The draft is for consideration and revision by the subcommittee in the first instance, as I understand it from the minutes of the July meeting. If the subcommittee is able to agree on a draft for circulation to the full SJL Committee before the next meeting, that will be the next step.

Liz Russo

My immediate reaction to this is that it seems to put the burden on the plaintiff to show that she used reasonable care in selecting a doctor and reasonable care in following instructions. I question whether, for instance, missing an appointment with the doctor (not following instructions) would bar a claim for recovery of damages based on the subsequent treater's negligent care. Rather, it seems, the initial tortfeasor would be liable for whatever injuries are caused by treatment and care the plaintiff receives as a result of the initial tort, but that the defendant would have a defense akin to comparative negligence or a bar to certain claimed damages if the defendant proves that the plaintiff was negligent in failing to follow instructions AND if such negligence caused the plaintiff to suffer further injury or failed to mitigate the injury that was caused by the initial tortfeasor.

Alan Wagner

If we want the narrowest possible instruction, we could delete the language as to "as long as the plaintiff used reasonable care in selecting medical providers and in following medical instructions."

Stuart v Hertz includes the reasonable selection and following instructions in stating the basic rule, but it may be better just to reserve language on those subjects for cases in which there are issues about the providers selected by the plaintiff or about the plaintiff's compliance with medical instructions. Not many cases have those issues when all that is present is a true *Stuart v Hertz* case, i.e., initial injury/subsequent additional injury from medical treatment of the initial injury.

Liz

From: Lake Lytal, Jr. [mailto:llytal@palmbeachlaw.com]
Sent: Wednesday, August 18, 2010 11:31 AM

I prefer the preemptive type of instruction suggested by Judge Farmer in the decision we discussed at the meeting. I also agree with Allen's concerns. I believe the following covers it:

A person responsible for negligently injuring another is also responsible for loss, injury or damage caused by medical care or treatment reasonably obtained by the Claimant.

I disagree with the second sentence of Elizabeth's Notes as the defense should not be able to avoid this aspect of the law by arguing that the treatment was unnecessary. I believe this is covered by requiring that the treatment be reasonably obtained.

I also agree with Lake's version. Allen's concerns are well taken and I think Lake's version covers the initial or basic use of *Stuart v Hertz* (as Liz has also subsequently suggested). Jeff

From: Lucy Chernow Brown [mailto:LCbrown@pbcbgov.org]
Sent: Wednesday, August 18, 2010 11:53 AM

I agree with Lake's version and reasoning. lcb

From: Elizabeth Russo [mailto:Liz@russoappeals.com]
Sent: Thursday, August 19, 2010 8:39 AM

Lake's comments are getting us back into the problem I thought we were trying to avoid, at least at this juncture. The idea discussed at the end of the last meeting was that we try to come up with a straight *Stuart v Hertz* instruction, separating out the unnecessary medical treatment subject for the time being. But, maybe it is not possible to separate the two.

Lake says: "I disagree with the second sentence of Elizabeth's Notes as the defense should not be able to avoid this aspect of the law by arguing that the treatment was unnecessary."

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 creating any advantages or disadvantages for either plaintiffs or defendants.

Using Lake's format, here is another possible way of doing it.

A person responsible for negligently injuring another is also responsible for additional loss, injury or damage caused by necessary medical care or treatment the claimant obtained.

On 8/19/10 10:13 AM, "Louis K. Rosenbloum" <lrosenbloum@rosenbloumlaw.com> wrote:

I think the question whether medical treatment is necessary and reasonable is covered by FSJI 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]."). Adding such terms as "necessary" or "reasonable" to the *Stuart v. Hertz* instruction is redundant.

FSJI 501.2b gives the defense the right to argue that plaintiff obtained additional medical treatment unnecessarily to inflate her claim (if there is evidence to support that argument).

I agree, this still allows the defense to argue that specifics treatment was not necessary. Pete DeMahy

I think we are getting close. However, do we need the word "additional"? And are we missing a basic concept that the initial tortfeasor is liable not only if the care was reasonable to obtain, but negligently delivered? The goal should be to instruct the jury that the tortfeasor is liable for negligently caused injury by a health care provider. Neal Roth

From: Alan Wagner <AlanWagner@WagnerLaw.com>
Sent: Thu Aug 19 13:17:13 2010

I can live with that format. As a practical matter, I think that any medical treatment "reasonably obtained" will always be "necessary medical care". I would suggest a slight rewording so that it is a little clearer and consistent with existing instruction form, so, we would go from:

A person responsible for negligently injuring another is also responsible for additional loss, injury or damage caused by necessary medical care or treatment the claimant obtained.

To:

A person who negligently injures another is also responsible for additional loss, injury or damage caused by necessary medical care or treatment obtained by the claimant.

Actually, in drafting this, I think we need to consider where the instruction would fall when actually given to a jury. That way, we can look at the wording and structure of the instruction as it would be given in context. Will this be part of 501.5 – perhaps as a subsection "c"? If so, we might follow the format of the aggravation instruction, so that it becomes:

If you find that the (defendant(s)) caused a bodily injury, then the defendant is also responsible for any additional loss, injury or damage caused by necessary medical care or treatment obtained by the claimant

That said, we may put the instruction in 501.2, as a part of 501.2(b) – where the elements of damage are listed. To me, the Stuart instruction is probably more logical to be found there. This is, after all, an additional item of damage. In that case, the instruction would become (inclusive of (b), for the sake of context:

b. Medical expenses:

Care and treatment of claimant:

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].

Additional losses caused by subsequent medical care

any additional loss, injury or damage caused by necessary medical care or treatment obtained by the claimant

Alan Wagner

I started to add a "whether or not the medical care was negligently provided or not" type of addition, but by doing so and instructing specifically that the D is liable for negligent care, you start to interjecting into the trial the issue of whether the care was negligent or not when it does not matter whether the subsequent care

was within the standard of care or a breach of it. In either case, the initial tortfeasor is liable, so the jury will never be called upon to hear evidence about whether the subsequent care was negligent or whether there was a breach of the standard of care. It is not an issue to be determined. Like all medical care for which you seek recovery, though, it must have been “necessarily or reasonably obtained”

losses caused by subsequent medical care

any loss, injury or damage caused by medical care and treatment necessarily or reasonably obtained by the claimant

Alan

I disagree with the word “necessary” for reasons previously expressed.

I don’t think the new instruction should go in 501.2 because that instruction deals with specific elements of damages. *Stuart v. Hertz* relates to intervening cause and therefore should go in the legal cause instruction, perhaps as 401.12d. Or, as you originally suggested, 501.5 is a good choice since *Stuart v. Hertz* is already cited in the Notes on Use to 501.5b. Louis Rosenbloum

Folks, I suggest we break this into two pieces. First would be basic *Stuart v. Hertz*:

A person who negligently injures another is also responsible for additional loss, injury or damage caused by necessary medical care or treatment obtained by the claimant.

Then, if the subcommittee wishes, there could be another optional subsection to deal with the question of whether the treatment was reasonable and necessary IF THAT IS AN ISSUE IN THE CASE.

Then the full committee can take up how they want to address this. What do you think?

Jennifer

I like this two-pronged approach. Chuck Ingraham

From: Pete DeMahy [mailto:pdemahy@dldlawyers.com]

Sent: Thursday, August 19, 2010 1:50 PM

...as long as the care was reasonable and necessary...

