

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 0072

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the litigation.”⁸⁸⁸ After a lengthy discussion of the competing interests of the parties, (i.e., the patient’s interest in ensuring open communication with his healthcare provider by requiring that these discussions remain confidential, versus the defendant’s right to present a defense to a claim brought against him), the New Jersey Supreme Court stated:

In our view, these competing interests can be respected adequately without requiring the formality of depositions in every case. The Rules regulating pretrial discovery do not purport to set forth the only methods by which information pertinent to the litigation may be obtained. Personal interviews, although not expressly referred to in our Rules, are an accepted, informal method of assembling facts and documents in preparation for trial. Their use should be encouraged as should other informal means of discovery that reduce the cost and time of trial preparation . . .

Plaintiff may also seek and obtain a protective order if under the circumstances a proposed *ex parte* interview with a specific physician threatens to cause such substantial prejudice to plaintiff as to warrant the supervision of the trial court. Such supervision could take the form of an order requiring the presence of plaintiff’s counsel during the interview or, in extreme cases, requiring defendant’s counsel to proceed by deposition.⁸⁸⁹

Clearly, Stempler exemplifies the situation frequently facing defendants in medical malpractice actions throughout Florida. When the malpractice action is brought, the defendant is frequently in the position of having to investigate the plaintiff’s medical history or current condition in order to discover other possible causes of the plaintiff’s injury that could be used in defending the action. In addition, this information is often useful in determining the strength of the plaintiff’s case, which the defendant could use to decide whether to settle the claim or proceed to trial. It is often necessary to interview several of the plaintiff’s treating healthcare providers in order to acquire this information. But, because formal discovery is an expensive and time consuming process, defendants are often unable to adequately gather this information in preparation of their defense.

Streamlining this process would not only expedite the litigation process, but also reduce the process’ cost, thus limiting the insurer’s expense and slowing subsequent increases in insurance premiums. Further, as pointed out by the Stempler court, this reform creates no legitimate hardship for

⁸⁸⁸ Id. at 859.

⁸⁸⁹ Id. at 864.

the plaintiff because the plaintiff may still seek protection from the court in the event that the defendant attempts to abuse this less formal process.

Information Presented to the Task Force

Concerns about whether defendants may communicate extra-judicially with prior and subsequent treating physicians were expressed from opposite points of view. In one respect, the "playing field" was said to be one-sided, making more difficult a party's ability to quickly and fairly assess the merits of the case. On the other hand, the accessibility to treating physicians was believed to be adequate and available by use of the pre-suit and discovery procedures governing medical malpractice cases.

A practical impediment to the fair adjudication of medical malpractice claims is the issue of communications with subsequent treating physicians.⁸⁹⁰ The issue arises at the onset of a medical malpractice suit and continues throughout. Prior to the 1988 amendments to section 455.241, Florida Statutes, the common law allowed for equal access to non-party treating physicians by both the plaintiffs and the defendants. However, the Legislature, in creating a privilege to protect the confidentiality of medical records, inadvertently caused a "great advantage to the plaintiffs and a great disadvantage to the defendants" once there was notice of litigation or the litigation actually commenced.⁸⁹¹ The disadvantage is seen as soon as a plaintiff "injects [the plaintiff's] medical condition in the sense of the public domain by pursuing or electing to pursue medical malpractice action, because the non-party treating physicians remain off-limits to the defendant healthcare provider."⁸⁹² The defendant's lawyer must take the deposition of the non-party treating physician to discover the facts of the case. This is after the plaintiff's attorney has had the opportunity to sit down with the non-party physician and, in confidence, share with the non-party physician the plaintiff's theory of the case.⁸⁹³

This unfair and unbalanced privilege, as it currently exists, also drives up the cost of litigation.⁸⁹⁴ For example, if a problem arises in the legibility of medical records for a particular treating physician, rather than simply picking up a phone and calling the physician for clarification, the defendant's attorney must arrange a deposition involving court reporters, lawyers, and the involved doctor.⁸⁹⁵ A more fair and cost-efficient

⁸⁹⁰ Tommy Dukes, J.D., testimony, Nov. 22, 2002, pg. 294.

⁸⁹¹ *Id.* at 295.

⁸⁹² *Id.* at 296.

⁸⁹³ *Id.* at 297-298.

⁸⁹⁴ *Id.* at 298.

⁸⁹⁵ *Id.*

situation would be where each side, not only the plaintiff, is given access to the treating physicians in an informal fashion.⁸⁹⁶

Suggestions for proposed legislative language to change the existing situation to allow fair and equal access to non-party treating physicians by both entities were tendered. The proposal also included maintaining the privacy of the plaintiff by limiting its use to the context of the litigation proceedings.⁸⁹⁷

An alternative perspective opined "there is no other group of individuals or businesses in our state who have the ability to get more information about a case before it ever is filed in the circuit court."⁸⁹⁸ Before a case commences, pre-suit notice is required, and a detailed affidavit must be provided.⁸⁹⁹

The Legislature "thought long and hard about a problem that was clearly demonstrated at the time" during the 1980s, when they enacted the statute, which was a compromise between the rights of the injured party's and the insurance issues existing at the time.⁹⁰⁰ The problem the Legislature corrected was the private, closed-door meetings between insurance adjusters, defense lawyers, and the person being sued.⁹⁰¹ Typically, the person being sued would speak with his or her colleagues and say "I need your help here. I'm getting sued. I need you to help me out on either the causation issue or the liability issue or the damage issue".⁹⁰²

In effect, the Legislature said that to have access to this information, the rules of evidence and the rules of discovery must be followed including giving the patient's representative notice and an opportunity to be present when any questioning takes place.⁹⁰³

The present system is not broken.⁹⁰⁴ Crafting language to go back prior to 1988, to allow unfettered access, is not appropriate.⁹⁰⁵ To allow a situation where a defense lawyer or an insurance adjuster and the doctor go to see a patient's treating physician on an informal basis would further drive a wedge between that physician and the patient. That should not be permitted.⁹⁰⁶

⁸⁹⁶ *Id.* at 300.

⁸⁹⁷ *Id.* at 300-301.

⁸⁹⁸ Neal Roth, J.D., testimony, Nov. 22, 2002, pg. 302.

⁸⁹⁹ *Id.*

⁹⁰⁰ *Id.*

⁹⁰¹ *Id.* at 303.

⁹⁰² *Id.*

⁹⁰³ *Id.* at 303-304.

⁹⁰⁴ *Id.* at 306.

⁹⁰⁵ *Id.* at 304.

⁹⁰⁶ *Id.* at 306.

