

# CASE LAW

May 2008

# Update

Barbara Green, P.A.  
Attorney at Law  
(305) 669-1994

## Caselaw Update on the Internet

Issues of *Case Law Update* since January 1995 can be found at the new Case Law Update website. The hypertext versions you'll find there are searchable by any text string and you can download to disk or print any portions you desire for your personal use.

[www.caselawupdate.com](http://www.caselawupdate.com)

## Amendment 7 (Patients' Right To Know)

### ***Florida Hospital Waterman, Inc. v. Buster***

Case No. SC06-688, 2008 WL 596700, 33 Fla. L. Weekly S154 (Fla. 3/6/2008)

Article X, Section 25 of the Florida Constitution, the Patients' Right to Know About Adverse Medical Incidents, also known as Amendment 7, was overwhelmingly approved by the voters in 2004. The Supreme Court holds that the amendment is self-executing and retroactive, and that it applies to records existing prior to its passage.

Attempting to implement, and to limit, Amendment 7, the Legislature passed §381.028, Florida Statutes (2005). The Court holds several provisions of that statute unconstitutional because they conflict with Amendment 7. However, the Court severs those provisions from the statute in order to preserve the remainder of the statute.

The provisions that are unconstitutional are:

- (1) the statute only allows for final reports to be discoverable, while the amendment provides that "any records" relating to adverse medical incidents are subject to the amendment;
- (2) the statute only provides for disclosure of final reports relating to the same or a substantially similar condition, treatment, or diagnosis with that of the patient requesting access;
- (3) the statute limits production to only those records generated after November 2, 2004; and
- (4) the statute states that it will have no effect on existing privilege statutes. *Id.*; see also §§ 381.028 (3)(j), (5)-(7)(a), Fla. Stat. (2005)...

In addition, the Court invalidates §381.028(7)(a), which limits patients' access to records only of a facility or provider of which they themselves are a patient; and the provision in §381.028(2), which would have kept in effect existing laws concerning discovery or admissibility into evidence of records of adverse medical incidents.

## Attorneys' Fees

### ***Barco v. School Board of Pinellas County***

975 So.2d 1116 (Fla. 2008)

A motion for attorneys' fees served and filed before the filing of the judgment is not untimely. The provision in Rule 1.525 that requires the motion to be filed "within 30 days after" the filing of the judgment is intended to set an outside time limit, to eliminate tardy motions, not to create a "window" following the filing of judgment.

### ***Continental Cas. Co. v. Ryan Inc. Eastern***

974 So.2d 368 (Fla. 2008)

A surety that has paid money on behalf of its principal and is subrogated to any rights the principal has against its own insurer under principles of equitable subrogation, but has no written assignment from the insured and is not a named or omnibus insured or named beneficiary under the policy, is not entitled to attorney's fees under section 627.428.

The statute provides for fees to a named or omnibus insured or a named beneficiary who obtains a judgment or decree against an insurer. A "named insured" is one who is "designated as an insured" under the liability policy. An "omnibus insured" is one who is covered by a provision in the policy but not specifically named or designated. The rights of an "omnibus insured" flow "directly from his or her status under a clause of the insurance policy without regard to the issue of liability." A "named beneficiary" is one who is specifically designated as such in the policy. In this case, the surety is none of those things.

The Court has recognized an exception to this strict rule for assignees of the insured, but absent an assignment, there can be no fees under the statute. An assignment arises by contract. Equitable subrogation arises by operation of law. The Court reaffirms its holding in *Roberts v. Carter*, 350 So.2d 78 (Fla.

1977) “that only the named or omnibus insured, the insured’s estate, specifically named beneficiaries under the policy, and other third parties who claim policy coverage through an assignment are entitled to an award of fees under section 627.428.”

***Mady v. DaimlerChrysler Corp.***

2008 WL 783329 (Fla. 4<sup>th</sup> DCA 3/26/2008)

In an action under the Magnuson-Moss Warranty Act, a plaintiff who accepts a proposal for settlement that calls for a dismissal rather than an entry of judgment is not a “consumer who finally prevails” entitled to fees under 15 U.S.C. section 2310(d)(2). A settling plaintiff would be entitled to fees if a judgment were entered in which the court retained jurisdiction. The court certifies conflict with the decision of the Second District in *Dufresne v. DaimlerChrysler Corp.*, 975 So.2d 555 (Fla. 2d DCA 2008).