No, the care does not need to be reasonable and necessary – it needs to be “care and treatment necessarily or reasonably **obtained**”. If the care you reasonably obtain turns out to be unreasonably provided, *Stuart* tells us that you still get to recover the cost of the unreasonably provided care (and other damages that may have been caused by it).

Alan

Should we say

If you find that the (defendant(s)) caused a ~~bodily injury~~ loss, injury or damage to claimant, then the defendant is also responsible for any additional loss, injury or damage caused by medical care or treatment reasonably and necessarily obtained by the claimant.

Louis Rosenbloum

From: Alan Wagner [mailto:AlanWagner@WagnerLaw.com]

Sent: Thursday, August 19, 2010 1:05 PM

I tend to agree with Louis about the "necessary" word. If we are to follow the 501.5 format, then it should read:

If you find that the (defendant(s)) caused a bodily injury, then the defendant is also responsible for any additional loss, injury or damage caused by medical care or treatment reasonably and necessarily obtained by the claimant

It would seem that the trigger is whether the care was reasonably and necessarily "obtained" (see 501.2).

I think bodily injury is the correct phrase because you seek medical care for bodily injury, not for other losses or damages.

Alan

Agree w/ Alan, but I also like Jennifer's two-prong approach for those few cases in which the issue of whether the treatment was reasonable and necessary may be appropriate.

Dixon Ross McCloy, Jr., Esq.

Sent: Friday, August 20, 2010 9:46 AM

I too like Jennifer's approach and suggestion - it's legally accurate, fair, systematic and logically ordered.

Joseph L. Amos, Jr.

In my opinion, adding a second instruction to decide whether the additional treatment obtained by the claimant was reasonable and necessary creates an affirmative defense not authorized by Florida law and will create additional, unnecessary litigation. Louis Rosenbloum

From: Kest, John [mailto:ctjuk1@ocnjcc.org]

Sent: Friday, August 20, 2010 6:42 AM

From an "ease of use" and clarity standpoint, Jennifer's two-prong approach may be more workable for both the Bar and the Bench.

John Marshall Kest

I concur with Judge Kest. lcb

The problem is the defense would like to hire a medical expert to say that the treatment selected by the treating Dr was unnecessary and thus avoid responsibility for the consequences of the treatment while the law is that the defendant is responsible for the consequences of the treatment if the Claimant reasonably obtained the treatment. In my opinion the instruction we are working on should not include the word necessary.

Lake Lytal

I have saved copies of all of the e-mails circulated on this topic so we can go back to them during the meeting if we need to retrace the steps. But, to sum up where things seem to be now, a lot of the subcommittee members have indicated that they like Judge Bailey's suggested two pronged approach, which was:

Folks, I suggest we break this into two pieces. First would be basic *Stuart v. Hertz*:

A person who negligently injures another is also responsible for additional loss, injury or damage caused by necessary medical care or treatment obtained by the claimant.

Then, if the subcommittee wishes, there could be another optional subsection to deal with the question of whether the treatment was reasonable and necessary IF THAT IS AN ISSUE IN THE CASE.

Then the full committee can take up how they want to address this. What do you think?

Another group was working on a version started, I think, by Alan Wagner, the latest of which looked like this:

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

If there is a general concurrence in Judge Bailey's two pronged approach, then we could take references to "reasonable" and "necessary" out of the basic *Stuart v Hertz* first prong instruction, and choose between the versions suggested respectively by Judge Bailey and by Alan Wagner et al. The choice would thus be between:

A person who negligently injures another is also responsible for additional loss, injury or damage caused by medical care or treatment obtained by the claimant.

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

I don't mean to be overstepping my bounds here, but was just trying to get the various trails of discussion back on one page

Elizabeth Russo, Esquire

From: Louis K. Rosenbloum [mailto:lrosenbloum@rosenbloumlaw.com]

Sent: Friday, August 20, 2010 10:01 AM

For the reasons outlined in Lake's last e-mail, I oppose using the word "necessary" in the Stuart v. Hertz instruction. I don't think the word "necessary" appears in the Stuart opinion. The word "reasonable" gives the defense sufficient leeway to challenge the claimant's additional medical treatment.

I also oppose using the word "negligently" because the Stuart v. Hertz instruction will be used in personal injury cases not involving negligence, such as strict product liability and intentional torts.

In short, I prefer Alan's instruction without the word "necessary" as follows:

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

I agree with Louis on this. lcb

My vote too. Jeff

From: Judge Jacqueline R. Griffin [mailto:griffinj@flcourts.org]

I vote for this one.

I agree with this approach.

Elizabeth Russo, Esquire

From: Bailey, Jennifer [mailto:JBailey@jud11.flcourts.org]

Sent: Friday, August 20, 2010 2:16 PM

If we do a simple Stuart instruction for part 1, which would be part of legal cause (I think) Then can't we draft something and debate whether the reasonable and necessary part should be part 2 of a Stuart instruction or treat it as part of the damages instructions?

From: Elizabeth Russo [mailto:Liz@russoappeals.com]

Sent: Friday, August 20, 2010 1:37 PM

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.

Elizabeth Russo

The proposed instruction does not say the tortfeasor is responsible for medical treatment obtained by the plaintiff as your email suggests. It says the tortfeasor is responsible for medical treatment **reasonably** obtained by the plaintiff. Louis Rosenbloum

From: Elizabeth Russo [mailto:Liz@russoappeals.com]

Sent: Friday, August 20, 2010 1:54 PM

How about this:

Note on Use: The appropriate bracketed portion to be given only if there is there is an issue as to the reasonableness of, or necessity for, the medical care or treatment.

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

Elizabeth Russo, Esquire

Well-worded. I just disagree with the word "necessarily." Louis Rosenbloum

From: Alan Wagner [mailto:AlanWagner@WagnerLaw.com]

Sent: Friday, August 20, 2010 3:22 PM

But that is not what the bracket deals with. The bracket deals with whether the care was reasonably or necessarily OBTAINED, not whether, in fact, the care was unnecessary, which is the point of your note

Typically, the defense argues that claimant's medical treatment and resulting medical expenses were unnecessary because the accident did not cause any injury. If the jury so finds, it won't assess damages for the additional injuries caused by medical treatment (assuming, as we must, the jury follows the instruction we are drafting). Rosenbloum

I don't know what this two pronged approach would look like.

Even without *Stuart*, the medicals musty be "reasonably and necessarily obtained". You can always, only, recover for medicals that are "reasonably and

necessarily obtained.” If we were to take this in two steps, then the “pure” Stuart instruction would read something like:

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

If we were to agree that the care must also be objectively “necessary” (and I do not), then we would need a separate instruction that somehow dealt with this “necessary” issue -- telling the jury that if they think that the care was “unnecessary” (whatever that is) that the defendant is not responsible.

If the medicals were reasonably and necessarily obtained, the defendant is responsible. If care that is reasonable and necessarily obtained is provided negligently, then the initial tortfeasor is responsible for that additional damage. That is clear from Stuart.

The defense still retains the right to argue or prove that the bills were not reasonably incurred. The defense always has the ability to prove that the \$250,000 bill to set a broken arm should not be the responsibility of the defendant.

