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MEMORANDUM

**To: The Honorable Jennifer Bailey, Chair
SJI Negligence Sub-Committee**

**Subject: Potential jury instructions on *Stuart v Hertz/Dungan v. Ford*
generated issues**

Date: June 28, 2010

From: Elizabeth Russo

A. Introduction

This memorandum was generated by a potential need for jury instructions in connection with the subject of an initial tortfeasor's liability for subsequent medical treatment of the tort victim's injuries, the *Stuart v Hertz* principle, and by some subsequent developments which may require additional instructions.

Judge Farmer recently identified one such area in the thoughtful concurring opinion set out in *Nason v. Shafranski*, 33 So. 3d 117 (Fla. 4th DCA 2010), Farmer, J., concurring specially, in which he said:

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 negligence FN2 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.

FN2. Here, a mistake in judgment amounting to medical negligence.

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 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.

33 So. 3d at 123-124.

Judge Farmer's proposed instruction covers the true *Stuart v Hertz* type case, in which there is evidence that **negligent** medical treatment may have aggravated the initial injury or caused additional injury. There are additional scenarios, however, that involve unnecessary medical treatments and procedures obtained and/or prescribed for other than medical reasons. Other instructions may be warranted by those scenarios. This memorandum - which turned out to be much more of an undertaking than I had anticipated, for which I apologize - attempts to trace the development of the law and some additional considerations that may warrant instructions.

Although I do both plaintiff and defense work, much of my work involving the issues discussed herein has been on the defense side. I mention that background fact recognizing that this whole area is not only complex, but also likely to involve strong feelings on the part of plaintiff and defense practitioners. I am new to the committee, and approach serving with complete humility. I presume that controversial subjects have come before the committee before, probably many times, so the following is offered totally on a for-what-it-is-worth basis, and as a possible starting point for discussion amongst heads much wiser and more experienced than mine. The memorandum begins by tracing the evolution of the law on liability for medical treatment of the injuries a tortfeasor may have caused, followed by discussions of scenarios not covered by the existing law, and then by a beginning foray into potential instructions.

B. Discussion of the evolution of the law

1. Origins of the rule as to a tortfeasor's liability for medical negligence in treatment of the tort victim's injuries

The original legal principle in the line of cases pertinent to the current need to craft additional jury instructions was most famously stated in the 1977 Florida Supreme Court decision in *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977), although the Court was really just reiterating its much earlier decision in *J. Ray Arnold Corporation, etc. v. Richardson*, 141 So. 133 (Fla. 1932). The thrust of both decisions is that where a tortfeasor's negligence causes an injured victim to seek medical treatment, any negligence or malpractice in the treatment will be viewed as the responsibility of the original tortfeasor. The rule is stated in *Stuart v Hertz* as follows:

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 Corporation, supra*, 141 So. at 135.

A part of the original rationale was that the risk that medical treatment may be negligently administered is foreseeable as a matter of law, and thus that when a tortfeasor inflicts injury on another, negligent medical treatment of the resulting injury is among the foreseeable consequences for which the tortfeasor will be held liable:

From the very outset of this trial, one of the primary issues was whether the plaintiff was entitled to an instruction pursuant to the law set forth in *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977). Under traditional negligence principles, a tortfeasor is responsible for all reasonably foreseeable consequences of his or her actions. [cites omitted]. An independent, unforeseeable intervening force, however, may serve to break the causal link and extinguish liability. [cites omitted]. ***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

Letzter v. Cephas, 792 So. 2d 481, 485 (Fla. 4th DCA 2001). As the inimitably to-the-point Prosser put it in an early discussion of the rule: "It would be an undue compliment to the medical profession to say that bad surgery is no part of the risk of a broken leg." Prosser, Torts, Sec. 511, pp. 318-319 (3d ed. 1964).

The precise issue in *Stuart v. Hertz* was whether the initial tortfeasor could bring a third party claim against the negligent treating physician to be tried at the same time as the injured plaintiff's negligence claim against the initial tortfeasor. The *Stuart v. Hertz* Court held that the initial tortfeasor would **not** be allowed to complicate the injured plaintiff's trial by bringing a third party indemnity claim for the malpractice of a subsequently negligent physician, both because such a claim does not qualify as an indemnity claim (because of the initial tortfeasor's own fault - indemnity being a claim available only to one who has been required to pay for the fault of another based solely on technical or vicarious liability), and because of the prejudice to the injured plaintiff:

In summary, to allow a third party action for indemnity, as in the case *sub judice*, would not only incorrectly expand traditional concepts of indemnity to the point of making it indistinguishable from contribution, but also expand the applicability of the third-party rule and make it a tool whereby the tortfeasor is allowed to complicate the issues to be resolved in a personal

injury suit and prolong the litigation through the filing of a third-party malpractice action.