The defendants do have access to information through duly-noticed depositions and discovery and there is no reason to change the current system.⁹⁰⁷

Findings and Recommendations

The Task Force finds that prohibiting *ex parte* communication by defense counsel increases the defendant/insurer's administrative costs by requiring formal depositions of all treating physicians. In many cases, an informal interview would reveal a particular treating physician has little or no information relevant to the plaintiff's claim. Under such circumstances, the expense of a formal deposition could be avoided.

Accordingly, the prohibition on *ex parte* contact reduces the chances of an early settlement. In addition, because the statute does not prohibit *ex parte* contact between the plaintiff's counsel and the treating physician, the defendant is at an unfair disadvantage. At an early stage of the litigation, the plaintiff has the opportunity to present to the treating physician his or her theory of the case. Such one-sided advocacy has the potential to tilt the treating physician's opinion in favor of the plaintiff. Should the treating physician's deposition testimony prove favorable to the defense, however, the present scheme prohibits the defendant from preparing the treating physician for his or her direct examination. The plaintiff would face no such obstacle if the treating physician's testimony supported his or her theory of the case.

Recommendation 1. The Legislature should amend the Florida Statutes to allow *ex parte* communication between defense counsel for a defendant in a medical malpractice lawsuit and the plaintiff's treating physicians.

Recommendation 2. As an alternative, the Legislature may consider requiring the plaintiff to execute a medical information release when filing a lawsuit that would allow for the defendant to conduct *ex parte* interviews with the plaintiff's treating physicians only in areas potentially relevant to the plaintiff's alleged injury or illness.

⁹⁰⁷ *Id.*

Expert Witness Qualifications

Issue

The Task Force voted on December 20, 2002, by a 5-0 vote, to examine the following issue with respect to expert witness qualifications in the context of medical malpractice cases:

- Should the qualifications for a medical expert testifying in a medical malpractice action be amended to require the expert testifying to be of the same specialty as the physician being sued?

Current Situation

The most critical issue regarding expert witness qualifications questions the need for that expert to be of the same specialty, or be a similar healthcare provider pursuant to section 766.102, Florida Statutes, regarding the nature of the healthcare services provided.

Section 766.102(2), Florida Statutes, provides definitions of inclusion for experts who may testify and further provides that courts have the authority to interpret the section's provisions broadly. As a result, a specialist may testify against a general practitioner or a specialist in one field and may be permitted to testify against a specialist in another field. The statute provides that "the prevailing professional standard of care for a given health care provider shall be the level of care, skill and treatment which, in light of all relevant circumstances is recognized as acceptable and appropriate by reasonably prudent similar health care providers."⁹⁰⁸

Historically, case law has reflected a case-by-case fact-based determination as to whether a tendered expert should be permitted to testify regarding qualifications and opinions as to the standard of care given. As summarized in Stewart v. Price,⁹⁰⁹ "under the circumstances of the instant case, exclusion of the appellant's primary expert constitutes harmless error especially since this case, as many medical malpractice cases, was necessarily a 'battle of the experts'."⁹¹⁰

⁹⁰⁸ Section 766.102(1), Florida Statutes.

⁹⁰⁹ 718 So. 2d 205, 209 (Fla. 1st DCA 1998).

⁹¹⁰ See Cenatus v. Naples Community Hosp., Inc., 689 So. 2d 302 (Fla. 2d DCA 1997); see also Barrio v. Wilson, 779 So. 2d 413 (Fla. DCA 2000) (specialist who frequently consulted on emergency room cases

With the exception of changes made by chapter 85-175, Laws of Florida (1985), regarding the "prevailing professional standard" for "accepted standard of care" in subsections (3)(a) and (4) and adding subsection (5), no significant modifications have been made to this provision.

The issue to be reviewed by the Task Force is whether a more stringent standard for determining expert witness qualifications is mandated based on prevailing practices and perceived problems with accountability under the current statute.

Section 766.102, Florida Statutes, partially regulates the prevailing professional standard of care for a given healthcare provider and the degree of expertise necessary for a similar healthcare provider to be qualified to testify against another in a court of law. If an individual is not certified by an appropriate American board as being a specialist, is not trained or experienced in a medical specialty, or does not hold himself or herself out as a specialist, then a similar healthcare provider is one who:

1. Is licensed by the appropriate regulatory agency of this state.
2. Is trained and experienced in the same discipline or school of practice; and
3. Practices in the same or similar medical community.⁹¹¹

For those individuals who are certified by the appropriate American board as a specialist, and trained and experienced in a medical specialty, or hold themselves out as specialists, a similar care provider is one who:

1. Is trained and experienced in the same specialty; and

and saw patients in that setting was not qualified to testify on standard of care for emergency room physicians because he was not an emergency room physician and had not served on the staff in an emergency room department for at least fifteen years); Fuentes v. Spier, 766 So. 2d 1081 (Fla. 3rd DCA 2000) (critical care and trauma specialist qualified as a standard of care expert witness case against allegedly negligent emergency room physician even where expert was not an emergency room physician, given the expert's experience over the past five years in having been intimately involved in care of emergency room trauma patients and coordinating with emergency medical faculty and having written triage policies followed by emergency room personnel); Myron v. South Broward Hosp. Dist., 703 So. 2d 527 (Fla. 4th DCA 1997) (pediatrician was qualified to give opinion as to negligence of neurosurgeon in failing to perform procedure on infant because a pediatrician is well qualified to provide an opinion on necessary procedures such as a spinal tap even by a neurosurgeon); Fort Walton Beach Medical Center, Inc. v. Dingler, 697 So. 2d 575 (Fla. 1st DCA 1997) (requirement for qualifications as medical expert under pre-suit notification statutes of engagement of practice of medicine is satisfied so long as expert's active involvement in practice occurred within five-year period before incident giving rise to claim).

⁹¹¹ Section 766.102(2)(a)1-3, Florida Statutes.

2. Is certified by the appropriate American board in the same specialty.⁹¹²

The statute further provides that if any healthcare provider is providing treatment or diagnosis for a condition which is not within his or her specialty, a specialist trained in the treatment or diagnosis of that condition shall be considered a similar healthcare provider and shall be permitted to testify as an expert in any action if he or she is:

1. A similar healthcare provider pursuant to paragraph (a) or paragraph (b); or
2. Is not a similar healthcare provider pursuant to paragraph (a) or paragraph (b) but, to the satisfaction of the court, possesses sufficient training, experience, and knowledge as a result of practice or teaching in the specialty of the defendant or practice or teaching in a related field of medicine, so as to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine. Such training, experience, or knowledge must be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim.⁹¹³

As previously noted, the determination as to whether an expert witness qualifies to testify against another healthcare professional depends upon case-specific facts and whether a trial court is convinced that the expert is qualified to testify.