If the medical treatment was unnecessary, then, that is, by definition, medical care that would violate the standard of care. I cannot see any rational doctor testifying that it is perfectly reasonable and fully within the standard of care to provide “unnecessary” treatment. Whether some other doctor would have done it differently, of course, is irrelevant. That is a matter of professional judgment. If you do not reasonably need surgery (i.e., it is unnecessary), then a doctor is negligent to operate. However, if the claimant reasonably obtained the treatment, then the defendant is liable, even if it was negligently provided. That is the holding of Stuart.

This still leaves the defense able to argue that the care received when a claimant goes to a doctor who advertizes “let us run up your bills for a bigger settlement” is care that was not reasonably obtained. That happenstance is covered by the requirement that all care be reasonably obtained.

The two pronged approach has the jury deciding whether the care itself was “necessary”. What exactly would that instruction look like? What would be the proof upon which a jury would decide this issue? When a doctor would testify that some specific care, at the time it was rendered, was “unnecessary” how could that be the case if it was also care that was reasonable for a physician to provide (i.e., within the standard of care)?

We would be left with a strange quandary indeed. Clearly, if a physician provided “unnecessary” care that was unreasonable for him or her to provide (a breach of the standard of care), Stuart tells us that the defendant is responsible

for that doctor's negligent care. Thus, in this two pronged approach, it would only be reasonable care, provided within the applicable standard of care, but which is also "unnecessary" (whatever that is) that the Defendant would not be responsible for – since the unreasonable and unnecessary care is plainly a Stuart damage for which the defendant is responsible. We would now need to instruct the jury on medical malpractice issues, since if they found the care to be negligent, the defendant is liable for it. You will turn auto accidents into mini medical cases.

There is no such thing as unnecessary care that was reasonably provided within the applicable standard of care. That creature does not exist. Even if it did exist, there is no case about which I am aware that would hold that the defendant is not liable for medical care reasonably obtained, that was provided to a patient within the applicable standard of care.

If it was proper for a doctor to provide the care, the defendant is liable. If it was improper to provide the care, the defendant is liable. There is no room for a "necessary" or "unnecessary" consideration by the jury when you are talking about the specific care itself. The care was either reasonable (proper) to provide or negligent (improper) to provide. It was either reasonably obtained or it was not.

In fact, as I see it, a Stuart instruction, combined with the traditional damage instruction for recovery of medicals accomplished both:

If you find that the (defendant(s)) caused a bodily injury to the claimant, then the defendant is also responsible for any additional loss, injury or damage caused by medical care or treatment reasonably and necessarily obtained by the claimant.

Frankly, I tend to agree with Louis that we don't need the "necessarily" component. I don't think that it adds much of substance, but it is already in the standard instruction for recovering medical bills already, so I would hesitate to make the standard different from what is already being instructed. To do so would leave us with the "normal" instruction that does say Reasonably and necessarily obtained" but then another instruction that omitted "necessarily" – which would beg for a jury question about why the word was in one instruction dealing with recovering medical bills, but not in the other instruction dealing with the same subject.

Alan

I have been out of pocket for a while and thus have not commented on this for some time. I must confess that I am having a hard time putting all of these emails together to understand everyone's concerns. I agree with Louis. While we are addressing Stuart v Hertz we can not ignore the Dungan decision which rejected Liz's argument that the necessity of treatment is a separate hurdle the Claimant must clear to recover from the consequences of care the Claimant reasonably (in the mind of the Claimant) obtained. If the Claimant reasonably thought the care

was necessary Stuart applies according to Dungan. Frankly, I thought this was conceded at the last meeting. I still think one simple sentence is all that is required. Lytal 9/1



"Elizabeth Russo"
<Liz@russoappeals.com>

01/30/2011 09:27 AM

To "Louis K. Rosenbloum"
<lrosenbloum@rosenbloumlaw.com>, "Lake Lytal, Jr."
<llytal@palmbeachlaw.com>, "Lucy Chernow Brown"
cc <jjenning@flabar.org>, "Tracy Gunn"
<tgunn@gunnappeals.com>, "Judge James Barton "
<BARTONJM@fljud13.org>

bcc

Subject RE: Negligence subcommittee

I agree with Louis' final version and Note on Use, except that I think the Note on Use should refer only to *Stuart v Hertz* and delete the reference to *Nason v. Shafranski*, 33 So. 3d 117 (Fla. 4th DCA 2010). *Nason* contained a broader discussion and additional concepts beyond *Stuart v Hertz* and will create arguments between defense and plaintiffs lawyers. It was a long and winding road that led to the draft instruction and note on use as phrased without *Nason*. They will serve the intended *Stuart v Hertz* purpose, I submit, if the *Nason* case is just left out.

Liz Russo

Elizabeth Russo, Esquire
Russo Appellate Firm, P.A.
6101 SW 76 Street
Miami, Florida 33143
Telephone (305) 666-4660
Facsimile (305) 666-4470
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From: Louis K. Rosenbloum [mailto:lrosenbloum@rosenbloumlaw.com]
Sent: Friday, January 28, 2011 3:10 PM
To: 'Lake Lytal, Jr.'; Elizabeth Russo; 'Lucy Chernow Brown'; 'Kest, John'; 'Ross McCloy'; 'Neal Roth'; 'Alan Wagner'; 'Bailey, Jennifer'; 'Pete DeMahy'; jamos@fisherlawfirm.com; costellod@jud14.flcourts.org; jeff@fulfordlaw.com; griffinj@flcourts.org; jci@eifg-law.com; larosee@flcourts.org
Cc: jjenning@flabar.org; Tracy Gunn; Judge James Barton ; Louis K Rosenbloum
Subject: RE: Negligence subcommittee

Dear Negligence Subcommittee members:

I attach a memo regarding the pending Stuart v. Hertz instruction.

Louis Rosenbloum

From: Lake Lytal, Jr. [mailto:llytal@palmbeachlaw.com]

Sent: Wednesday, September 01, 2010 12:38 PM

To: Louis K. Rosenbloum; Elizabeth Russo; Lucy Chernow Brown; Kest, John; Ross McCloy; Neal Roth; Alan Wagner; Bailey, Jennifer; Pete DeMahy; jamos@fisherlawfirm.com; costellod@jud14.flcourts.org; jeff@fulfordlaw.com; griffinj@flcourts.org; jci@eifg-law.com; larosee@flcourts.org

Cc: jjenning@flabar.org

Subject: RE: Negligence subcommittee

I have been out of pocket for a while and thus have not commented on this for some time. I must confess that I am having a hard time putting all of these emails together to understand everyone's concerns. I agree with Louis. While we are addressing Stuart v Hertz we can not ignore the Dungan decision which rejected Liz's argument that the necessity of treatment is a separate hurdle the Claimant must clear to recover from the consequences of care the Claimant reasonably (in the mind of the Claimant) obtained. If the Claimant reasonably thought the care was necessary Stuart applies according to Dungan. Frankly, I thought this was conceded at the last meeting. I still think one simple sentence is all that is required.