351 So. 2d at 706. Expanding on the prejudice to the plaintiff, the Court said: "An active tortfeasor should not be permitted to confuse and obfuscate the issue of his liability by forcing the plaintiff to concurrently litigate a complex malpractice suit in order to proceed with a simple personal injury suit. To hold otherwise would in effect permit a defendant to determine the time and manner, indeed the appropriateness, of a plaintiff's action for malpractice." 351 So. 2d at 706.

Shortly after the decision in *Stuart v Hertz* was issued, the Supreme Court followed up in *Underwriters at Lloyds v. City of Lauderdale Lakes*, 382 So. 2d 702, 704 (Fla. 1980) by holding that, although the initial tortfeasor would not be allowed to bring a third party claim for indemnity in the injured plaintiff's negligence action, the initial tortfeasor could thereafter bring a separate action against the negligent treating physician for equitable subrogation from the surgeon.

2. The actual facts in *Stuart v Hertz* and the corresponding legal elements set by the *Stuart v Hertz* rule

The facts in *Stuart v. Hertz* and progeny are important because they are factually very different from cases in which the *Stuart v Hertz* rule is now being applied. In *Stuart v Hertz*, the plaintiff was in an automobile accident and sustained orthopedic injuries that undisputedly required surgery. During the surgery, the attending physician mistakenly severed the plaintiff's carotid artery, causing neurological damage beyond anything related to the injuries from the car accident. It was these additional injuries - directly attributable to the surgeon's malpractice - for which the initial tortfeasor was held liable:

The negligent action of the defendant tortfeasor in the case *sub judice* was the proximate cause of the plaintiff's injuries. However, the action of petitioner doctor was in fact an aggravating intervening cause of the ultimate condition of the plaintiff.

351 So. 2d at 705.

The key facts of note from *Stuart v Hertz* are: (a) that it was undisputed that the plaintiff sustained injuries in the initial accident; (b) that it was undisputed that the injuries required the specific medical treatment that was given, i.e., surgery; (c) that it was undisputed that the treating physician caused a separate additional injury; and (d) that the separate additional injury was caused by **negligent** medical care. As discussed later below, some or all of these facts are **not** undisputed in cases that are beginning to crop up with some frequency and in which *Stuart v Hertz* principals are nonetheless being applied. First, however, the discussion of the legal history is continued, addressing next the developments in the uses to which the *Stuart v Hertz* doctrine came to be put.

3. Later developments in *Stuart v Hertz* case law

As time went on, the *Stuart v Hertz* principle began to be raised and addressed in circumstances beyond the fact pattern like that in *Stuart v Hertz* itself. One development - not of particular significance here, but for completeness of the discussion - is that the doctrine was held to apply also in cases where the original negligence was that of a doctor in providing medical care, thus occasioning the need for further medical care which also is claimed to be negligence. See, e.g., *Farina v. Zann*, 609 So. 2d 629 (Fla. 4th DCA 1992); *Barrios v. Darrach*, 629 So. 2d 211, 213 (Fla. 3d DCA 1993); *Davidson v. Gaillard*, 584 So. 2d 71 (Fla. 1st DCA 1991).

Of more significance than the fact of the principle being applied in cases of initial medical negligence is that an issue arose in those cases as to how to apply the principle in cases where there were not two separate injuries (as there were in *Stuart v Hertz* - initial orthopedic injury, and then separate neurologic injury from the physician's negligent severing of the carotid artery during surgery) but rather one injury of disputed causation. In *Letzter v. Cephas*, 792 So. 2d 481 (Fla. 4th DCA 2001), for example, the injury was a right leg amputation below the knee. The plaintiff sued two of his treating physicians - Dr. Letzter and Dr. Armand - alleging that Dr. Letzter, who initially treated the plaintiff, had been negligent for taking a wait-and-see approach and failing to timely operate, and that Dr. Armand, who later treated the plaintiff, had been negligent for performing the wrong operation. Dr. Letzter defended by asserting that his treatment fell within the appropriate standard of care and that the plaintiff's below-the-knee amputation was the result of Dr. Armand's negligence. Dr. Armand defended by saying that Dr. Letzter's delay in performing necessary surgery while the infection was confined to the patient's toe had necessitated the below-the-knee amputation. The court described the causation issues as follows:

During the proceedings below, causation was the critical issue. The bulk of the evidence suggested that medical experts believed that Dr. Armand's decision to perform a femoral-to-popliteal bypass on Cephas' right leg, which addresses blood supply from the femoral artery in the thigh to the popliteal artery above the knee, was negligent because the procedure did not address the real problem -- the reduced blood flow to Cephas' foot. On the issue of Dr. Letzter's negligence, the evidence was more varied. There was evidence from which the jury could have found either (1) that Letzter's initial wait-and-see approach was negligent, allowing the infection to set in, and that this "initial injury" gave rise to all of the subsequent medical treatment given by Dr. Armand or (2) that Letzter's and Armand's negligence combined to cause the amputation, which was the initial injury. In short, given the evidence, it was up to the jury to decide if the negligent actions of Drs. Letzter and Armand combined to create the initial injury, i.e., whether the two physicians were joint tortfeasors.

792 So. 2d at 487.

The legal issues in *Letzter* became complex because the plaintiff wanted a *Stuart v*

Hertz instruction, but Dr. Letzter argued that such an instruction would be inappropriate because there was only one injury of questioned causation. Dr. Letzter asserted that there were three possible answers on causation: (1) Dr. Letzter's negligence caused the need for the below-the-knee amputation; (2) Dr. Armand's negligence caused the need for the below-the-knee amputation; or (3) the **combined negligence** of the two doctors caused the need for the amputation. In any of the three scenarios, Dr. Letzter argued, a *Stuart v Hertz* instruction would be inappropriate. As to the first two, if his own negligence caused the need for the amputation, the *Stuart v Hertz* instruction about possible later medical negligence would be unnecessary and unduly confusing for the jury. If Dr. Armand's negligence was the legal cause of the amputation, the *Stuart v Hertz* instruction would likewise be unnecessary and confusing. If the third scenario applied, i.e., the **combined negligence** of the two doctors caused the need for the amputation, then the doctors would be **joint tortfeasors**. The *Stuart v Hertz* decision made it very clear that an original tortfeasor and a physician who is negligent in treating the injuries caused by the tortfeasor are **not joint tortfeasors** - but rather an initial and subsequent tortfeasor who have caused distinct injuries.

The trial court in *Letzter* decided to give a *Stuart v Hertz* instruction, and also an instruction which stated:

If Dr. Mark Letzter made a negligent diagnosis or rendered negligent medical treatment to Joseph Cephas and because of that negligence Joseph Cephas ultimately suffered injury as a result of the negligence, mistake, or lack of skill of Dr. Armand, the law regards the negligence of Dr. Letzter as the proximate cause of the damages flowing from the subsequent negligence or unskillful treatment by Dr. Armand and holds Dr. Letzter liable for all the damages.

792 So. 2d at 485-486. The jury was then asked to determine (1) whether there was negligence on the part of Dr. Letzter that was the legal cause of injury to the plaintiff, and (2) whether there was negligence on the part of Dr. Armand that was the legal cause of injury to the plaintiff. If the answer to either question was "yes," the jury was then asked to apportion the negligence between the two doctors. The jury answered both questions "yes", and apportioned the fault at 45% to Dr. Letzter and 55% to Dr. Armand. The trial court, however, refused to apportion fault as to the non-economic damages as would be required under the Florida statute on apportionment of damages in accordance with fault, §768.81, Fla. Stat. The trial court decided that apportionment would be inappropriate because *Stuart v Hertz* applied.

The *Letzter* appellate court agreed with the giving of the *Stuart v Hertz* instruction, but also agreed that the instruction does not apply to joint tortfeasors. But, the appellate court decided that the issue of whether the two doctors were joint tortfeasors was a question of fact for the jury:

The *Stuart v. Hertz* Instruction

Dr. Letzter contends that the jury should not have been given the *Stuart v. Hertz* instruction, arguing that the instruction is not appropriate where the

defendants are joint tortfeasors and that, as a matter of law, he and Dr. Armand are joint tortfeasors. We agree that, by its very definition, the rule in *Stuart v. Hertz*, which contemplates an initial negligent act causing injury followed by negligent medical treatment for that injury, does not apply to joint tortfeasors. We disagree, however, with Letzter's argument that he and Dr. Armand were joint tortfeasors as a matter of law.