Information Presented to the Task Force

In the early 1960s, the Frye standard was applied in ascertaining whether a potential expert witness qualified to testify regarding medical malpractice practices.⁹¹⁴ In moving away from the Frye standard and the court appointment of non-advocate experts, concerns have grown regarding whether experts hired by various parties in fact testify truthfully and reflect accurately the standard of care provided in cases under litigation.⁹¹⁵ Today, doctors are sought out for their medical opinions. When a doctor who can provide favorable testimony is located, more times than not, that doctor is hired and is told to provide an opinion but not to provide a report.⁹¹⁶ Under the current statute, judges have the authority to qualify experts based on the information provided from the potential expert

⁹¹² Section 766.102(2)(b)1-2, Florida Statutes.

⁹¹³ Section 766.102(2)(c)1-2, Florida Statutes.

⁹¹⁴ Dennis Agliano, M.D., testimony, Nov. 22, 2002, pg. 334.

⁹¹⁵ *Id.* at 333-334.

⁹¹⁶ *Id.* at 334.

witness. For example, a family practitioner can be called as an expert against a neurosurgeon regarding a case involving brain surgery and the jury hearing the case will not appreciate that there is a quantitative and qualitative difference between hearing from a family practitioner versus an expert neurosurgeon as to whether the neurosurgeon rendered professional care.⁹¹⁷

Some stakeholders believe that having a qualified, in-kind specialist testify, rather than allow a judge decide who is a specialist, will satisfy what is perceived to be a "fairness issue."⁹¹⁸

Moreover, under current practices, medical practitioners not licensed within Florida are routinely hired to testify as experts in Florida courts. In these circumstances, there is no accountability in regulating the level of expertise of these experts, nor can Florida sanction them for any false testimony that may be provided.⁹¹⁹

The fairness issue requires that expert witnesses be healthcare providers who have the same or equal qualifications beginning with the pre-suit affidavit level up to and including any trial. These experts not only must have similar or the same expertise but must also be in the active practice of medicine for five years and possess a Florida medical license.⁹²⁰

One stakeholder observed that the problem might not be as great as first perceived. In 80 percent of the cases where a healthcare provider was specializing as a cardiologist, a cardiologist would be hired to testify.⁹²¹ Further statements suggested that, since 1975, the courts have been doing a "pretty good job of being gatekeepers" regarding the admission of expert witnesses in medical malpractice cases. The case law reflects that suits have been decided on a case-by-case basis and that there are restrictions in place pursuant to the statutes regarding qualifying overlapping specialists as expert witnesses.⁹²² It was observed that the medical associations routinely deal with these kinds of issues and have successfully disciplined their own by expelling identified bad actors from their membership.⁹²³ Regarding out-of-state experts and the need for certification to testify, some stakeholders were opposed to any changes. Further, those same stakeholders were opposed to any changes in evidentiary rules on expert witnesses, concluding that it would have no impact on the cost of insurance.⁹²⁴

⁹¹⁷ *Id.* at 335.

⁹¹⁸ *Id.* at 335-336.

⁹¹⁹ *Id.* at 336-337.

⁹²⁰ *Id.* at 337.

⁹²¹ Neal Roth, J.D., testimony, Nov. 22, 2002, pg. 349.

⁹²² *Id.* at 339-340.

⁹²³ *Id.* at 341.

⁹²⁴ *Id.* at 343.

However, other anecdotal reports revealed that there are cases where doctors who had never performed the procedure under scrutiny or never reviewed the records provided for review signed pre-suit affidavits. It was reported that for a few thousand dollars, an expert witness would put their name on a signed affidavit.⁹²⁵ Additionally, evidence reflected that 70 percent of the lawsuits are dropped because they are frivolous, and so it was concluded that 70 percent of the doctors signing these affidavits are doing so inappropriately. These kinds of statistics not only impact the physicians under scrutiny but the medical profession as a whole.⁹²⁶

Still additional evidence revealed that requiring in-kind specialists for pre-suit proceedings would cause the cost of litigation to escalate. For example, it was suggested that just to get started in a pre-suit case without an in-kind specialist, the cost ranged from \$5000 to \$7000 dollars per case. In a situation where a "specialist" is required, it could cost as much as \$25,000 to just start the case with a mail out notice letter.⁹²⁷ Ultimately, because these cases "take a lot of money to do correctly," care must be taken in crafting an outcome to the expert witness qualification issue.⁹²⁸

Findings and Recommendation

The Task Force finds, based on the testimony presented and the litigation to date, that in-kind specialists provide the greatest likelihood of satisfying the fairness issue regarding medical malpractice lawsuits. While trial judges traditionally determine qualifications of expert witnesses, the proliferation of expert witnesses in all disciplines has greatly diminished the ability of the courts to accurately assess the pertinent credentials of potential expert witnesses in a medical malpractice case.

Recommendation 1. The Legislature should examine ways to improve the use of in-kind experts at trial.

⁹²⁵ Dennis Agliano, M.D., testimony, Nov. 22, 2002, pg. 350.

⁹²⁶ *Id.* at 350-351.

⁹²⁷ Neal Roth, J.D., testimony, Nov. 22, 2002, pgs. 352-353.

⁹²⁸ *Id.* at 353.

Limitation on Liability Related to Emergency Services

Issue

The Task Force voted on December 20, 2002, by a 5-0 vote, to examine the issue of a limitation of liability related to emergency services in the context of medical malpractice cases:

- Should the definition of "reckless disregard," as applied to emergency care in section 768.12(2)(b)3, Florida Statutes, be clarified to make it a more stringent standard than that currently applied by the courts?

Current Situation

One of the main issues relating to limitations on liability to emergency services is whether the definition of "reckless disregard" should be clarified. Specifically at issue is whether the definition as found in section 768.13(2)(b), Florida Statutes, and as applied in emergency care should be amended to provide a more stringent standard. A second issue which has also emerged is whether the "stabilization standard" found in section 768.13(2)(b)2a, Florida Statutes, should be deleted. Such a deletion would allow immunity to any hospital, hospital employee, or any person practicing medicine to be extended beyond the stabilization of the patient at the non-emergency level.

Although the Good Samaritan Act has existed since 1965, it was not until the mid 1980's that the act underwent modifications in reaction to a growing medical malpractice crisis. This crisis was more evident in the area of emergency room and trauma care than in any other area of medical practice.⁹²⁹ In fact, from 1983 to 1987, emergency medical physicians experienced greater liability premium increases than any other medical specialty.⁹³⁰

⁹²⁹ Thomas R. Tedcastle & Marvin A. Dewar, Medical Malpractice: A New Treatment for An Old Illness, 16 Florida State University Law Review 535, 591 (Fall 1988).