From: Louis K. Rosenbloum [mailto:lrosenbloum@rosenbloumlaw.com]

Sent: Friday, August 20, 2010 10:01 AM

To: 'Elizabeth Russo'; 'Lucy Chernow Brown'; 'Kest, John'; 'Ross McCloy'; 'Neal Roth'; 'Alan Wagner'; 'Bailey, Jennifer'; 'Pete DeMahy'; Lake Lytal, Jr.; jamos@fisherlawfirm.com; costellod@jud14.flcourts.org; jeff@fulfordlaw.com; griffinj@flcourts.org; jci@eifg-law.com; larosee@flcourts.org

Cc: jjenning@flabar.org

Subject: RE: Negligence subcommittee

For the reasons outlined in Lake's last e-mail, I oppose using the word "necessary" in the Stuart v. Hertz instruction. I don't think the word "necessary" appears in the Stuart opinion. The word "reasonable" gives the defense sufficient leeway to challenge the claimant's additional medical treatment.

I also oppose using the word "negligently" because the Stuart v. Hertz instruction will be used in personal injury cases not involving negligence, such as strict product liability and intentional torts.

In short, I prefer Alan's instruction without the word "necessary" as follows:

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

From: Elizabeth Russo [mailto:Liz@russoappeals.com]

Sent: Friday, August 20, 2010 8:27 AM

To: Lucy Chernow Brown; Kest, John; Ross McCloy; Neal Roth; Alan Wagner; Louis K. Rosenbloum; Bailey, Jennifer; Pete DeMahy; llytal@palmbeachlaw.com; jamos@fisherlawfirm.com;

costellod@jud14.flcourts.org; jeff@fulfordlaw.com; griffinj@flcourts.org; jci@eifg-law.com;
larosee@flcourts.org
Cc: jjenning@flabar.org
Subject: RE: Negligence subcommittee

I have saved copies of all of the e-mails circulated on this topic so we can go back to them during the meeting if we need to retrace the steps. But, to sum up where things seem to be now, a lot of the subcommittee members have indicated that they like Judge Bailey's suggested two pronged approach, which was:

Folks, I suggest we break this into two pieces. First would be basic *Stuart v. Hertz*:

A person who negligently injures another is also responsible for additional loss, injury or damage caused by necessary medical care or treatment obtained by the claimant.

Then, if the subcommittee wishes, there could be another optional subsection to deal with the question of whether the treatment was reasonable and necessary IF THAT IS AN ISSUE IN THE CASE.

Then the full committee can take up how they want to address this. What do you think?

Another group was working on a version started, I think, by Alan Wagner, the latest of which looked like this:

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

If there is a general concurrence in Judge Bailey's two pronged approach, then we could take references to "reasonable" and "necessary" out of the basic *Stuart v Hertz* first prong instruction, and choose between the versions suggested respectively by Judge Bailey and by Alan Wagner et al. The choice would thus be between:

A person who negligently injures another is also responsible for additional loss, injury or damage caused by medical care or treatment obtained by the claimant.

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

I don't mean to be overstepping my bounds here, but was just trying to get the various trails of discussion back on one page

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From: Lucy Chernow Brown [mailto:LCbrown@pbcgov.org]
Sent: Friday, August 20, 2010 8:54 AM
To: Kest, John; Ross McCloy; Neal Roth; Alan Wagner; Louis K. Rosenbloum; Bailey, Jennifer; Pete DeMahy; Elizabeth Russo; llytal@palmbeachlaw.com; jamos@fisherlawfirm.com; costellod@jud14.flcourts.org; jeff@fulfordlaw.com; griffinj@flcourts.org; jci@eifg-law.com; larosee@flcourts.org
Cc: jjenning@flabar.org
Subject: RE: Negligence subcommittee

I concur with Judge Kest. lcb

From: Kest, John [mailto:ctjuk1@ocnjcc.org]
Sent: Friday, August 20, 2010 6:42 AM
To: Ross McCloy; Neal Roth; Alan Wagner; Louis K. Rosenbloum; Bailey, Jennifer; Pete DeMahy; Liz@russoappeals.com; llytal@palmbeachlaw.com; jamos@fisherlawfirm.com; costellod@jud14.flcourts.org; jeff@fulfordlaw.com; griffinj@flcourts.org; jci@eifg-law.com; larosee@flcourts.org; Lucy Chernow Brown
Cc: jjenning@flabar.org
Subject: RE: Negligence subcommittee

From an "ease of use" and clarity standpoint, Jennifer's two-prong approach may be more workable for both the Bar and the Bench.

John Marshall Kest
Circuit Judge, Ninth Judicial Circuit

From: Ross McCloy [mailto:rmccloy@harrisonsale.com]
Sent: Thursday, August 19, 2010 6:05 PM
To: Neal Roth; Alan Wagner; Louis K. Rosenbloum; Bailey, Jennifer; Pete DeMahy;

Liz@russoappeals.com; llytal@palmbeachlaw.com; jamos@fisherlawfirm.com;
costellod@jud14.flcourts.org; jeff@fulfordlaw.com; griffinj@flcourts.org; jci@eifg-law.com; Kest, John;
larosee@flcourts.org; LCBrown@pbcgov.org

Cc: jjenning@flabar.org

Subject: RE: Negligence subcommittee

Agree w/ Alan, but I also like Jennifer's two-prong approach for those few cases in which the issue of whether the treatment was reasonable and necessary may be appropriate.

Dixon Ross McCloy, Jr., Esq.
Harrison, Sale, McCloy,
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From: Neal Roth [mailto:NAR@grossmanroth.com]

Sent: Thursday, August 19, 2010 4:53 PM

To: Alan Wagner; Louis K. Rosenbloum; Bailey, Jennifer; Pete DeMahy; Liz@russoappeals.com; llytal@palmbeachlaw.com; jamos@fisherlawfirm.com; costellod@jud14.flcourts.org; jeff@fulfordlaw.com; griffinj@flcourts.org; jci@eifg-law.com; ctjujk1@ocnjcc.org; larosee@flcourts.org; Ross McCloy; LCBrown@pbcgov.org

Cc: jjenning@flabar.org

Subject: RE: Negligence subcommittee

This is looking good now.

Neal A. Roth
2525 Ponce de Leon Blvd
Coral Gables, Florida 33134
305-442-8666(O)
305-285-1668(fax)
nar@grossmanroth.com

From: Alan Wagner [mailto:AlanWagner@WagnerLaw.com]

Sent: Thursday, August 19, 2010 11:52 AM

To: 'Louis K. Rosenbloum'; 'Bailey, Jennifer'; 'Pete DeMahy'; Neal Roth; Liz@russoappeals.com; llytal@palmbeachlaw.com; jamos@fisherlawfirm.com; costellod@jud14.flcourts.org; jeff@fulfordlaw.com; griffinj@flcourts.org; jci@eifg-law.com; ctjujk1@ocnjcc.org; larosee@flcourts.org; rmccloy@harrisonsale.com; LCBrown@pbcgov.org

Cc: jjenning@flabar.org

Subject: RE: Negligence subcommittee

I think bodily injury is the correct phrase because you seek medical care for bodily injury, not for other losses or damages.

Alan

From: Louis K. Rosenbloum [mailto:lrosenbloum@rosenbloumlaw.com]
Sent: Thursday, August 19, 2010 2:11 PM
To: 'Alan Wagner'; 'Bailey, Jennifer'; 'Pete DeMahy'; 'Neal Roth'; Liz@russoappeals.com; llytal@palmbeachlaw.com; jamos@fisherlawfirm.com; costellod@jud14.flcourts.org; jeff@fulfordlaw.com; griffinj@flcourts.org; jci@eifg-law.com; ctjujk1@ocnjcc.org; larosee@flcourts.org; rmccloy@harrisonsale.com; LCbrown@pbcgov.org
Cc: jjenning@flabar.org
Subject: RE: Negligence subcommittee

Should we say

If you find that the (defendant(s)) caused a ~~bodily injury~~ loss, injury or damage to claimant, then the defendant is also responsible for any additional loss, injury or damage caused by medical care or treatment reasonably and necessarily obtained by the claimant.