" 'Joint tortfeasors' are defined as '[t]hose who act together in committing wrong, or whose acts if independent of each other, unite in causing single injury.' " *Ass'n for Retarded Citizens-Volusia, Inc. v. Fletcher*, 741 So. 2d 520, 530 n. 3 (Fla. 5th DCA)(Harris, J., dissenting)(quoting Black's Law Dictionary 752-53 (5th ed. 1979), which cites *Bowen v. Iowa Nat'l Mut. Ins. Co.*, 270 N.C. 486, 155 S.E. 2d 238, 242 (1967)), *review denied*, 744 So. 2d 452 (Fla. 1999). "In order to be joint tortfeasors in fact, each tort-feasor must have committed some wrong which results in an injury or damage to another. Although there is but a single damage done, there are several wrongs." *Phillips v. Hall*, 297 So. 2d 136, 139 (Fla. 1st DCA 1974)(Boyer, J., concurring specially). Whether or not defendants are joint tortfeasors is a question of fact determined by the circumstances of the particular case. *See Sands v. Wilson*, 140 Fla. 18, 191 So. 21, 23 (1939).

Since at least one view of the evidence in the instant case could support the suggestion that Letzter and Armand were not joint tortfeasors, we find that the trial judge did not err in giving the *Stuart v. Hertz* instruction. *See Seaboard Coast Line R.R. Co. v. Clark*, 491 So.2d 1196, 1198 (Fla. 4th DCA 1986); *see also Barrios v. Darrach*, 629 So.2d 211, 213 (Fla. 3d DCA 1993)(stating that "**[w]here inconsistent theories of causation exist, it is error not to instruct on all theories**" and that medical malpractice plaintiff was entitled to a *Stuart v. Hertz* instruction where the case involved "a single injury of disputed causation"); *Haas v. Zaccaria*, 659 So. 2d 1130, 1133-34 (Fla. 4th DCA 1995)(citing and quoting *Barrios*).

792 So. 2d at 486-487.

While the *Letzter* appellate court decided that the *Stuart v Hertz* instruction was correctly given, the court also held that the trial court erred in refusing to apportion the non-economic damages under §768.81, Fla. Stat. The court reasoned that, based on the jury instructions as a whole, the jury must have concluded that *Stuart v Hertz* did **not** apply and that the doctors **were** joint tortfeasors such that apportionment was appropriate.

A dissenting opinion in *Letzter* expressed the view that *Stuart v Hertz* has been superseded by §768.81, Fla. Stat., and opined that said statute should be applied to require apportionment of fault between tortfeasors regardless of whether they are joint torfeasors or initial/subsequent tortfeasors.¹ The majority disagreed, but certified that

¹ A similar view had been expressed by the dissent in *Association for Retarded*

question to the Florida Supreme Court. The Florida Supreme Court accepted the case for review, but later dismissed the case without explanation and without issuing a decision. *Review granted by Cephas v. Letzter*, 796 So. 2d 535 (Fla. 2001) (Table, NO. SC01-374), and *review dismissed as improvidently granted by Cephas v. Letzter*, 843 So. 2d 871, (Fla. 2003). That question was again certified by the Florida Fourth District Court of Appeal in *Caccavella v. Silverman*, 814 So. 2d 1145 (Fla. 4th DCA 2002), but review was again declined by the Florida Supreme Court. *See Caccavella v. Silverman*, 860 So. 2d 976 (Fla. 2003)(Table, No. SC02-1062).

The reasons for the discussion of *Letzter* in such excruciating detail are twofold. First, to give some idea of the complexities that can be presented in cases involving these *Stuart v Hertz* issues, even where the motives of injured plaintiff and treating physician for proceeding with medical procedures are not suspect. Second, it is significant that the *Letzter* opinion emphasized that all theories of causation should be permitted to be presented to the jury and made the subject of jury instructions, as discussed further below.

Another decision of note for the analysis of the causation issues is the Fourth District's decision in *Nathanson v. Houss*, 717 So. 2d 114 (Fla. 4th DCA 1998), in which the court stated: "In order to establish an initial tortfeasor's liability for an aggravation or increase of the original injury under *Stuart*, a plaintiff must establish that the treating physician caused the aggravation or increase." Often in these cases, there is no issue as to a separate injury or aggravation, complicating the question of whether *Stuart v Hertz* should apply at all.

We next discuss the First District Court of Appeal's decision in *Dungan v. Ford*, 632 So. 2d 159 (Fla. 1st DCA 1994), which spawned another complication in *Stuart v Hertz* cases, this one of ever-widening proportions.