⁹³⁰ This fact was confirmed by the 1987 Academic Task Force for Review of the Insurance and Tort Systems in its report dated August 14, 1987, when it found that emergency room physicians experienced a 49 percent annual increase in premiums during the period of 1983 to 1987. Academic Task Force for Review of the Insurance and Tort Systems, Preliminary Fact-Finding Report on Medical Malpractice 29-30. Consequently, some emergency rooms in South Florida closed and others curtailed their services. Thomas R. Tedcastle & Marvin A. Dewar, Medical Malpractice: A New Treatment for An Old Illness, 16 Florida State University Law Review 535, 591 (Fall 1988).

In 1986, the Legislature, through chapter 86-160, section 62, Laws of Florida, added a subsection to the Good Samaritan Act. Subsection 768.13(2)(b), Florida Statutes, created a provision that a licensed physician who rendered emergency care or treatment in response to a "code blue" emergency within a hospital or trauma center would be eligible for immunity.⁹³¹ Immunity would be granted if the physician acted as would a reasonably prudent person licensed to practice medicine under the same or similar circumstances.⁹³²

In response to the medical malpractice crisis in 1987, former Governor Martinez organized the Governor's Task Force on Emergency Room and Trauma Care.⁹³³ This Task Force recommended specific reform proposals such as changing the standard of care in medical malpractice cases involving emergency care to gross negligence; requiring physicians to provide emergency room coverage as a condition of staff membership; establishing qualification criteria for expert witnesses in emergency care malpractice cases; and expanding funding for indigent emergency care.⁹³⁴ Former Governor Martinez also created the 1987 Academic Task Force for Review of the Insurance and Tort Systems, which was tasked to evaluate the state's tort and insurance laws in light of the growing malpractice crisis. Although Governor Martinez did not endorse all the proposals from the task forces, the 1988 Legislature did enact legislation that addressed a number of these proposals.⁹³⁵

In 1988, the Florida Legislature reformed the Good Samaritan Act's standard of care requirements for cases arising from injuries received in emergency rooms and trauma centers. Due to amendments to section 768.13(2)(b), Florida Statutes, the standard of care for emergency and non-emergency situations by physicians in offices or hospitals would no longer be indistinguishable.⁹³⁶ Instead, the standard of care now required a change in the degree of culpability on the part of physicians and hospitals rendering care in emergency rooms and trauma centers.

⁹³¹ "Code Blue" emergencies generally are those involving cardiopulmonary arrest that require immediate application of cardiopulmonary resuscitation (CPR). *Id.* at 535.

⁹³² Chapter 86-160, section 62, Laws of Florida.

⁹³³ Thomas R. Tedcastle & Marvin A. Dewar, Medical Malpractice: A New Treatment for An Old Illness, 16 Florida State University Law Review 535, 591 (Fall 1988).

⁹³⁴ *Id.* at 591-592.

⁹³⁵ *Id.* at 592.

⁹³⁶ A claimant in an action for medical malpractice had the burden of proof by the greater weight of the evidence to show that the healthcare practitioner breached the standard of care as measured by a reasonably prudent person licensed to practice medicine under the same or similar circumstances. Thomas R. Tedcastle & Marvin A. Dewar, Medical Malpractice: A New Treatment for An Old Illness, 16 Florida State University Law Review 535 (Fall 1988).

Section 768.13(2)(b), Florida Statutes, granted civil immunity to hospitals, hospital employees working within the facility, and persons licensed to practice medicine for injuries occurring as a result of medical care or treatment if the actions occurred in good faith and treatment was necessitated by a sudden, unexpected situation or occurrence resulting in a serious medical condition which demanded immediate medical attention.⁹³⁷ The patient receiving the care must have entered the hospital through the emergency room or trauma center.⁹³⁸ Actionable malpractice occurring after February 8, 1988, would necessitate a demonstration of "reckless disregard" for the life or health of the patient.⁹³⁹ Therefore, a hospital and its covered personnel would not be protected from civil liability if the injuries were a result of care, or lack of care or treatment, under circumstances that demonstrated a reckless disregard for the consequences of the life or health of a patient.

The Legislature chose to define "reckless disregard" as conduct which, at the time of the services were rendered, the healthcare provider knew or should have known would likely result in injury to the patient so as to affect the life or health of that patient.⁹⁴⁰ The definition delineated five elements that addressed circumstances to be considered when determining if a person "knew or should have known" that injury was likely to occur. As codified, section 768.13(2)(b)3, Florida Statutes (1988), delineates these elements as follows: "the extent or serious nature of the circumstances prevailing; the lack of time or ability to obtain appropriate consultation; the lack of a prior patient physician relationship; the ability to obtain an appropriate medical history of the patient; the time constraints imposed by coexisting emergencies."⁹⁴¹

Significant changes to the Good Samaritan Act relative to emergency rooms and trauma centers have not occurred since 1988. Moreover, appellate review has been *de minis* with few issues surfacing in the area of the "reckless disregard" standard. In the case of Garcia v. Randle-Eastern Ambulance Service, the Third District Court of Appeals determined that the issue of whether the facility acted with "reckless disregard" to the victim was a jury question based on the competent substantial evidence presented.⁹⁴² The court further stated it would apply the legislatively-created statutory definition of reckless disregard and would not rely on any common law definition of recklessness to determine liability under the Good Samaritan Act.⁹⁴³

⁹³⁷ Section 768.13(2)(b), Florida Statutes.

⁹³⁸ *Id.*

⁹³⁹ Thomas R. Tedcastle & Marvin A. Dewar, Medical Malpractice: A New Treatment for An Old Illness,

16 Florida State University Law Review 535, 593 (Fall 1988).

⁹⁴⁰ Section 768.13(2)(b)3, Florida Statutes.

⁹⁴¹ *Id.*

⁹⁴² Garcia v. Randle-Eastern Ambulance Service, 710 So. 2d. 74, 75 (Fla. 3d DCA 1998).

⁹⁴³ *Id.*

Two subsections of section 768.13, Florida Statutes, are controlling in reference to liability limitations related to emergency services. One is section 768.13(2)(b)1, Florida Statutes, which sets forth the criteria for those who may be considered a covered party and what circumstances the covered party must be under before the immunity delineated in the Good Samaritan Act can be imposed. Specifically, section 768.13(2)(b)1, Florida Statutes, applies to hospitals licensed under chapter 395, Florida Statutes; employees of the hospitals working in the clinical area within the facility and rendering patient care; and any person licensed to practice medicine.⁹⁴⁴ The second part of the statutory section lists certain elements that must be met before application of this immunity provision can be asserted. Those statutory elements are a good faith rendering of medical care or treatment of a sudden, unexpected situation or occurrence that results in a serious medical condition demanding immediate medical attention. Additionally, the patient must have entered the hospital through the emergency room or trauma center.⁹⁴⁵

However, the immunity granted by this statutory section has a caveat clause. Section 768.13(2)(b)1, Florida Statutes, states that a covered entity shall not be held liable for "any civil damages as a result of such medical care or treatment unless such damages result from providing, or failing to provide, medical care or treatment under circumstances demonstrating a reckless disregard for the consequences so as to affect the life or health of another."