From: Alan Wagner [mailto:AlanWagner@WagnerLaw.com]
Sent: Thursday, August 19, 2010 1:05 PM
To: 'Bailey, Jennifer'; 'Pete DeMahy'; 'Neal Roth'; Liz@russoappeals.com; llytal@palmbeachlaw.com; jamos@fisherlawfirm.com; costellod@jud14.flcourts.org; jeff@fulfordlaw.com; griffinj@flcourts.org; jci@eifg-law.com; ctjujk1@ocnjcc.org; larosee@flcourts.org; rmccloy@harrisonsale.com; lrosenbloum@rosenbloumlaw.com; LCbrown@pbcgov.org
Cc: jjenning@flabar.org
Subject: RE: Negligence subcommittee

I tend to agree with Louis about the "necessary" word. If we are to follow the 501.5 format, then it should read:

If you find that the (defendant(s)) caused a bodily injury, then the defendant is also responsible for any additional loss, injury or damage caused by medical care or treatment reasonably and necessarily obtained by the claimant

It would seem that the trigger is whether the care was reasonably and necessarily "obtained" (see 501.2).

Alan

From: Bailey, Jennifer [mailto:JBailey@jud11.flcourts.org]
Sent: Thursday, August 19, 2010 2:01 PM
To: Pete DeMahy; Neal Roth; AlanWagner@WagnerLaw.com; Liz@russoappeals.com; llytal@palmbeachlaw.com; jamos@fisherlawfirm.com; costellod@jud14.flcourts.org; jeff@fulfordlaw.com; griffinj@flcourts.org; jci@eifg-law.com; ctjujk1@ocnjcc.org; larosee@flcourts.org; rmccloy@harrisonsale.com; lrosenbloum@rosenbloumlaw.com; LCbrown@pbcgov.org

Cc: jjenning@flabar.org

Subject: RE: Negligence subcommittee

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Then the full committee can take up how they want to address this. What do you think?

Jennifer

From: Pete DeMahy [mailto:pdemahy@dldlawyers.com]

Sent: Thursday, August 19, 2010 1:50 PM

To: Neal Roth; AlanWagner@WagnerLaw.com; Liz@russoappeals.com; llytal@palmbeachlaw.com; Bailey, Jennifer; jamos@fisherlawfirm.com; costellod@jud14.flcourts.org; jeff@fulfordlaw.com; griffinj@flcourts.org; jci@eifg-law.com; ctjujk1@ocnjcc.org; larosee@flcourts.org; rmccloy@harrisonsale.com; Irosenbloum@rosenbloumlaw.com; LCbrown@pbcgov.org

Cc: jjenning@flabar.org

Subject: Re: Negligence subcommittee

...as long as the care was reasonable and necessary...

On 8/19/10 1:29 PM, "Neal Roth" <NAR@grossmanroth.com> wrote:

I think we are getting close. However, do we need the word "additional"? And are we missing a basic concept that the initial tortfeasor is liable not only if the care was reasonable to obtain, but negligently delivered? The goal should be to instruct the jury that the tortfeasor is liable for negligently caused injury by a health care provider.

----- Original Message -----

From: Alan Wagner <AlanWagner@WagnerLaw.com>

To: 'Elizabeth Russo' <Liz@russoappeals.com>; Neal Roth; 'Lake Lytal, Jr.' <llytal@palmbeachlaw.com>; 'Bailey, Jennifer' <JBailey@jud11.flcourts.org>; 'Amos, Joseph' <jamos@fisherlawfirm.com>; 'Dedee Costello' <costellod@jud14.flcourts.org>; 'Pete DeMahy' <pdemahy@dldlawyers.com>; 'Jeff Fulford' <jeff@fulfordlaw.com>; griffinj@flcourts.org <griffinj@flcourts.org>; 'Ingram, J.' <jci@eifg-law.com>; 'Kest, John' <ctjujk1@ocnjcc.org>; 'LaRose, Edward' <larosee@flcourts.org>; 'McCloy, Dixon' <rmccloy@harrisonsale.com>; 'Louis K. Rosenbloum' <Irosenbloum@rosenbloumlaw.com>; 'Lucy Chernow Brown' <LCbrown@pbcgov.org>

Cc: 'Jodi @ TFB' <jjenning@flabar.org>

Sent: Thu Aug 19 13:17:13 2010

Subject: RE: Negligence subcommittee

I can live with that format. As a practical matter, I think that any medical treatment "reasonably obtained" will always be "necessary medical care". I would suggest a slight rewording so that it is a little clearer and consistent with existing instruction form, so, we would go from:

A person responsible for negligently injuring another is also responsible for additional loss, injury or damage caused by necessary medical care or treatment the claimant obtained.

To:

A person who negligently injures another is also responsible for additional loss, injury or damage caused by necessary medical care or treatment obtained by the claimant.

Actually, in drafting this, I think we need to consider where the instruction would fall when actually given to a jury. That way, we can look at the wording and structure of the instruction as it would be given in context. Will this be part of 501.5 – perhaps as a subsection “c”? If so, we might follow the format of the aggravation instruction, so that it becomes:

If you find that the (defendant(s)) caused a bodily injury, then the defendant is also responsible for any additional loss, injury or damage caused by necessary medical care or treatment obtained by the claimant

That said, we may put the instruction in 501.2, as a part of 501.2(b) – where the elements of damage are listed. To me, the Stuart instruction is probably more logical to be found there. This is, after all, an additional item of damage. In that case, the instruction would become (inclusive of (b), for the sake of context:

b. Medical expenses:

Care and treatment of claimant:

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].

Additional losses caused by subsequent medical care

any additional loss, injury or damage caused by necessary medical care or treatment obtained by the claimant

Alan

Alan Wagner

Wagner, Vaughan & McLaughlin

Tampa, Florida

From: Elizabeth Russo [<mailto:Liz@russoappeals.com>]

Sent: Thursday, August 19, 2010 9:39 AM

To: Neal Roth; Lake Lytal, Jr.; Bailey, Jennifer; Amos, Joseph; Dedee Costello ; Pete DeMahy; Jeff Fulford; griffinj@flcourts.org; Ingram, J.; Kest, John; LaRose, Edward; McCloy, Dixon; Louis K. Rosenbloum; alanwagner@wagnerlaw.com; Lucy Chernow Brown

Cc: Jodi @ TFB

Subject: RE: Negligence subcommittee

Lake's comments are getting us back into the problem I thought we were trying to avoid, at least at this juncture. The idea discussed at the end of the last meeting was that we try to come up with a straight Stuart v Hertz instruction, separating out the unnecessary medical treatment subject for the time being. But, maybe it is not possible to separate the two.

Lake says: " I disagree with the second sentence of Elizabeth's Notes as the defense should not be able to avoid this aspect of the law by arguing that the treatment was unnecessary."

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 creating any advantages or disadvantages for either plaintiffs or defendants.

Using Lake's format, here is another possible way of doing it.