**Evidence – Frye**

***Marsh v. Valyou***

Case No. SC06-118,

2007 WL 4124744, 32 Fla. L. Weekly S750 (Fla. 2007)

“*Frye* does not apply to expert testimony causally linking trauma to fibromyalgia and . . . even if it did, such testimony satisfies it.” *Frye* does not apply to “pure opinion” testimony. *Frye* only applies to testimony based on methodology, tests or procedures that are “new or novel.” The plaintiff’s experts based their diagnoses and opinions about the cause of her fibromyalgia on a review of her medical history, clinical physical examinations, their own experience, published research, and differential diagnosis. The plaintiff’s experts did not base their opinions on new or novel scientific tests or procedures. The defendants did not challenge the patient history, examination methods, clinical practices, or other methodologies upon which the plaintiff’s experts did rely. The court points out that the defendants could not challenge the underlying methodology, because the court previously held that differential diagnosis is a generally accepted method for determining specific causation.

Relying heavily on its decision in *Castillo v. E.I. DuPont de Nemours & Co.*, 854 So.2d 1264 (Fla. 2003), the Court emphasizes that *Frye* does not apply just because the expert’s ultimate conclusion is new or novel; it applies only when the underlying methodology is new or novel. *Frye* does not require unanimity in the scientific community. If there are competing theories in the scientific community, it is for the jury, not the court, to resolve them. “A lack of studies conclusively demonstrating a causal link between trauma and fibromyalgia, and calls for further research, do not preclude admission of the testimony.”

**Homestead Exemptions**

***Chames v. DeMayo***

972 So.2d 850 (Fla. 2007)

The homestead exemption, Art. X, §4(c) of the Florida Constitution, which protects homestead property from forced sale, can be waived in a mortgage, as specifically provided in the constitution. However, it cannot be waived in an unsecured agreement, such as an attorney’s retainer agreement. Such a purported waiver contained in an unsecured agreement is unenforceable. While an individual may waive a constitutional right, an individual may not waive a right “designed to protect both the individual and the public.”

**Insurance – CGL Policies**

***United States Fire Ins. Co. v. J.S.U.B., Inc.***

2007 WL 4440232, 32 Fla. L. Weekly S811,  
Case No. SC05-1295 (Fla. 12/20/07)

Defective work performed by a subcontractor that causes damage to the contractor’s completed project and is neither expected nor intended from the standpoint of the contractor can constitute “property damage” caused by an “occurrence” as those terms are defined in a standard form commercial general liability policy. A claim made against the contractor for damage to the completed project caused by a subcontractor’s defective work is covered under a post-1986 CGL policy with products-completed operations hazard coverage unless a specific exclusion applies to bar coverage.

Here, the subcontractor’s improper soil preparation caused “property damage” under the policy, which defined “property damage” as “[p]hysical injury to tangible property, including all resulting loss of use of that property.”

***Auto-Owners Ins. Co. v. Pozzi Window Co.***

2007 WL 4440389, 32 Fla. L. Weekly S809  
Case No. SC06-779 (Fla. 12/20/07)

A CGL policy issued to a general contractor, with products completed operations hazard coverage, does not cover the general contractor’s liability to a third party for the cost of repair or replacement of a subcontractor’s defective work. Although a subcontractor’s defective work can constitute an “occurrence” under a post-1986 standard form commercial general liability policy, the defective work itself does not constitute “property damage.”

## **Insurance – PIP**

### ***United Auto Ins. Co. v. Bermudez***

2008 WL 1883650 (Fla. 3d DCA 4/30/2008)

Answering a question certified from County Court, the Third District holds that a medical report issued for the withdrawal of personal injury protection benefits pursuant to section 627.727(7)(a), Florida Statutes is not required to be based upon a physical examination of the insured that is personally conducted by the physician issuing the report. The court certifies conflict with the decision of the Second District in *State Farm Mut. Auto. Ins. Co. v. Rhodes & Anderson, D.C., P.A.*, 2008 WL 786856 (Fla. 2d DCA 3/26/2008) which held that when an insurer seeks to deny a payment for treatment on the basis that the tests were unreasonable and medically unnecessary, section 627.736(7)(a) does not apply and, therefore, a valid report by a reviewing physician is not required. *State Farm* held that section 627.736(7)(a) is applicable only in “circumstances involving the complete termination of payments to a physician” rather than the denial of a single claim .

## **Jury Instructions**

### ***In Re: Standard Jury Instructions in Criminal Cases No. 2007-02 and Standard Jury Instructions in Civil Cases Report Re: Proposed Instruction 2.11.***

2008 WL 731924, 33 Fla. L. Weekly S200 Case No. SC07-471 (Fla. 3/ 20/08)

The Supreme Court has approved new standard instruction no. 1.13 in civil cases, and a similar one in criminal cases, for use when a taped conversation in a foreign language and a transcript of the English translation are used at trial. The new civil instruction provides that the jurors may consider the knowledge, training and experience of the translator as well as the nature of the conversation and the reasonableness of the translation in light of all the evidence, but not on the jurors’ own knowledge of the language on the tape.