Section 768.13(2)(b)2, Florida Statutes, is the second controlling subsection that impacts the practical application of this statutory immunity law for emergency room and trauma center events. The immunity does not apply to causes of action under two different settings.

The first is when the injury is a result of any act or omission in providing medical care or treatment occurring after the patient is stabilized and is capable of receiving medical treatment as a non-emergency patient, unless surgery is required as a result of the emergency within a reasonable time after the patient is stabilized.⁹⁴⁶ As such, an actionable malpractice case for injuries occurring in emergency rooms or trauma centers is governed by the simple negligence standard unless all the criteria of the Good Samaritan Act are met.⁹⁴⁷ While this subsection was enacted in an effort

⁹⁴⁴ Section 768.13(2)(b)1, Florida Statutes.

⁹⁴⁵ *Id.*

⁹⁴⁶ Section 768.13(2)(b)2, Florida Statutes.

⁹⁴⁷ In Standard Jury Instructions – Civil Cases– Nos. 95-1, 95-2, 658 So. 2d 97 (Fla. 1995), the Florida Supreme Court adopted the jury instructions and commentary regarding the application of the degree of negligence standard submitted to the court by the Florida Supreme Court Committee on Standard Jury Instruction in Civil Cases. Standard Jury Instruction MI 9 was drafted "to address amendments to s. 768.13(2)(b), Florida Statutes. It applies only to cases described in that statute. MI 9 does not apply to cases

to clarify the circumstances in which immunity does not apply, unintended consequences have resulted. A line of demarcation as to when immunity may or may not apply has been drawn. This line of demarcation is predicated on "patient stabilization" which unwittingly creates an opportunity for prolific, protracted litigation. For example, questions such as what constitutes stabilization, at what point stabilization occurred and what is considered non-emergency care, may make ripe the opportunity for litigation that was not the intent of the legislation. Consequently, the stabilization element of this subsection brings into question, and may make meaningless, the Legislature's intent to provide immunity, thus requiring a case-by-case assessment in the granting of the immunity.

Second, immunity does not apply if the act or omission of providing medical care or treatment is unrelated to the original medical emergency.⁹⁴⁸

Based on the afore-noted discussion, it would appear that possible modifications are needed to conform current limitations as to any issue of stabilization to the applicability of any immunity.

Information Presented to the Task Force

Most of the testimony obtained pertaining to the reckless disregard standard and its application to emergency service events was presented to the Task Force at its December 3, 2002 meeting in Tallahassee. The testimony was derived from a point, counterpoint perspective.

Two reasons were outlined as to why the reckless disregard standard was not beneficial to emergency room doctors, the hospitals, and others.⁹⁴⁹ First, the offered evidence noted that an emergency room doctor in Williston, Florida, was "desperately searching" and could not find malpractice insurance for his emergency services.

The second reason was based on fairness and common sense.⁹⁵⁰ The reckless disregard standard has not changed the situation for emergency room doctors since its establishment "12 or 14 years ago."⁹⁵¹ It was

involving patients capable of receiving treatment as nonemergency patients, even if treated in the emergency room. No reported decision construes the legislative intent behind the amendments. Based upon the definition of 'reckless disregard' in subpart (2)(b)3, the Committee has concluded that the intent was to limit liability in civil actions for damages arising out of fact situations to which the statute applies to cases where something more than 'simple' negligence is established. Therefore, the standard instructions dealing with 'simple' negligence are not appropriate for civil damage actions to which the statute applies."

⁹⁴⁸ Section 768.13(2)(b)2, Florida Statutes.

⁹⁴⁹ George Meros, J.D., testimony, Dec. 3, 2002, pgs. 124-125.

⁹⁵⁰ *Id.* at 99.

⁹⁵¹ *Id.* at 100.

judged to be a “band-aid to try and calm down doctors” who were having problems. It has not done that because an expert is still going to come in and testify that “[O]h yes, that rises to the level of reckless disregard.” In essence, notwithstanding the reckless disregard language, emergency room doctors and emergency care still have a problem.⁹⁵²

One suggestion proffered was to change the language to require the plaintiff to prove that the emergency provider committed a willful disregard for the rights of the patient. This would be consistent with the common law standard.⁹⁵³

Modifying the statute to add “willful” conduct to the reckless disregard standard is not supported by all stakeholders. It was suggested that adding the term “willful” to the standard would be “tantamount to intentional acts and would literally wipe out the law of medical negligence and the right for injured people in the state to bring medical negligence actions.”⁹⁵⁴

Findings and Recommendations

Two related issues have come before the Task Force: (1) clarification of the “reckless disregard” standard, and (2) whether the “stabilization standard” should be redefined or abandoned.

The Task Force finds, based on the consideration of current law, the testimony provided during the meetings and the practical impact and application of the Good Samaritan Act to date, the definition of “reckless disregard” as defined by statute is sufficient and needs no further modification.

The Task Force further finds that as to the issue of patient stabilization as set forth in section 768.13(2)(b)2a, Florida Statutes, all references to patient stabilization should be repealed. The Task Force finds that because of the uncertainty of when patient stabilization occurs, undue and unintended litigation may result which dilutes the intent of this limited liability statute. By eliminating the patient’s stability factor, the statute becomes more meaningful and more purposeful and greater immunity coverage is provided. As a result, the Task Force believes the limitation of liability in civil actions for damages arising out of emergency services provided to a standard of reckless disregard for life or health of another, satisfactorily protects patient’s care in these identified circumstances and provides the necessary requirements for meeting liability immunity for covered parties.

⁹⁵² *Id.*

⁹⁵³ *Id.* at 101.

⁹⁵⁴ Lance Block, J.D., testimony, Dec. 3, 2002, pg. 104.

Recommendation 1. The Legislature should retain the definition of "reckless disregard," as that term is currently defined by statute, as it is sufficient.

Recommendation 2. The Legislature should repeal references to patient stabilization in section 768.13(2)(b)2a, Florida Statutes.

Sovereign Immunity

Issue

The Task Force voted on December 20, 2002, by a 5-0 vote, to examine the following issues of sovereign immunity for emergency room physicians in the context of medical malpractice cases:

- When emergency medical providers are performing medical services pursuant to the mandate imposed upon them in sections 395.1041 and 401.45, Florida Statutes, is there a reasonable basis to define the providers as agents of the state under section 768.28, Florida Statutes, due to the state-imposed mandate to implement the public policy goals underlying sections 395.1041 and 401.45, Florida Statutes?
- If so, should section 768.28, Florida Statutes, be amended to define emergency medical providers as agents of the state entitled to sovereign immunity for damages beyond the allowable caps, with the state to consider paying any claims exceeding the caps pursuant to the legislative claims bill process?