A person responsible for negligently injuring another is also responsible for additional loss, injury or damage caused by necessary medical care or treatment the claimant obtained.

From: Neal Roth [<mailto:NAR@grossmanroth.com>]
Sent: Wednesday, August 18, 2010 12:16 PM
To: Lake Lytal, Jr.; Elizabeth Russo; Bailey, Jennifer; Amos, Joseph; Dedee Costello ; Pete DeMahy; Jeff Fulford; griffinj@flcourts.org; Ingram, J.; Kest, John; LaRose, Edward; McCloy, Dixon; Louis K. Rosenbloum; alanwagner@wagnerlaw.com; Lucy Chernow Brown
Cc: Jodi @ TFB
Subject: RE: Negligence subcommittee

I agree with Lake.

Neal A. Roth

2525 Ponce de Leon Blvd

Coral Gables, Florida 33134

305-442-8666(O)

305-285-1668(fax)

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From: Lake Lytal, Jr. [<mailto:llytal@palmbeachlaw.com>]
Sent: Wednesday, August 18, 2010 8:31 AM
To: Elizabeth Russo; Bailey, Jennifer; Amos, Joseph; Dedee Costello ; Pete DeMahy; Jeff Fulford; griffinj@flcourts.org; Ingram, J.; Kest, John; LaRose, Edward; McCloy, Dixon; Louis K. Rosenbloum; Neal Roth; alanwagner@wagnerlaw.com; Lucy Chernow Brown
Cc: Jodi @ TFB
Subject: RE: Negligence subcommittee

I prefer the preemptive type of instruction suggested by Judge Farmer in the decision we discussed at the meeting. I also agree with Allen's concerns. I believe the following covers it:

A person responsible for negligently injuring another is also responsible for loss, injury or damage caused by medical care or treatment reasonably obtained by the

Claimant.

I disagree with the second sentence of Elizabeth's Notes as the defense should not be able to avoid this aspect of the law by arguing that the treatment was unnecessary. I believe this is covered by requiring that the treatment be reasonably obtained.

From: Elizabeth Russo [<mailto:Liz@russoappeals.com>]
Sent: Wednesday, August 18, 2010 10:03 AM
To: Bailey, Jennifer; Amos, Joseph; Dedee Costello ; Pete DeMahy; Jeff Fulford; griffinj@flcourts.org; Ingram, J.; Kest, John; LaRose, Edward; Lake Lytal, Jr.; McCloy, Dixon; Louis K. Rosenbloum; Neal Roth ; alanwagner@wagnerlaw.com; Lucy Chernow Brown
Cc: Jodi @ TFB
Subject: Negligence subcommittee

Dear Negligence Subcommittee Members-

During the July meeting, it was decided that we should assemble a draft jury instruction on the straight Stuart v Hertz principle, setting aside the unnecessary medical treatment issue currently covered by the damages instruction as to awarding costs of medical treatment reasonably and necessarily obtained by the plaintiff.

As Chair of the subcommittee, Judge Bailey asked me to circulate a draft that she and I put together during the last meeting. The draft is for consideration and revision by the subcommittee in the first instance, as I understand it from the minutes of the July meeting. If the subcommittee is able to agree on a draft for circulation to the full SJI Committee before the next meeting, that will be the next step.

Liz Russo

Elizabeth Russo, Esquire
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Pete L. DeMahy, Esq.

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***Stuart v. Hertz* Instruction**
Notes for February, 2011 Meeting

At the October 2010 meeting, the committee consensus was to adopt the *Stuart v. Hertz* instruction shown on page 24 of the October materials after removing the language “and necessary.” That leaves us with the following instruction:

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

I added a title and made a few minor modifications and came up with this instruction (struck through type = deletions; underlining = additions):

Subsequent injuries caused by medical treatment:

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

The chairperson directed the negligence subcommittee to consider the consensus instruction before the next meeting and determine (1) whether any introductory language is necessary; (2) where the instruction should be located in the book; (3) what notes on use are needed; and (4) whether any case citations should be added to the notes on use.

I recommend the following on these four issues:

1. I don’t think we need any introductory language other than what is suggested above.
2. Judge Barton suggested we locate the instruction in the “damages” section as 501.5(c), immediately following 501.5(a) (aggravation or activation of disease or defect) and 501.5 (b) (subsequent injuries/multiple events). Another possibility is adding the *Stuart* instruction to the legal cause instruction after concurring cause and intervening cause. I prefer Judge Barton’s suggestion because we have several different legal cause instructions that would require modification.

3 & 4. The following note on use was proposed before the October meeting (at page 17 of the October materials):

NOTE ON USE

This instruction is intended for use in cases like *Stuart v. Hertz*, 351 So. 2d 703 (Fla. 1977). It should not be used where there is an issue as to the necessity for the medical treatment.

I think we can improve on this Note on Use. As to the first sentence, *Stuart* was an indemnity case. See *Stuart*, 351 So. 2d at 704 (“[T]he issue before us is whether or not an active tortfeasor in an automobile accident may bring a third party action for indemnity against a physician for damages directly attributable to malpractice which aggravated the plaintiff’s injuries.”). So it’s somewhat misleading to say our “instruction is intended for use in cases like *Stuart v. Hertz*.”

The second sentence also is a bit misleading because it implies the *Stuart* instruction is never appropriate in cases where necessity of medical treatment is an issue. I can envision cases involving both a *Stuart* issue and a medical necessity issue.

I therefore propose the following note on use:

NOTE ON USE FOR 501.5c

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.

Louis Rosenblum

***Stuart v. Hertz* Instruction**
Notes for July, 2011 Meeting

A. Instruction

Based on the discussion and comments at the October 2010 and February 2011 meetings, the following instruction represents the committee consensus:

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).

B. Note on Use

At the October 2011 meeting, Rosenbloum proposed the following note on use:

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.

The committee members agreed we should omit the citation to the *Nason* case. Rosenbloum also believes we should omit the “e.g.” before the citation to *Stuart*. Some members favored retaining the second sentence as worded or with language to that effect. Other members favored omitting the second sentence. With the omission of the *Nason* case reference and the “e.g.”, those choices as to the note on use would read as follows:

NOTE ON USE

This instruction is intended for use in cases alleging aggravation of the initial injuries by subsequent medical treatment. *See Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977). This instruction should not be used to instruct the jury on an issue involving the necessity for medical treatment.

NOTE ON USE

This instruction is intended for use in cases alleging aggravation of the initial injuries by subsequent medical treatment. *See Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977).

C. Placement

Two placement options have been discussed, 401.12 (legal cause) and 501.5 (other contributing causes of damages). The text of both existing instructions is attached.

If the committee selects 401.12, the new instruction will be 401.12d. The note on use can be added to existing note 1 or as a separate note on use, either number 7 or placed elsewhere among the existing six notes (which will require renumbering).

If the committee selects 401.12, we will need to add the new instruction and note on use to the legal cause instructions for other types of cases where plaintiff seeks damages for bodily injuries, such as professional negligence (402.6).

If the committee selects 501.5, the new instruction will be 501.5c with the note on use added as number 3.