4. The *Dungan v Ford* wrinkle added to the *Stuart v Hertz* case law

Dungan v Ford arose from a motor vehicle accident in which a van was hit by a tractor-trailer. The driver of the van, Mary Jo Dungan, did not require any immediate medical treatment, but later developed pain and disabilities which she attributed to the accident and for which she received extensive treatment, including surgery. She sued the driver of the tractor-trailer, Travis Ford. The jury returned a verdict finding that there was no negligence on the part of the defendant which was a legal cause of injury to Dungan. Dungan filed a motion for new trial arguing, *inter alia*, that the trial court had erred in admitting testimony regarding inappropriate medical treatment received by Dungan. Specifically, Dungan argued that the trial court erred in allowing testimony by the defendant's medical expert, Dr. Rutledge, that a substantial cause of Dungan's pain and physical impairment was the inappropriate treatment provided by her treating physician, Dr. Flynn, particularly the surgical procedure known as a percutaneous discectomy, and disc fusion surgery. The decision describes Dr. Rutledge's testimony as follows:

Citizens-Volusia, Inc. v. Fletcher, 741 So. 2d 520 (Fla. 5th DCA 1999).

Dr. Rutledge, the defense witness, testified that in his opinion the accident of April 20, 1986 aggravated Mary Jo's preexisting condition and caused her pain to begin.^{FN1} Following that statement, he was asked to elaborate upon what type of treatment he would have recommended had he seen Mary Jo initially. The doctor related that he would have instructed her in exercises, and may well have ordered some physical therapy. She would also have been counseled, and probably would have been given medication of several different varieties. Then she would have been monitored with the expectation of slow improvement. He stated that it is very common for patients with preexisting degenerative disc disease to have symptoms that last for months or even longer after an episode of the type she experienced, and he would try to let the patient know what was expected, and that the condition would eventually get better and subside.

632 So. 2d at 160-161. The court made a point of stating, in a footnote, that: There was no evidence that Mrs. Dungan's pre-existing condition was symptomatic prior to the accident, nor does it appear that her later symptoms and physical impairment were the result of a normal progression of her pre-existing condition." 632 So. 2d at 160, n 1.

The examination of defense expert Dr. Rutledge continued, and he was asked whether he thought the surgeries performed on Dungan were reasonable and necessary. Dungan's counsel objected, and a side bar ensued, described in the appellate decision as follows:

Upon objection by [Dungan's] counsel, there followed a bench conference in which the court and counsel discussed, among other things, this court's recent ruling in *Davidson v. Gaillard*, 584 So. 2d 71 (Fla. 1st DCA 1991), *rev. denied*, 591 So. 2d 181 (Fla. 1991), regarding the rule that an original tortfeasor remains liable for subsequent medical malpractice of a treating physician, so long as the treatment is related to the conditions caused by the original wrong. [The defendant's] counsel argued to the court that [the defendant] had no intention of contending that Mary Jo was injured as a result of malpractice by Dr. Flynn, but that [the defendant was] entitled to provide evidence from which the jury would be able to assess what was reasonable and necessary treatment, so that the jury could decide what should be paid, or not paid, to Mrs. Dungan, as covered by the standard jury instructions concerning the award of reasonable and necessary medical costs and treatment.

The trial judge responded, we think correctly, that although experts are permitted to disagree with opinions reached by other experts, a lay person is entitled to reasonably rely on the judgment of a licensed expert and should not be required to do some independent investigation beyond that. After further discussion, in which [defendant's] counsel attempted to distinguish the present situation from the usual rule, in that Mary Jo was referred to Dr. Flynn by her attorney, the court ruled that it would be proper to ask Dr. Rutledge whether he agreed with certain

conclusions of Dr. Flynn so far as his diagnosis was concerned, but it would be impermissible to inquire of Dr. Rutledge whether or not in his opinion the surgery was reasonable or necessary.

[The defendant's] counsel was then permitted to proffer the testimony of Dr. Rutledge that, in his opinion, both the percutaneous discectomy in January 1987 and the two level fusion operation in January 1989 were not reasonable and necessary. Following the proffer, the trial court ruled that counsel would be permitted to ask Dr. Rutledge whether or not his opinions differed from Dr. Flynn's, but that counsel would not be permitted "to launch a direct broadside attack into what Dr. Flynn did.

632 So. 2d at 161.

The testimony defense expert Dr. Rutledge was then allowed to give was described as follows:

After the proffer and the trial court's ruling, direct examination of Dr. Rutledge continued. He was immediately asked to assume that Dr. Flynn had the opinion that the percutaneous discectomy was appropriate to do, and whether he had an opinion that this surgery was appropriate or whether he differed with Dr. Flynn's opinion. Appellants' objection to the question was overruled. Dr. Rutledge thereafter testified that he differed with Dr. Flynn's opinion, and then elaborated at length upon why he was of the view that the surgery was not appropriate, his reason being, essentially, that Mary Jo did not have the hard physical findings that go along with the ruptured disc or a radiographically-proven ruptured disc that was pressing on the nerve root, and for this reason, he felt that it was not reasonable to do the surgery. Upon further objection by [Dungan's] counsel, the trial court instructed the jury to disregard Dr. Rutledge's statement with respect to whether the surgery was reasonable or not. Appellants' motion for a mistrial was denied.