Current Situation

A proposal was made to apply sovereign immunity limits to emergency room physicians and hospital staff working within the hospital emergency room.

Sovereign immunity is derived from a medieval English doctrine that "one could not sue the king in his own courts; hence the phrase 'the king can do no wrong.'"⁹⁵⁵ Justice Holmes explained the basis for the doctrine in 1907:⁹⁵⁶ "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."⁹⁵⁷ The doctrine of sovereign immunity as applied by the Florida courts was based on two public policy considerations: "the protection of the public against profligate

⁹⁵⁵ Cauley v. City of Jacksonville, 403 So. 2d 379 (Fla. 1981).

⁹⁵⁶ Kawananakoa v. Polyblank, 205 U.S. 349, as cited in Cauley v. City of Jacksonville, 403 So. 2d 379 (Fla. 1981).

⁹⁵⁷ Cauley v. City of Jacksonville, 403 So. 2d 379 (Fla. 1981).

encroachments on the public treasury⁹⁵⁸ and the need for the orderly administration of government, which, in the absence of immunity, would be disrupted if the state could be sued at the instance of every citizen."⁹⁵⁹

Sovereign immunity is constitutionally absolute, subject only to the Legislature's right to waive immunity.⁹⁶⁰ The state, its agencies, and counties have always been fully covered by sovereign immunity. Municipalities and quasi-governmental entities have been found by the courts to have limited immunity depending on whether the activity performed was considered a governmental function covered by sovereign immunity or a proprietary function for which the entity could be held liable. For instance, where a special taxing district operated a hospital that provided services to both paying and indigent clients, the court found the hospital was covered by sovereign immunity as to the indigent patients but not as to the paying patients.⁹⁶¹ More recently, the Legislature, through specific enactment, or the courts through application of the law, have applied sovereign immunity to public institutions created, owned, and controlled by the state or its subdivisions,⁹⁶² and public corporations or public quasi-corporations created by the Legislature to perform state-wide functions.⁹⁶³

The authority to grant relief from sovereign immunity was vested in the Legislature by the Constitution in 1896.⁹⁶⁴ However, the Legislature did not exercise that authority until the passage of section 768.28, Florida Statutes, in 1973.⁹⁶⁵ Prior to the passage of that section, any person wronged by actions of a governmental entity could only seek relief through payment from the Legislature via a claims bill. With the passage of section 768.28, Florida Statutes, the Legislature established a specific process for filing claims against governmental entities and the statute more clearly defined those entities the Legislature considered governmental entities. Additionally, after the passage of section 768.28, Florida Statutes, the Supreme Court receded from the analysis of sovereign immunity based on governmental and proprietary functions and deferred to the statutory scheme.⁹⁶⁶

⁹⁵⁸ Spangler v. Florida State Turnpike Authority, 106 So. 2d 421 (Fla. 1958).

⁹⁵⁹ State Road Department v. Tharp, 146 Fla. 745, 1 So. 2d 868 (Fla. 1941).

⁹⁶⁰ See Fla. Const. art. X, section 13.

⁹⁶¹ Suwannee County Hospital Corp. v. Golden, 56 So. 2d 911 (Fla. 1952).

⁹⁶² Smith v. Duval County Welfare Bd., 118 So. 2d 98 (Fla. 1st DCA 1960).

⁹⁶³ Rabin v. Lake Worth Drainage Dist., 82 So. 2d 353 (Fla. 1955).

⁹⁶⁴ See Fla. Const. art. IV, section 19 (1868) (now art. X, section 13).

⁹⁶⁵ Prior to 1979 and passage of 768.28, Florida Statutes, a party suffering injury by the state could file a claims bill with the Legislature seeking relief.

⁹⁶⁶ Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979), Cauley v. City of Jacksonville, 403 So. 2d 379 (Fla. 1981), and Eldred v. North Broward Hospital District, 498 So. 2d 911 (Fla. 1986) (found the special taxing district to be covered by sovereign immunity on the basis of three actions: first, the passage of 768.28, second the specific recognition of special taxing districts as

The primary function of section 768.28, Florida Statutes, was the waiver of sovereign immunity for the state, its agencies or subdivisions. Additionally, the statute provides some limitations on suits against individuals and corporations who are not the sovereign but who pursue public or quasi-public objectives. Thus, the statute provides protection to the state, an agency, or subdivision, and to officers, employees, or agents of those governmental entities.

The section defines "state agencies or subdivisions" to include executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.

In 1979, the Legislature clarified section 768.28, Florida Statutes, to provide that an officer, employee, or agent of a covered entity was not personally liable when acting within the scope of his or her employment or function. The section defines "[o]fficer, employee, or agent" to include all officers, employees, or agents of any covered entity and in paragraphs (9)(b) and (c), specifically includes, but is not limited to, any healthcare provider when providing services pursuant to section 766.1115, Florida Statutes,⁹⁶⁷ any member of the Florida Health Services Corps, who provides uncompensated care to medically indigent persons referred by the Department of Health; and any public defender or his or her employee or agent; volunteer firefighters; and members of the national guard except as specifically provided. The section has been amended over the years to specify others to be included as employees or agents of a governmental entity within the provisions of section 768.28, Florida Statutes.

Certain entities are to be considered agents of the state for purposes of the application of the waiver of sovereign immunity in the section. These include:

- Contractual agents of the Department of Corrections who provide healthcare services to inmates of the state correctional system.⁹⁶⁸
- Regional poison control centers created in accordance with law and coordinated and supervised under the Division of Children's Medical Services Prevention and Intervention of the Department of Health.⁹⁶⁹

governmental entities in the constitution, and finally, the court's elimination of the governmental proprietary analysis).

⁹⁶⁷ Section 766.1115, Florida Statutes.

⁹⁶⁸ Section 768.28(10)(a), Florida Statutes.

⁹⁶⁹ Section 768.28(10)(c), Florida Statutes.

