

Ronald E. Bush  
Angela C. Cabassa  
Dominick J. Graziano  
Brian P. Haskell  
Laura French Martfeld  
Erin M. O'Toole  
Eric T. Olson  
Erin B. Reynolds  
Courtney L. Rice  
H. Hamilton Rice III

To view a full opinion, click  
on our website and select  
Newsletter

BUSH GRAZIANO & RICE, P.A.  
P.O. Box 3423  
Tampa, Florida 33601-3423  
[www.bgrtriallaw.com](http://www.bgrtriallaw.com)

## In The News

### SUPER LAWYERS 2009

Ron Bush, Dominick Graziano and Chip Rice have once again been named to the Super Lawyers list. Super Lawyers is a listing of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. Less than five percent of Florida's attorneys are recognized on the Super Lawyers list. We congratulate Ron, Dominick and Chip for this accomplishment.

## Recent Cases

*Ginsberg v. Northwest Medical Center, et al.*,  
34 Fla. L. Weekly D1349a (Fla. 4th DCA, July 1, 2009)

Plaintiff Harlan S. Ginsberg filed a medical negligence suit against two physicians, as well as Northwest Medical Center ("Northwest"), arising out of surgery performed by the physicians at Northwest. Plaintiff's claim against Northwest was based on vicarious liability for the alleged negligence of the two defendant physicians.

Northwest filed a motion for summary judgment, arguing it could not be vicariously liable for the actions of the defendant physicians because Plaintiff signed an agreement expressly negating any agency relationship between the physicians and Northwest. The agreement upon which Northwest's motion was based expressly provided that the surgeons and the physician associates were independent contractors and not employees or agents of Northwest. The lower court ultimately granted Northwest's motion and Plaintiff appealed.

The Fourth District Court of Appeal reversed the lower court's ruling, holding that the agreement did not "quiet all genuine issues of fact" with respect to the issue of apparent agent. This was the case in light of the Plaintiff's testimony at the summary judgment hearing that when he signed the consent form, he was in pain, did not have his glasses, had taken pain medication and could therefore not understand the form. The Court explained, "[i]f the record reflects even the possibility of a material issue of fact, or if different inferences can reasonably be drawn from the facts, the doubt must be resolved against the moving party." The action was remanded to provide the parties an additional opportunity to submit additional record evidence in support of the granting or denial of summary judgment under the apparent agency theory.

Ronald E. Bush  
Angela C. Cabassa  
Dominick J. Graziano  
Brian P. Haskell  
Laura French Martfeld  
Eric T. Olson  
Erin M. O'Toole  
Erin B. Reynolds  
Courtney L. Rice  
H. Hamilton Rice III

To view a full opinion, click  
on our website and select  
Newsletter

BUSH GRAZIANO & RICE, P.A.  
P.O. Box 3423  
Tampa, Florida 33601-3423  
[www.bgrtriallaw.com](http://www.bgrtriallaw.com)

## TORTS – NURSING HOMES – ARBITRATION AGREEMENTS

*New Port Richey Medical Investors et al. v. Stern*,  
34 Fla. L. Weekly D1140a (Fla. 2d DCA, June 5, 2009)

Dorothy Stern admitted to Life Care's facility in April 2006. When she admitted she executed an arbitration agreement which stated any disputes would be submitted to arbitration and administered by the American Arbitration Association (the AAA). In June 2008, Ms. Stern filed an action for nursing home residents' rights violations against New Port Richey Medical Investors, LLC, d/b/a Life Care Center of New Port Richey, et al. Life Care moved to dismiss the Complaint and compel arbitration.

At the hearing on the Motion to Compel Arbitration, Ms. Stern presented evidence showing that the American Arbitration Association would no longer be accepting the administration of cases involving individual patients without a post-dispute agreement to arbitrate. Notably, Ms. Stern and Life Care never entered into a post-dispute agreement to arbitrate. Based on the absence of such a post-dispute agreement and the AAA's policy statement, Ms. Stern's attorney argued there was no valid agreement to arbitrate. As such, the circuit court found the arbitration agreement invalid and unenforceable.

The issue of whether an agreement for arbitration between a nursing home resident and a nursing home is enforceable when the organization designated in the agreement to administer the arbitration is unavailable was presented to the Second District Court of Appeal.

The District Court of Appeal held § 682.04, *Fla. Stat.* (2007), provides that the court shall appoint one or more arbitrators if the method for appointment of arbitrators agreed to in the parties' agreement fails, or for any reason cannot be followed. Thus, the parties' arbitration agreement is not rendered invalid or unenforceable simply because the AAA is unavailable to conduct the arbitration. Instead, the circuit court must appoint another arbitrator or arbitrators.

The order denying Life Care's Motion to Compel Arbitration was reversed.

Ronald E. Bush  
Angela C. Cabassa  
Dominick J. Graziano  
Brian P. Haskell  
Laura French Martfeld  
Erin M. O'Toole  
Eric T. Olson  
Erin B. Reynolds  
Courtney L. Rice  
H. Hamilton Rice III

To view a full opinion, click  
on our website and select  
Newsletter

BUSH GRAZIANO & RICE, P.A.  
P.O. Box 3423  
Tampa, Florida 33601-3423  
[www.bgrtriallaw.com](http://www.bgrtriallaw.com)

## TORTS – PREMISES

*San Marco Realty v. Dopierala*,  
34 Fla. L. Weekly D1179a (Fla. 2d DCA, June 12, 2009)

Plaintiffs filed an action against San Marco after David Dopierala injured his leg following a slip into a manhole on San Marco's property. The cover for the manhole did not fit properly and the sole issue at trial centered around identifying the person, or party, responsible for maintaining the manhole and/or sewer system.

Plaintiffs also filed suit against Florida Water Systems (FWS), the Vucich Trust and the City of Marco Island. The evidence in the case revealed the Vucich Trust originally installed the sewer line, but sold the sewer system and its components to FWS in the early 1990's. Ultimately, Plaintiffs settled with the Vucich Trust and FWS, while the trial court entered summary judgment in favor of the City of Marco Island.

Upon learning of the settlement reached between FWS and Plaintiffs, San Marco named FWS as a *Fabre* defendant. However, as the case proceeded to trial, San Marco receded from its *Fabre* defense and argued FWS was not responsible for maintaining the sewer system and manhole cover.

At trial, the jury returned a \$500,000 verdict in favor of Plaintiffs. The award was then reduced to \$386,464 pursuant to additur and remittitur orders. The jury found San Marco to be 5% at fault and FWS to be 95% at fault. The trial court then granted Plaintiffs' motion for judgment notwithstanding the verdict – effectively granting their motion for directed verdict as to San Marco's *Fabre* defense.

On appeal, the Second District reversed the trial court's judgment notwithstanding the verdict, holding there was conflicting evidence as to whether San Marco or FWS was responsible for maintaining the sewer system. The appellate court further ruled the jury's verdict, including the apportionment of liability, was supported by the evidence presented at trial. Therefore, the trial court should not have substituted its own evaluation of the evidence over that of the jury. Accordingly, the case was remanded for reinstatement of the jury's verdict.