Notwithstanding the trial court's rulings, [the defendant's] counsel continued with examination of Dr. Rutledge, eliciting from him further testimony regarding his disagreement with Dr. Flynn as to whether the operation should have been performed. During the course of his testimony he pointed out that after her fusion surgery, Mary Jo had complaints of pain in her left lower extremity, whereas previously her pain had been of the right lower extremity. He pointed out that the pain in the left lower extremity had not been present before her two-level fusion in January of 1989, and that in his opinion, it was not appropriate to do that surgery. He further elaborated upon the inappropriateness of the percutaneous discectomy by pointing out that her x-rays, as interpreted by a radiologist, suggested that the problem with Mary Jo's disc was at the front or anterior portion, rather than at the back, or posterior portion, and that the percutaneous discectomy would relieve pressure at the back, rather than at the front where the problem resided.

[Dungan's] counsel again objected to the line of questioning of Dr. Rutledge

because it amounted to a claim that Dr. Flynn committed malpractice. The court allowed questioning of Dr. Rutledge to continue, whereupon the doctor stated that he had an opinion that in October 1991 Mary Jo had substantial impairment which was caused by three things: her preexisting lumbar degenerative disc disease; the injury that she sustained; and the subsequent treatment that she underwent. The doctor gave her a 25% permanent anatomic impairment, based upon the Social Security Disability Administration ratings for patients who have been through multiple back procedures up to and including a fusion, “and have been rendered impaired as a result of that.”

632 So. 2d at 162.

The appellate court decision remarks that “[i]t is clear from the arguments and discussions between the court and counsel, that the purpose and effect of this testimony was not, as [the defendant urges], directed to the reasonableness of the cost of Mary Jo’s medical treatment, but instead, to prove that Mary Jo’s pain, disability and physical impairment was caused by her inappropriate surgery, rather than her injuries received in the accident.” 632 So. 2d at 162.

During the trial, Dungan’s counsel not only objected to defense expert Dr. Rutledge’s testimony, but also requested a *Stuart v Hertz* instruction, which read as follows:

Where one who has suffered personal injuries as a result of the negligence of another seeks medical treatment from a physician or surgeon, and the injured person’s injuries are thereafter aggravated or increased by the negligence, mistake or lack of skill of such physician or surgeon or the poor results of such treatment, the law regards the negligence of the one causing the original injury as the proximate cause of the damages flowing from the later negligent, unskillful, or unsuccessful treatment of the physician or surgeon.

632 So. 2d at 163. This instruction was not given by the *Dungan* trial court.

The appellate court decided that reversal for a new trial was required both because the *Stuart v Hertz* instruction was not given, and because of the admission of Dr. Rutledge’s testimony criticizing the treating physician’s medical care: “We are of the view that the testimony of Dr. Rutledge clearly focused upon Dr. Flynn’s lack of skill or judgment, and upon the poor results achieved by his treatment. The admission of this testimony, coupled with the denial of the special instruction informing the jury as to how to deal with this aspect of the case, was reversible error.” 632 So. 2d at 164. As the decision went on to say:

As the case was tried, the jury was presented with the choice of whether Mary Jo Dungan’s pain and physical impairment was attributable to her accident, or to the improper treatment rendered by Dr. Flynn. Thus, the jury was improperly allowed to consider and base their verdict on whether Dr. Flynn’s

treatment was improper.

632 So. 2d at 164. The judgment in favor of the defendant was thus reversed, and the case remanded for a new trial.

The *Dungan v Ford* decision reflects various *assumptions* that appear without being identified as such in the opinion. For example, the court assumes that there was **some** injury from the accident that was being treated and also assumes that the defense contention was that Dr. Flynn, who performed the surgeries on the plaintiff, was being accused of **negligent** medical treatment, when neither of those assumptions is necessarily accurate. From experience on the defense side in some of these types of cases - and as discussed further below - the real thrust of the defense doctors' testimony can sometimes be that the surgery being recommended and/or performed was/is **not necessary at all**, either because there was no injury and/or because the type of surgery was not warranted. That is, the doctor's opinions in a given case may be that the (1) the plaintiff was not injured in the accident at all such that there is **no injury to treat**; and/or (2) that whatever adverse condition the plaintiff may have - and from whatever source (e.g., preexisting degenerative condition or trauma-induced injury) - it did not require any surgery; and/or (3) **this** type of surgery is not indicated for any condition that any patient may have, however caused. The *Dungan v Ford* decision is broadly worded enough that it could cover these situations even though **they do not involve negligent medical treatment at all**. The problems generated with the overbreadth of the *Dungan v Ford* opinion are discussed next, along with some of the additional comments in the *Dungan v Ford* opinion that have led to the overly broad use it is being given.