- Contractors of the Tri-Rail Authority or the Department of Transportation providing security and/or rail facility maintenance in the South Florida Rail Corridor.⁹⁷⁰
- Contractors with the Department of Juvenile Justice providing services to children in need of services, families in need of services, or juvenile offenders.⁹⁷¹

Other provisions of law provide for the application of section 768.28, Florida Statutes, to specified entities such as:

- The Hazardous Materials Emergency Response Commission and local committees established pursuant to section 252.89, Florida Statutes. The Federal Emergency Planning and Community Right to Know Act of 1986, requires the Governor to create a state commission and local committees to provide public information on the presence and release of toxic chemicals and to develop response plans for local communities and the state. The Governor appoints the commission members and the commission then appoints and supervises the local committees. Section 252.89, Florida Statutes, specifically provides that the commission and the local committees are state agencies and that the members of the commission and the local committees are officers, employees, or agents of the state for purposes of liability under section 768.28, Florida Statutes.
- Contractors with the Department of Business and Professional Regulations providing legal or investigative services to the Department or regulatory boards are provided sovereign immunity as to the investigations, conduct, and testimony provided to the various regulatory boards.⁹⁷²
- Persons or entities who allow governmental entities to use property for emergency shelters without compensation are immune from liability for any injury or death occurring during a real emergency or any practice or mock emergency.⁹⁷³ If the individual or entity is compensated for the use of the property, the person or entity is deemed an instrumentality of the state or its applicable agency or subdivision for purposes of the limitations on liability provided by section 768.28, Florida Statutes.
- Charter schools are defined in section 1002.33, Florida Statutes, as public schools and part of the state's program of public education.

⁹⁷⁰ Section 768.28(10)(d), Florida Statutes.

⁹⁷¹ Section 768.28(n), Florida Statutes.

⁹⁷² Section 252.89, Florida Statutes.

⁹⁷³ Section 252.51, Florida Statutes.

Each school receives an approved charter from the district school board that sets out the operations of the charter school in accordance with the terms and conditions set out in law.⁹⁷⁴ The approved charter schools receive state and local funding from the district school board based on the same funding standards as other public schools. Approved charter schools are eligible for state capital outlay funds in the same manner as other public schools.⁹⁷⁵ Thus, approved charter schools are covered by the same sovereign immunity provisions as any other public school.

- Family foster homes are licensed and regulated by the state pursuant to section 409.175, Florida Statutes. Each home that accepts only children referred by the Department of Families and Children or its agencies enters into a contract with the Department regulating the services to be provided. These family foster homes are provided sovereign immunity as agents of the state.⁹⁷⁶

In reviewing the application of sovereign immunity and the provisions of section 768.28, Florida Statutes, the courts have examined the application to specific entities and types of actions. In these cases, it has been argued that by applying sovereign immunity, the Legislature has violated article I, section 21 of the Florida Constitution by denying access to the courts. In analyzing this issue the courts have applied the test set forth in Kluger v. White.⁹⁷⁷ That test provides that "where a right of access to the courts for redress of a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the state of Florida, or where such right has become a part of the common law of the state pursuant to section 2.01, Florida Statutes, the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the state to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown."

The court, in evaluating the application of section 768.28, Florida Statutes, to municipalities, applied this analysis. In Caulev v. City of Jacksonville,⁹⁷⁸ the Florida Supreme Court reversed prior applications of the limitation of sovereign immunity to municipalities and instead applied the provisions of section 768.28, Florida Statutes. The court applied the Kluger test in analyzing the application of sovereign immunity and section 768.28, Florida Statutes, to municipalities and found "[t]here was no

⁹⁷⁴ Sections 1002.33(6)(a), 1002.33(6)(g), Florida Statutes.

⁹⁷⁵ Section 1002.33, Florida Statutes.

⁹⁷⁶ Section 409.175, Florida Statutes.

⁹⁷⁷ 281 So. 2d 1 (Fla. 1973).

⁹⁷⁸ 403 So. 2d 379 (Fla. 1981).

statutory right to recover for a municipality's negligence predating the adoption of the declaration of rights contained in the Florida constitution nor was there a cause of action at common law as of July 4, 1776, adopted under section 2.01, Florida Statutes."

The Kluger⁹⁷⁹ analysis was again argued in White v. Hillsborough County Hospital Authority,⁹⁸⁰ regarding the elimination of suit against a government employee. The court stated:

[s]trong policy reasons support the legislative immunization of state employees from personal liability.⁹⁸¹ Here the right of an injured party to seek redress has not been abolished. Rather, the legislature has merely substituted the state and its agencies, which previously could not be sued because of sovereign immunity, for the individuals who could have been sued.⁹⁸² Thus, appellant's cause of action has not been destroyed but has been converted to an action against a state agency.⁹⁸³

Subsequently, in interpreting the provisions of section 768.28, Florida Statutes, the courts have covered contractors and agents of the state similarly to employees.

Finally, the courts examined who qualifies as an agent, employee, or contractor of the state within the definitions of section 768.28, Florida Statutes. In Skoblow v. Ameri-Manage, Inc.,⁹⁸⁴ the district court of appeals found a state contractor who operated a state mental institution was operating as an agency of the state at the time of the plaintiff's alleged wrongful discharge. This determination was based on the court's examination of the contractual relationship between Ameri-Manage, Inc. and the state. In the case of Stoll v. Noel,⁹⁸⁵ the Florida Supreme Court found that physician consultants with Children's Medical Services (CMS) were acting as agents of the state within the provisions of section 768.28(9), Florida Statutes, and thus were immune from suit individually. Here again, the court carefully examined the relationship between the doctors and CMS. The court stated that the determination "turns on the degree of control retained . . . by CMS." In making that determination the court examined the terms of the employment contract.⁹⁸⁶ The court found the contract demonstrated that CMS had final authority over all care and

⁹⁷⁹ Kluger v. White, 281 So. 2d 1 (Fla. 1973).

⁹⁸⁰ 448 So. 2d 2 (Fla. 1st DCA 1983).

⁹⁸¹ State Department of Transportation v. Knowles, 402 So. 2d 1155 (Fla. 1981).

⁹⁸² Id.

⁹⁸³ White v. Hillsborough County Hospital Authority, 448 So. 2d 2 (Fla. 1st DCA 1983).

⁹⁸⁴ 483 So. 2d 809 (Fla. 3rd DCA 1986).

⁹⁸⁵ 694 So. 2d 701 (Fla. 1997).

⁹⁸⁶ Stoll v. Noel, 694 So. 2d 701, 703 (Fla. 1997).

treatment provided to CMS patients, and it could refuse to allow a physician consultant's recommended source of treatment of any CMS patient for either medical or budgetary reasons.⁹⁸⁷

Hospitals and physicians providing emergency medical care in designated trauma units and hospital emergency rooms are also directed by the state and the Federal governments to provide such care. The federal Emergency Medical Treatment and Active Labor Act (EMTALA) requires that all persons coming into an emergency department must be provided a screening exam to determine whether there is an emergency, and when an emergency is found, the person must be treated to the extent of the emergency room's capability without regard to ability to pay or the type of injury or illness.⁹⁸⁸

Each hospital providing emergency services is required to provide the Agency for Health Care Administration (AHCA) with a list of all emergency services within the service capability of the hospital.⁹⁸⁹ Those services are to be listed on the hospital license.⁹⁹⁰ The listed services are to be provided by the hospital upon the request of the patient, an emergency medical services provider, or another hospital.⁹⁹¹ Where the hospital is at capacity or does not provide the requested emergency service, the hospital may transfer the patient to the nearest facility with appropriate available services.⁹⁹² Each hospital must ensure the services listed on the hospital license can be provided at all times either directly or through another hospital.⁹⁹³ Through these sections, the state directs and controls the actions and activities of hospitals and physicians providing designated trauma services and emergency services in a designated trauma center or hospital emergency room.

