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## Recent Cases

### **MEDICAL MALPRACTICE – HOSPITALS – DISCOVERY – PATIENT'S RIGHT TO KNOW ABOUT ADVERSE MEDICAL INCIDENTS AMENDMENT TO FLORIDA CONSTITUTION**

*Florida Hospital Waterman, Inc. v. Teresa M. Buster, etc. et al.,  
Notami Hospital of Florida, Inc. v. Evelyn Bowen, et al.*, 33 Fla. L.  
Weekly S154a (Fla. March 6, 2008)

These two cases came before the Florida Supreme Court for the review of decisions of the First and Fifth District Courts of Appeal. Both cases addressed article X, section 25 of the Florida Constitution, also referred to as Amendment 7, the Patient's Right to Know About Adverse Medical Incidents. The District Courts certified three questions of great public importance and the First District held the implementing statute, Section 381.028, *Florida Statutes* (2005) to be unconstitutional.

#### **Self-Execution**

Agreeing with the First and Fifth Districts, the Florida Supreme Court held Amendment 7 is self-executing and its terms are enforceable as of the date of its passage. The Court found the Amendment provides a "sufficient rule" enabling patients to gain access to health care providers' adverse medical incidents. Further, the Amendment's language demonstrates the intent to make the change to the law governing access to medical records immediate and without legislative action.

#### **Application to Existing Records**

The Court applied analysis to this issue within the framework of "retroactivity." Retroactivity is a two-pronged analysis asking first if the relevant provision provides for retroactive application, and second if such application is constitutionally permissible. After review of the Amendment and ballot summary, the Court agreed with the First District's holding the Amendment was intended to provide immediate access to existing records. In addressing the second prong of the analysis, the Court examined whether the application of the amendment to existing records "impacts a substantive, vested right" by violating the due process rights of medical providers. Finding the existing statutory restrictions are limited to the discovery or

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*Florida Hospital Waterman (cont'd)*

introduction of the proceedings into evidence and have no application to dissemination or use within the institution or medical community, the Court held a vested right was not created by the scope of statutory guarantee of confidentiality afforded to reports of adverse medical incidents created by and for peer review committees.

**Section 381.028, Florida Statutes (2005)**

The Court agreed with the First District's holding that four provisions of Section 381.028 contravene the broad rights of access to adverse medical incident records granted by Amendment 7. Specifically, the following provisions contravene rights found in the Amendment: (1) the statute provides that only final reports be discoverable; (2) the statute only provides for access to reports relating to the "same or a substantially similar condition, treatment, or diagnosis" of the patient requesting the records; (3) the statute limits production to those records generated *after* November 2, 2004; and, (4) the statute states it will have no effect on existing privilege statutes. Additionally, the Court found the statute also provides patients can only access the records of the facility or provider of which they themselves are patients, a restriction not contained within the Amendment. The Court did not agree the offending provisions required invalidation of the entire statute. Rather, the Court held the statute otherwise appeared to fulfill the purpose of the implementing Amendment 7, and severed the unconstitutional portions of the statute leaving "a workable and helpful statute." Notably, the Court did not find offensive that provision of the statute allowing a healthcare provider to recoup reasonable costs related to production of the requested documents.

At this time, the Florida Supreme Court ruling on Amendment 7 is not final, as both hospitals involved in the cases have filed Motions for Rehearing and Clarification. The hospitals are asking the court to reconsider its decision making Amendment 7 apply to records created prior to its passage in 2004 and seeking clarification that Amendment 7 records are not admissible in a civil action, can be protected under attorney-client privilege, and that the Amendment does not impact any previous protections on testimony or immunities from suit.

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## TORTS – PRODUCTS LIABILITY – SPOILIATION OF EVIDENCE

*Travis Reed v. Alpha Professional Tools, et al.*,  
33 Fla. L. Weekly D692a, (Fla. 5th DCA, March 7, 2008)

Plaintiff appealed the trial court's dismissal of an action with prejudice against the distributors of a marble edge polishing wheel on the ground that the polishing wheel, the grinder and safety glasses had been lost by plaintiff and that defendant was unable to proceed with a defense without the lost evidence.

By way of background, the plaintiff filed a three-count products liability suit alleging strict liability, negligence and negligent failure to warn against each of two Defendants below, distributors of the polishing wheel. The suit alleged that Reed was operating a grinder with the polishing wheel attached when the polishing wheel broke into pieces and that one piece struck him in his left eye, causing permanent blindness. The suit also alleged that the polishing wheel was purchased less than a month before the incident and that Reed was wearing safety glasses while operating the grinder and wheel.

After the accident, Plaintiff's counsel obtained possession of the polishing wheel, the electric grinder and the safety glasses. Defendants filed a motion for inspection of the polishing wheel. At the hearing, Plaintiff's counsel informed the court that the evidence was lost and could not be located following a move by counsel's firm from its Tampa office building to offices in St. Petersburg. Extensive photographs of the polishing wheel had been made by Plaintiff's expert prior to the disappearance of the evidence.