## **Negligence – Foreseeable Zone of Risk**

### ***Williams v. Davis***

974 So.2d 1052 (Fla. 2007)

The foreseeable zone of risk analysis established in *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992), does not create a duty by the landowner for private residential property containing foliage that does not extend into the public-right of way to adjacent motorists. While the *McCain* foreseeable zone of risk analysis applies, owners of private property do

not owe a duty to motorists on abutting roadways as to the maintenance of foliage located wholly within the bounds of the property. The Court does recognize that all property owners owe a duty, under a *McCain* analysis, not to permit the growth of foliage on their property to extend outside the bounds of the property and into the public right-of-way so as to interfere with a motorist’s ability to safely travel on the adjacent roadway.

The Court distinguishes *Whitt v. Silverman*, 788 So.2d 210 (Fla. 2001), which involved an urban commercial property subject to high volume traffic with foliage that impaired the visibility of the adjacent sidewalk and roadway, causing an exiting motorist to fail to see two pedestrians, who were struck and killed. The Court holds that a residential property owner will only be liable if the foliage extends outside the bounds of the property.

## **NICA**

### ***Weeks v. Florida Birth Related Neurological Injury Compensation Fund***

2008 WL 268704 (Fla. 5<sup>th</sup> DCA 1/31/2008)

Section 766.316, Florida Statutes, requires providers seeking immunity under the NICA statute to provide the patient with notice of participation in the NICA program, if they want to avail themselves of NICA immunity. However, the requirement is excused “when the patient has an emergency medical condition as defined in §395.002(9)(b) or when notice is not practicable.”

Receding from *Orlando Regional Healthcare System, Inc. v. Alexander*, 909 So.2d 582 (Fla. 5<sup>th</sup> DCA 2005), the court en banc holds that the formation of the provider-obstetrical patient relationship is what triggers the obligation to provide the NICA notice under §766.316, Florida Statutes. Here, the patient had pre-registered with the hospital, and the hospital did not provide notice at that time, when it would have been practicable. Similarly, the doctor and clinic providing prenatal care did not provide notice on any of her visits. The duty to provide the notice was not excused by the fact that the mother subsequently was in an “emergency medical condition” the day the baby was delivered.

The court certifies the following question of great public importance:

When a NICA provider fails to provide the statutory notice to an obstetrical patient within a reasonable time after the commencement of the provider-obstetrical patient relationship, is the provision of the notice excused because the patient subsequently presents in an “emergency medical condition.”

***Bayfront Medical Center, Inc. v. Florida Birth-Related Injury Compensation Fund***  
2008 WL 140806 (Fla. 2d DCA 1/16/2008)

Holding that the doctor's pre-delivery notice to the mother of his participation in the NICA Plan satisfied the NICA notice requirement as to the hospital, the Second District concludes that the statute only requires the hospital to provide notice if the patient's delivering physician is a Plan participant and is also an employee of the hospital, as opposed to a physician who merely enjoys staff privileges at the hospital. The court certifies the following question of great public importance:

In light of the Florida Supreme Court's decision in *Galen of Florida v. Braniff*, 696 So.2d 308 (Fla. 1997), does a physician's predelivery notice to his or her patient of the Plan and his or her participation in the Plan satisfy the notice requirements of §766.316, Florida Statutes (1997) if the hospital where the delivery takes place fails to provide notice of any kind?

***All Children's Hospital, Inc. v. Department of Administrative Hearings***  
2008 WL 142308 (Fla. 2d DCA 1/16/2008)

Following the *Bayfront* decision above, the court allows a hospital immunity based on the doctor's provision of notice to the mother, and certifies the same question as in *Bayfront*.

***Florida Health Sciences Center, Inc. v. Division of Administrative Hearings***  
974 So.2d 1096 (Fla. 2d DCA 2007)

NICA immunity is an affirmative defense in a medical malpractice claim. The health care providers had the burden of proving that the NICA notice requirements were met. Evidence that the parents only received the standard brochure, but did not specifically receive notice that the doctor was a NICA Plan participant, supported the ALJ's finding that they did not receive notice that the physician was a participating physician. The court certifies the following question:

In light of the reasoning of *Galen of Florida v. Braniff*, 696 So.2d 308 (Fla. 1997), is a physician's notification to his patient of the existence of the NICA Plan as described by the brochure provided by NICA without notifying the patient that the physician is a participating physician sufficient to invoke the immunity and exclusivity provisions of the NICA Plan?