Louis Rosenblum
June 9, 2011

401.12 LEGAL CAUSE

a. Legal cause generally:

Negligence is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the negligence, the [loss] [injury] [or] [damage] would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage] negligence need not be the only cause. Negligence may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the negligence contributes substantially to producing such [loss] [injury] [or] [damage].

c. Intervening cause:

*Do not use the bracketed first sentence if this instruction is preceded by the instruction on concurring cause:**

***[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], negligence need not be its only cause.] Negligence may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the negligence occurs if [such other cause was itself reasonably foreseeable and the negligence contributes substantially to producing such [loss] [injury] [or] [damage]] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the negligence and the negligence contributes substantially to producing it].**

NOTES ON USE FOR 401.12

1. Instruction 401.12a (legal cause generally) is to be given in all cases. Instruction 401.12b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her negligence by reason of some other cause concurring in time and contributing to the same damage. Instruction 401.12c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 401.12a not only in determining whether defendant's negligence is actionable but also in determining whether claimant's negligence contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 401.12b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries/multiple events, instructions 501.5a or 501.5b should be given as well. See *Hart v. Stern*, 824 So.2d 927, 932–34 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So.2d 833, 835 (Fla. 4th DCA 1992).

4. Instruction 401.12c (intervening cause) embraces two situations in which negligence may be a legal cause notwithstanding the influence of an intervening cause: (1) when the damage was a reasonably foreseeable consequence of the negligence although the other cause was not foreseeable, *Mozer v. Semenza*, 177 So.2d 880 (Fla. 3d DCA 1965), and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So.2d 520 (Fla. 1980).

5. “*Probable*” results. The committee recommends that the jury not be instructed that the damage must be such as would have appeared “probable” to the actor or to a reasonably careful person at the time of the negligence. In cases involving an intervening cause, the term “reasonably foreseeable” is used in place of “probable.” The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So.2d 806, 810 (Fla. 1st DCA 1964); Prosser, *Torts* 291 (3d ed.); 2 Harper & James, *The Law of Torts*, 1137.

6. The term “substantially” is used throughout the instruction to describe the extent of contribution or influence negligence must have in order to be regarded as a legal cause. “Substantially” was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant’s negligence, *Loflin v. Wilson*, 67 So.2d 185, 191 (Fla. 1953), but also in relation to plaintiff’s comparative negligence, *Shayne v. Saunders*, 176 So. 495, 498 (Fla. 1937).

501.5 OTHER CONTRIBUTING CAUSES OF DAMAGES

a. Aggravation or activation of disease or defect:

If you find that the (defendant(s)) caused a bodily injury, and that the injury resulted in [an aggravation of an existing disease or physical defect] [or] [activation of a latent disease or physical defect], you should attempt to decide what portion of (claimant's) condition resulted from the [aggravation] [or] [activation]. If you can make that determination, then you should award only those damages resulting from the [aggravation] [or] [activation]. However, if you cannot make that determination, or if it cannot be said that the condition would have existed apart from the injury, then you should award damages for the entire condition suffered by (claimant).

NOTE ON USE FOR 501.5a

This instruction is intended for use in situations in which a preexisting physical condition is aggravated by the injury, or the injury activates a latent condition. See *C. F. Hamblen, Inc. v. Owens*, 172 So. 694 (Fla. 1937). Instruction 501.5a is necessary where Instruction 401.12b, Concurring cause, is given. See *Hart v. Stern*, 824 So.2d 927, 932–34 (Fla. 5th DCA 2002); *Auster v. Gertrude & Philip Strax Breast Cancer Detection Institute, Inc.*, 649 So.2d 883, 887 (Fla. 4th DCA 1995).

b. Subsequent injuries/multiple events:

You have heard that (claimant) may have been injured in two events. If you decide that (claimant) was injured by (defendant) and was later injured by another event, then you should try to separate the damages caused by the two events and award (claimant) money only for those damages caused by (defendant). However, if you cannot separate some or all of the damages, you must award (claimant) any damages that you cannot separate as if they were all caused by (defendant).

NOTES ON USE FOR 501.5b

1. Instruction 501.5b addresses the situation occurring in *Gross v. Lyons*, 763 So.2d 276 (Fla. 2000). It is not intended to address other situations. For example, see *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977), and *Eli Witt Cigar & Tobacco Co. v. Matatics*, 55 So.2d 549 (Fla. 1951). The committee recognizes that the instruction may be inadequate in situations other than the situation in *Gross*.

2. The committee takes no position on whether the subsequent event is limited to a tortious event, or may be a nontortious event.



Negligence Subcommittee Report for Meeting of July 12-13, 2012

Elizabeth Russo to: Barton, James

06/18/2012 03:54 PM

Cc: "Alan Wagner", "Bruce Jacobus", "Charles Ingram", "Cynthia Sass",
"Dedee Costello", "Edward LaRose", "Jeffrey Fulford", "Jennifer
Bailey", "Jodi Jennings", "John Kest", "Joseph Amos", "Karen

2 attachments



501 5c with note on use revised 5-29-12.doc3-22-12.Wagner to Barton re 401.2(b) vs. 501.5 Notes on Use.pdf

Dear Judge Barton –

The Negligence Sub-Committee had three assignments from the last meeting, as to which the following report is submitted.

(1) Stuart v Hertz instruction – We were to consider whether any changes were necessary to the proposed 'Stuart v Hertz' instruction that was published in the Florida Bar News on October 1, 2011 in light of recent additional decisions. It was decided by the majority of the Sub-Committee that the proposed instruction needed no further revisions, but that the Sub-Committee would recommend adding citations to the recent case law to the Note on Use – as reflected on the attached draft that Louis Rosenblum was kind enough to prepare. For whatever it means, Karen Barnett and the undersigned dissent and believe that the Note on Use should refer to Stuart v Hertz only as the rest of the cited cases (a) address situations other than that for which Stuart v Hertz was intended; and (b) 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.

(2) December 13, 2011 facsimile from Jeff Fulford to Judge Barton positing the need for an additional premises liability instruction to cover the duty to exercise reasonable care to reduce, minimize, or eliminate foreseeable risks before they manifest as a dangerous condition on premises.

Louis Rosenblum recalled discussing this topic and the case that prompted Jeff's inquiry - Asher v. Wal-Mart Stores, Inc., 39 So. 3d 484 (Fla, 3d DCA 2010 - at a prior meeting. Jodi Jennings checked and determined that the topic was discussed at the February 2011 meeting. Lake Lytal accordingly sent the following e-mail to Jeff Fulford:

May 29, 2012 E-mail from Lake Lytal to Jeff Fulford re his inquiry as to changing the premises liability instruction

A sub committee took up your suggestion regarding a need for a change in the premises liability jury instruction based on the mode operation theory today. Louis Rosenblum mentioned that the Asher decision was discussed at the last meeting and it was decided that the current instruction is sufficient as it mentions liability can be based on a failure to maintain the premises. I missed the last meeting but the minutes do confirm Louis' comment. We have another telephone conference scheduled for 6/5. I am sure the

subcommittee would welcome any comments you may have if you disagree with the decision of the full committee. Liz Russo is the chair of the subcommittee and can be reached at Liz@russoappeals.com.

I have not heard anything further from Jeff Fulford, and the Sub-Committee accordingly believes that this matter as been adequately addressed.

(3) March 22, 2012 letter from Alan Wagner to Judge Barton concerning what he sees as a mistake in the Notes on Use to 401.12b and 501.5a (copy attached).

To consider his issue, the materials needed are Instructions 401.12b and 501.5a and their Notes on Use, which are included below with the pertinent portions highlighted.