5. The wake of *Dungan v Ford*

The *Dungan v Ford* case has turned out to have created quite an aftermath. Several aspects of the decision have been forged into overbroad propositions (supported, again, by the overbreadth of the opinion itself).

First, it is argued that *Dungan v Ford* stands for the proposition that any criticism of a doctor's medical decisions is forbidden. This point is reached by making the unstated assumption that any bad medical decisions are medical **negligence**. In actuality, some bad medical decisions are intentional - not negligent at all - and driven purely by financial motivation. Performing a generally low risk procedure on a patient with the ability to collect \$40,000 to \$80,000 for a few hours of work is a powerful, powerful draw - particularly in these times when many in the medical profession are embittered over the effects that health insurance issues and procedures are having on their ability to make money. But, current use of *Dungan v Ford* in conjunction with *Stuart v Hertz* disallows the defense from making any suggestion that there was anything wrong in any way with what treating doctors did in treating a claimed injury. The defense experts are made to walk a perilous tightrope in which the only opinion they are allowed to voice is one suggesting that it was not the accident that caused the need for the otherwise perfectly fine and proper medical treatment - but they are not allowed to explain why they do not believe that the accident did not cause the need for

surgery. The defense experts are, in this manner, effectively being precluded from speaking the truth and giving their honest opinions as medical professionals. *Stuart v Hertz* is being used to say that there is no relevance to the fact of any post-accident bad medical treatment because the initial tortfeasor is legally liable for it anyway. And, *Dungan v Ford* is being used to say that it is also improper to criticize post-accident bad medical treatment because any attempt to characterize such criticism as questioning the reasonableness or necessity of the medical treatment is a disingenuous pretext by the defense through which the defense is really trying to suggest to the jury that the subsequent medical treatment - and not the accident - was the cause of any permanent injuries the plaintiff's may have. As the *Dungan v Ford* opinion states:

We think it can be fairly stated, from a review of the entire record, that [the defense's] contention that their inquiry regarding Mary Jo's surgeries was properly directed to the issue of the reasonable sums to be awarded for her medical expenses is somewhat disingenuous, under the circumstances. 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 163.

This commentary also led directly to the other main use to which the *Dungan v Ford* decision is currently being put. Based on the above language, the argument is made that the decision establishes a rule of law that the issue of whether medical care - and, by extension, the cost of the care - was reasonable or necessary is to be determined solely from the perspective of the lay patient, i.e., the plaintiff, and is **not** a subject for medical expert testimony. There are two assumptions underlying this "rule of law", both of which may or may not be factually accurate in any given case.

The first is that the patient, as a lay person, is relying on his/her doctors' medical advice in making decisions as to medical treatments and procedures, and the risks and benefits of same. Some patients, however, are motivated by secondary gain², to the point

² "Secondary gain is a medically recognized disease component. Secondary gains are the external advantages that exist as a result of a medical condition, such as monetary and disability benefits, personal attention, or escape from unpleasant situations and responsibilities. It is medically recognized that some patients manipulate their medical conditions to take advantage of these secondary gains." *Pippin v. Thaler*, 2010 WL 2487278, *4 (S.D. Tex. 2010). The concept of secondary gain is by no means new to

of being willing to undergo medical treatments and procedures for the sole purpose of enhancing the value of a lawsuit and regardless of the relationship that the treatment does - or does not - bear to necessity or reasonableness.

The second assumption is that the doctor's advice as to treatments and procedures is informed solely by medical motivation to provide the best treatment for the patient, such that even if the doctor happens to be negligent, the only considerations that went into the advice were medical ones. This assumption, too, is not always warranted. As noted above, some doctors are willing to make medical recommendations (particularly as to low risk procedures) for the sake of making money, regardless of whether the procedures are necessary or reasonably priced.

Disregarding the potential inaccuracy of the underlying assumptions, the *Dungan v Ford* "rule of law" is now being made into a frequently requested instruction which tells the jury that the necessity of any particular medical treatment or procedure is to be judged solely from the perspective of the patient/plaintiff.