Shortly thereafter, Defendants filed a motion for dismissal with prejudice or, in the alternative, for the entry of an appropriate spoliation remedy. Defendants filed an affidavit by their expert, a licensed engineer, who attested that Defendants were prejudiced as a result of the destruction of evidence and its inability to test the polishing wheel, the grinder and the safety glasses.

Plaintiff's counsel filed several affidavits by firm employees that attested to the fact that the evidence was properly secured prior to the move. At the hearing, Defendants urged dismissal of the suit, claiming prejudice at not having the evidence for their expert to inspect. Plaintiff's counsel argued that prevailing law disfavored dismissal as excessively harsh when the loss of the evidence was not intentional, and that the plaintiff was able to proceed without the lost evidence, where a lesser sanction would eliminate any disadvantage to the defense.

Subsequently, Plaintiff's counsel filed a motion to continue ruling, requesting the opportunity to permit discovery of the experts with an attached affidavit by his expert. In the affidavit, the expert attested

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*Travis Reed v. Alpha Professional Tools* (cont'd)

he had inspected the evidence prior to its loss, had taken extensive photographs and his opinion that the product was defective could be substantiated entirely by the detailed close-up photographs he had taken. After hearing argument from both parties, the trial court entered its order of dismissal, concluding that Defendants were prejudiced by the loss of the evidence.

The Fifth District Court of Appeal reversed the trial court's ruling because extensive photographs of the item had been taken. The Court held that the parties can be placed on an equal footing by limiting the plaintiff to photographic evidence which is available to both parties. The Court held that although Defendants would not be able to inspect the product, they would benefit from the inherent limitations on Plaintiff's proof and would be able to match Plaintiff's access to the available evidence.

**TORTS – DAMAGES – EVIDENCE**

*Gregory Sorrells & Linda Sorrells v. Alberto Montesino & Maria D. Delgado*, 33 Fla. L. Weekly D859a (Fla. 4th DCA, March 26, 2008)

In this matter, Gregory and Linda Sorrells appealed the jury verdict in a negligence action in which the trial court refused to permit Gregory Sorrells' treating physician to testify as to the future cost of his medical care.

By way of background, Gregory Sorrells' counsel called Dr. Lichtblau at trial to testify as to the physical and rehabilitative prognosis of Gregory Sorrells. During direct examination, Appellants' counsel inquired as to the cost of Gregory Sorrells' future pain management. Counsel for the Appellees objected to the line of questioning and argued Dr. Lichtblau's expert report did not contain information regarding future medical expenses; therefore, he should not be permitted to testify about same.

In response, Appellants' attorney contended the expert's report stated he would testify as to Gregory Sorrells' prognosis, which includes future medical expenses. Furthermore, counsel for the Appellees had the opportunity to depose Dr. Lichtblau and question him regarding his opinions. Therefore, Appellees should have been prepared for questioning relevant to future expenses.

The trial court ruled in favor of Appellees, stating Dr. Lichtblau's opinions in reference to future medical expenses should have been submitted in written form prior to trial. Therefore, Dr. Lichtblau was not permitted to offer an opinion as to the estimated cost of Gregory Sorrells' future medical expenses at trial.

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### *Sorrells v. Montesino* (cont'd)

On appeal, the District Court of Appeal held the trial court erred in omitting portions of Dr. Lichtblau's opinion since prior to trial Appellants represented that Dr. Lichtblau would testify as to Gregory Sorrells' injuries, treatment, diagnosis and prognosis. The appellate court held that it is not necessary for pretrial notices of expected expert testimony to be "subjected to literalistic, mechanical or crabbed readings." Thus, it was not necessary for Dr. Lichtblau's pretrial report detail each opinion he intended to offer.

Consequently, the Fourth District Court of Florida remanded this matter for retrial of future medical costs.

### **TORTS – PREMISES LIABILITY**

*Tina DiMarco and Jimmy DiMarco v. Colee Court, Inc.*,  
33 Fla. L. Weekly D751b (Fla. 4th DCA, March 12, 2008)

Tina DiMarco, a former tenant at Colee Apartment Complex, filed a negligence action against Colee after she allegedly tripped and fell on a paver on the defendant's property. Mrs. DiMarco specifically alleged that the paver had deteriorated, that it "irregularly extended above the adjacent ground level," and that Colee was negligent in allowing the dangerous condition to exist without warning the residents of the complex.

Colee moved for summary judgment on the ground that it had no duty to warn Ms. DiMarco of an open and obvious condition, as Ms. DiMarco had lived in the complex for approximately two months prior to the incident. The trial court ultimately granted Colee's motion for summary judgment and the DiMarcos appealed.

On appeal, the Fourth District Court of Appeal held that the trial court failed to consider whether there were any issues of material fact as to Colee's duty to maintain. The Court went on to note that Colee, as a property owner, owed two duties to Ms. DiMarco, an invitee, including: (1) the duty to use reasonable care in maintaining the property in a reasonably safe condition; and (2) the duty to warn of dangers of which the owner has or should have knowledge and which are unknown to the invitee and cannot be discovered by the invitee through the exercise of reasonable care.

Accordingly, the Fourth District reversed the trial court's ruling on the basis that the trial court only relieved Colee of the duty to warn and failed to address the second duty of Colee's use of reasonable care in maintaining the property.