Bottom line, Alan thinks that the highlighted portion of the 501.5(a) Note on Use should be changed to: "Where instruction 501.5(a) is given, instruction 401.12(b) is necessary."

Lake Lytal suggested that in light of the Note on Use to Instruction 401.12b highlighted below, we could instead simply eliminate the portion of the current 501.5(a) Note on Use highlighted below.

The consensus was that the change suggested by Alan Wagner to the wording of the 501.5(a) Note on Use should be implemented.

In the course of considering this issue, Lake Lytal developed a larger concern over the wording of 501.5(a) and its Note on Use, which he will present to the full Committee when he has formulated a proposal to address his concern.

This concludes our report. We look forward to seeing you at the meeting.

Respectfully,

Liz Russo

401.12 LEGAL CAUSE

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage] negligence need not be the only cause. Negligence may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the negligence contributes substantially to producing such [loss] [injury] [or] [damage].

NOTES ON USE FOR 401.12

1. Instruction 401.12a (legal cause generally) is to be given in all cases. Instruction 401.12b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her negligence by reason of some other cause concurring in time and contributing to the same damage. Instruction 401.12c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 401.12a not only in determining whether defendant's negligence is actionable but also in determining whether claimant's negligence contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 401.12b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries/multiple events, instructions 501.5a or 501.5b should be given as well. See *Hart v. Stern*, 824 So. 2d 927, 932-34 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So.2d 833, 835 (Fla. 4th DCA 1992).

* * *

501.5 OTHER CONTRIBUTING CAUSES OF DAMAGES

a. Aggravation or activation of disease or defect:

If you find that the (defendant(s)) caused a bodily injury, and that the injury resulted in [an aggravation of an existing disease or physical defect] [or] [activation of a latent disease or physical defect], you should attempt to decide what portion of (claimant's) condition resulted from the [aggravation] [or] [activation]. If you can make that determination, then you should award only those damages resulting from the [aggravation] [or] [activation]. However, if you cannot make that determination, or if it cannot be said that the condition would have existed apart from the injury, then you should award damages for the entire condition suffered by (claimant).

NOTE ON USE FOR 501.5a

This instruction is intended for use in situations in which a preexisting physical condition is aggravated by the injury, or the injury activates a latent condition. See *C. F. Hamblen, Inc. v. Owens*, 172 So. 694 (Fla. 1937). Instruction 501.5a is necessary where Instruction 401.12b, Concurring cause, is given. See *Hart v. Stern*, 824 So.2d 927, 932-34 (Fla. 5th DCA 2002); *Auster v. Gertrude & Philip Strax Breast Cancer Detection Institute, Inc.*, 649 So.2d 883, 887 (Fla. 4th DCA 1995).

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).

March 22, 2012

By Hand Delivery

Honorable James M. Barton, II
George Edgecomb Courthouse
800 E. Twiggs Street, Room 512
Tampa, FL 33602

RE: Civil Jury Instructions 401.2(b) vs. 501.5: Notes on Use

Dear Judge Barton:

I am writing because of an issue that recently arose in a case that Kevin McLaughlin and I are preparing for trial. Our case involves an issue where a woman with osteoporosis was injured in a boating accident that produced a T-12 burst fracture. The proof is clear that if she did not have osteoporosis, there would have been no injury – your so-called “eggshell-skull plaintiff.” Likewise, the evidence is clear that she had osteoporosis both before and after the accident and that her osteoporosis was not activated or aggravated by the accident itself.

Certainly, Jury Charge 401.2(b) (Concurring Cause) applies to our case. That charge instructs a jury on the issue of concurring cause, namely, that negligence need not be the only cause to be regarded as a legal cause of injury. Negligence may be a legal cause of injury, even though it operates in combination with some natural cause (i.e., a pre-existing osteoporotic condition), if the negligence contributes substantially to producing such injury. The Note on Use 3 states, I believe accurately, that if there is an issue of aggravation of a pre-existing condition or of subsequent injuries/multiple events, Instruction 501.5(a) or 501.5(b) should be given.

Jury Instruction 501.5 (Other Contributing Causes of Damages) which is given for aggravation or activation of a disease does not apply to our case. By its terms, the instruction applies when there has been an aggravation of an existing disease or an activation of a latent disease or physical defect. Neither is present in my case, and all the doctors have so testified.

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Bill Wagner • Roger Vaughan • John McLaughlin • Alan Wagner • Kevin McLaughlin • Michael McLaughlin • Jason Whittemore

Honorable James M. Barton, II
March 22, 2012
Page 2

The Note on Use for 501.5(a), though, is at odds with Note on Use 3 for 401.12. The Note on Use for 501.5(a) states that the instruction is necessary where Instruction 401.12(b), Concurring Cause, is given. That cannot be accurate, especially when the negligence has contributed substantially to producing the injury but there is, in fact, no aggravation and no activation of a disease or physical defect. In addition, the cited cases do not support the proposition stated and, in fact, stand for the opposite proposition.

It is not that 401.2(b) requires 501.5(a); rather, the aggravation instruction requires the concurring cause instruction. Hart v. Stern, 824 So.2d 927, 933-4 (Fla. 5th DCA 2002) (plaintiff "argues that when the aggravation instruction is required ... the concurring cause instruction should also be given." The plaintiff "is correct."). Marinelli v. Grace, 608 So.2d 833 (Fla. 4th DCA 1992) ("the instruction on assessing damages, standing alone, is patently insufficient protection against the risk of confusion arising by a failure to give the concurring causation instruction."). Both cases are referenced in the Notes on Use.

In my judgment, the Note on Use for Instruction 501.5(a) is inaccurate. I think we got it backwards, in fact. I would suggest that it be altered to read as follows:

Where instruction 501.5(a) is given, instruction 401.12(b),
Concurring Cause, is necessary.

I wish I could say I was not a "legal cause" of the troublesome note problem here, but I was there when this one headed out the door and to the Court. Undoubtedly, I was a "substantial contributing cause." Oops!

Sincerely,



Alan F. Wagner

AFW/ald/encl.

P.S. I today noticed that the jury instruction book and the instructions online contain an error for Instruction 501.1 (Personal Injury and Property Damage). The online instruction contains a subparagraph "c" which was not part of the submission to the Court or its approved instruction. It seems to have been erroneously reproduced from Instruction 502.1.

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November 30, 2012

Via email only: BartonJM@FLJud13.org

Honorable James M. Barton, II
Chair of the Supreme Court Standard Civil Jury Instructions Committee
Hillsborough County Courthouse Annex
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Via email only: JJennings@FlaBar.org

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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,


CURTWRIGHT C. TRUITT

CCT/mv

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

ABBEY • ADAMS

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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

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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.

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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:

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- (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).

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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.

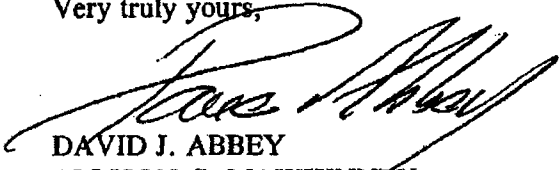
Thus, we suggest in order for the instruction to accurately reflect the law, it should use the following, or similar, language:

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,



DAVID J. ABBEY
ALLISON G. MAWHINNEY
DJA/AGM/saf

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