C. Spectrum of fact issues that any instructions will need to take into account

As harsh as the reality may be, the following are factors that have to be considered in formulating the law - or reaching individual case decisions - on how, if at all, the original *Stuart v Hertz* rule should be applied, and on whether the *Dungan v Ford* "rules", or any version of them, can be justified:

- is there an issue as to whether there was any injury requiring medical treatment at all
- is there an issue as to whether any injury or adverse medical condition that does exist was caused by the accident in question
- is there an issue as to whether the plaintiff's reasons for undergoing the medical treatment were medical or for purposes of secondary gain

Florida law. See, e.g., *Johnny's Welding Shop v. Eagan*, 143 So. 2d 470 (Fla. 1962); *Bishop v. Baldwin Acoustical & Drywall*, 696 So. 2d 507 (Fla. 1st DCA 1997); *Willimon v. Astrue*, 2010 WL 1252152, *6 (M.D. Fla. 2010) ("Other courts have considered a claimant's motivation to achieve secondary gain as a relevant factor in making a credibility determination. [cites omitted]. The ALJ's observation that Plaintiff was motivated to present himself as more limited by a desire to achieve secondary gain was a proper consideration, and that observation is supported by substantial evidence").

- is there an issue as to whether the physician provided the medical treatment because it was medically necessary or for reasons of financial gain

It must be remembered that *Stuart v Hertz* dealt only with an **undisputed** initial orthopedic injury from the car accident; with **undisputedly** necessary surgery; with an **undisputed** second and separate neurologic injury from the severing of the carotid artery; and with actions on the part of the treating physician that were **undisputedly** born of possible **negligence** with no question about possible alternative financial motivation. In any case where any of these factors is not **undisputed**, the evidence that should be permitted and the instructions that may be required will have to shift. As the Fourth District has noted: **“Where inconsistent theories of causation exist, it is error not to instruct on all theories.”** *Letzter v. Cephas*, 792 So. 2d 481, 487 (Fla. 4th DCA 2001), quoting *Barrios v. Darrach*, 629 So. 2d 211, 213 (Fla. 3d DCA 1993). As things have started to evolve under *Dungan v Ford* and its application of *Stuart v Hertz*, the defense is not being permitted to present its theories of causation, and neither are the instructions that are being given fairly presenting both sides’ views of the evidence. It may be that it is distasteful for the courts to have to factor in the reality of the plaintiff who selects medical treatment solely for motives of secondary gain, or the reality of the doctor who advises or renders medical care solely for financial gain, but if there is medical evidence that would support a jury conclusion that such were the facts of the case, the law cannot fairly be such as to suppress any such evidence as a matter of course.

Another concept that has to be reconciled with the original *Stuart v Hertz* rule is that *Stuart v Hertz* was premised on the notion that negligent medical treatment is not so rare or surprising that it cannot be characterized as a foreseeable consequence of causing injury to another that will require medical treatment. While the possibility of negligent medical treatment may be deemed foreseeable to a tortfeasor - basically for policy reasons, it does not seem that the same policy considerations would - or should - apply to unnecessary medical treatment rendered solely for financial gain, whether at the behest of the plaintiff or the treating physician or both. Decisions intentionally made to obtain money are not at all the same as unfortunate medical mistakes. This concept, too, should be taken into account in proposed instruction.

D. Possible instructions

1. A basic *Stuart v Hertz* instruction

As set out above, Judge Farmer has drafted a cogent *Stuart v Hertz* instruction, repeated here for ease of reference:

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.

This instruction would cover true *Stuart v Hertz* cases in which there is a question about the plaintiff having received **negligent** medical care. It also does a good job of allowing both sides to make their arguments about what injuries were - or were not - sustained in the accident in question, and whether the medical care in question is, in fact, being provided for any condition caused by the defendant. It does not address medical treatment and procedures obtained by a plaintiff for the secondary gain of enhancing the value of a lawsuit or medically unnecessary medical treatment or procedures provided by a physician for financial gain.

It may be that a Note on Use should restrict use of this instruction to cases in which there is evidence that **negligent** medical treatment may have aggravated the initial injury or caused additional injury.

2. Possible additional instruction

To be added to SJ1 6.2b ***if warranted by the evidence:***

In determining the reasonableness and necessity of medical care for which you may be awarding damages to the plaintiff, you may consider [the plaintiff's reasons for obtaining the medical care, treatment, or procedures][and][the physician's reasons for prescribing the medical care, treatment, or procedures]. Medical care [obtained][prescribed] for other than medical reasons may not be reasonable or necessary medical care for which damages should be awarded against the defendant.

Having gotten this far, I confess to insufficient experience in drafting instructions. The above is just a possible beginning point for discussion. There is no question that this is a complex area of the law. As is often the case, it is easier to see the problems than the solutions. But, the journey of a thousand miles begins with the first step – and all that.