**Offer of Judgment / Proposal for Settlement**

***Frosti v. Creel***  
2008 WL 731912 (Fla.), 33 Fla. L. Weekly S199  
Case No. SC07-122 (Fla. 3/20/08)

A motion for fees and costs predicated on a rejected proposal pursuant to the offer of judgment rule need not be denied because the underlying proposal was filed with the trial court before judgment was entered. "Neither the rule nor the statute states that a proposal for settlement may not be filed prior to the filing of a judgment or unambiguously defines when a proposal for settlement should be filed. Any grievance with the timing of the filing of a proposal for settlement can be addressed by filing a motion to strike, and the proper remedy where a court finds that a proposal is filed unnecessarily is to strike the proposal from the record, with leave to refile the proposal if and when it becomes necessary to enforce an entitlement to attorney fees and costs."

**Products Liability – Alternative Design**

***Liggett Group Inc. v. Davis***  
973 So.2d 684 (Fla. 4<sup>th</sup> DCA 2008)

The Fourth District certifies the following questions of great public importance:

1. Is a plaintiff required to establish an alternative safer design in order to prevail on a design defect claim for an inherently dangerous product?
2. Should Florida adopt the Restatement (Third) of Torts for design defect cases?

In its original opinion in the case, 973 So.2d 467 (Fla. 4<sup>th</sup> DCA 2007), the Fourth District held that the plaintiff's negligence claim that the manufacturer continued to manufacture cigarettes after it knew of the health risks was preempted by federal law. The court also held that the jury could probably have been instructed that the availability of a safer alternative design was a factor to be considered, but the plaintiff was not required to prove it in order to prove their case, and the trial court did not err in failing to instruct the jury that the plaintiff had to prove that her injuries would have been avoided or less severe if Liggett had used a "feasible and then available alternative design." The Third Restatement has not been adopted by the Florida Supreme Court. The "consumer expectation" test is the rule in Florida.

The Court explains that, when it cited the Third Restatement in *Scheman-Gonzalez v. Saber Mfg. Co.*, 816 So. 2d 1133, 1139 (Fla. 4<sup>th</sup> DCA 2002), it did so "merely to make the point that 'a product is defective in design when the foreseeable risks of

harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design and its omission renders the product not reasonably safe.” “If a product is reasonably safe, the fact that there may be a better alternative design is not grounds for product liability.” This does not make the existence of an alternative design a prerequisite to finding a defect.

The Supreme Court has granted review. 2008 WL 1774994.

## **Release – Exculpatory Clause**

### ***Applegate v. Cable Water Ski, L.C.***

974 So.2d 1112 (Fla. 5<sup>th</sup> DCA 2008)

In a commercial setting, an unambiguous pre-injury exculpatory clause in a contract between the parents and the camp where the child was injured was unenforceable because of the overriding public policy of protecting children from injuries caused by negligence. The Court expresses skepticism about, but does not reach, the plaintiffs’ alternative argument that parents never have authority to waive their children’s tort claims absent express authorization by statute. The court limits its holding to commercial enterprises, noting that “we can envision a public policy distinction supporting a different conclusion” in the context of a public or nonprofit entity. The court certifies the following question of great public importance:

Whether a contract containing an exculpatory clause, signed by a parent on behalf of her child, in favor of a commercial enterprise, is enforceable to defeat the child’s action to recover for personal injuries sustained by the child as a result of the enterprise’s negligence.

## **Standing**

### ***Maynard v. Florida Board of Education***

2008 WL 1808523 (Fla. 2d DCA 4/23/2008)

The court holds that the issue of standing need not be raised as an affirmative defense, and can be raised for the first time in a motion to set aside the judgment. It cannot be raised for the first time on appeal. The court certifies the following question of great public importance:

In applying the decisions of *Love v. Hannah*, 72 So.2d 39 (Fla. 1954), *Cowart v. City of West Palm Beach*, 255 So.2d 673 (Fla. 1971), and *Krivanek v. Take Back Tampa Political Committee*, 625 So. 2d 840 (Fla. 1993), is the defense of standing to bring a cause of action preserved for appellate review when raised for the first time in the trial court after trial by a motion to set aside but not in an affirmative defense filed before trial?

## **Trust Accounts – Garnishment**

### ***Arnold, Matheny & Egan, P.A. v. First American Holdings, Inc.***

Case No. SC07-1136 (Fla. 5/1/2007)

Florida law imposes on garnishees, whether they are a bank or not, the duty to retain funds held by the garnishee, even after a check on those funds has been drawn by the garnishee and delivered to the payee. Here, the Court holds that the funds remain in the possession or control of an attorney garnishee, and subject to garnishment, if service of the writ of garnishment occurs after a check drawn on an attorney’s trust account has been written and delivered to a client but before presentment to the attorney’s bank. The attorney in those circumstances has an obligation under the garnishment statute to inquire of the bank as to the status of the funds in the account and to issue a stop payment order if he or she has the ability to do so. However, the Court clarifies that the stop payment duty on attorneys does not apply to certified or cashier’s checks issued on or purchased with funds from an attorney trust account.