State regulation of designated trauma centers is even more intensive than for emergency rooms. Part II of chapter 395, Florida Statutes, provides for the designation and regulation of designated trauma centers and the filing of trauma center plans to be approved by ACHA.⁹⁹⁴ To qualify as a designated trauma center, a hospital must meet the requirements of part II of chapter 395, Florida Statutes, and services must be provided in accordance with that part and rules adopted by ACHA.⁹⁹⁵ Section 395.1041, Florida Statutes, requires every hospital with an emergency room to provide services or arrange for services in accordance with the

⁹⁸⁷ *Id.* at 703.

⁹⁸⁸ Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. section 1395dd.

⁹⁸⁹ Section 395.1041(2), Florida Statutes.

⁹⁹⁰ *Id.*

⁹⁹¹ Section 395.1041(3), Florida Statutes.

⁹⁹² *Id.*

⁹⁹³ Section 395.1041(3), Florida Statutes.

⁹⁹⁴ Section 395.401, Florida Statutes.

⁹⁹⁵ Sections 395.401, 395.405, Florida Statutes.

needs of the patient for any patient requesting services. In enacting section 395.1041, Florida Statutes, the Legislature stated its intent as follows:

It is the intent of the Legislature that the agency vigorously enforce the ability of persons to receive all necessary and appropriate emergency services and care and that the agency act in a thorough and timely manner against hospitals and physicians which deny persons emergency services and care. It is further the intent of the Legislature that hospitals, emergency medical services providers, and other healthcare providers work together in their local communities to enter into agreements or arrangements to ensure access to emergency services and care.⁹⁹⁶

The Emergency Medical Transportation Services Act in chapter 401, Florida Statutes, similarly regulates the services provided by emergency medical technicians, paramedics, and ambulances. This chapter requires that services be provided to all persons requesting transportation to the capacity of the service without regard to ability to pay.⁹⁹⁷

Clearly those facilities and the staff's facilities providing emergency transportation, emergency care, and designated trauma services are providing a necessary and critical public function of care for the most seriously ill or injured. Once a facility and the doctors practicing within the facility agree to provide emergency or trauma care, they must provide that care within the parameters and requirements of state and federal law. In fact, the hospital license granted by the state sets forth the services the hospital has committed to provide and thus must provide on demand. This does not appear to be significantly different from the charter school that has its charter approved by the district school board or the family foster homes granted coverage under section 768.28, Florida Statutes.

While the courts have applied the Kluger test in cases evaluating the application of sovereign immunity to governmental agents, the courts have generally found that there was not an abrogation of a remedy but a substitution of a governmental entity for the agent or employee of that entity. The application of section 768.28, Florida Statutes, to providers of emergency services would be no different. In sum, the courts have extended sovereign immunity on numerous occasions to governmental and quasi-governmental entities. There appears to be a rational basis to extend the protections of section 768.28, Florida Statutes, to those who have the burden of implementing critical state objectives.

⁹⁹⁶ Section 395.1041(1), Florida Statutes.

⁹⁹⁷ Section 401.45, Florida Statutes.

Information Presented to the Task Force

At the November 22, 2002, meeting of the Task Force, Mr. George Meros, on behalf of the Florida College of Emergency Physicians, presented the need and rationale for providing limited sovereign immunity to physicians providing services in any state-licensed emergency room.⁹⁹⁸ Mr. Meros stated that "emergency care personnel, which includes emergency physicians, . . . hospitals, on-call physicians and others attending emergencies pursuant to the state mandate in chapters 395 and 401, have the burdens of implementing state policy without the benefit of all others who act as arms of the state in implementing state policy."⁹⁹⁹ As an example, Mr. Meros discussed the situation where county or state health personnel worked alongside private doctors in addressing a medical emergency such as Anthrax or a hurricane. The medical staffs employed by the state or local governments would have the benefit of sovereign immunity while the private doctors would be subject to full personal liability.¹⁰⁰⁰ Mr. Meros argued that an extension of sovereign immunity to emergency room physicians would be constitutional, and would not be subject to the Kluger test, because the plaintiff's cause of action is not abolished but the defendant is changed from the healthcare provider to the state.¹⁰⁰¹ This is the same position excepted by the court in White.¹⁰⁰² In the summary of testimony provided to the Task Force, the emergency physicians also stated, "Florida courts have held that the extension of 'sovereign immunity' to persons pursuing state objectives is constitutional."¹⁰⁰³ Further, he stated damages were not capped because the claims bill process would be available to the plaintiff.¹⁰⁰⁴

In information provided to the Task Force, Mr. Meros has set forth the following benefits to the public and Florida's emergency care system that could be expected:

- Encouraging specialists to maintain hospital privileges or to provide needed services in a hospital environment, thus making such services available for emergency department patients.¹⁰⁰⁵

⁹⁹⁸ George Meros, transcript, Nov. 22, 2002, pgs. 209-211.

⁹⁹⁹ Id. at 209.

¹⁰⁰⁰ Id. at 209-210.

¹⁰⁰¹ Id. at 211.

¹⁰⁰² White v. Hillsborough County Hospital Authority, 448 So. 2d 2 (Fla. 2d DCA 1983).

¹⁰⁰³ Summary of Testimony of the Florida College of Emergency Physicians Before the Select Task Force on Healthcare Professional Liability Insurance (Nov. 22, 2002), citing White v. Hillsborough County Hospital Authority, 448 So. 2d 2 (Fla. 2d DCA 1983) and Campbell v. City of Coral Springs, 538 So. 2d 1373 (Fla. 4th DCA 1989).

¹⁰⁰⁴ Id.

¹⁰⁰⁵ Id.

- Enhancing recruitment of physicians to hospitals in Florida, thereby enhancing the availability of such emergency and specialist physicians to serve in Florida's emergency departments.¹⁰⁰⁶
- Enabling smoother operation of Florida's EMS system through availability and stabilization of emergency physicians and specialists available to hospital emergency departments.¹⁰⁰⁷
- Enhancing the trauma system by encouraging physicians who serve at trauma centers to remain available to the system and by encouraging other physicians to agree to serve at trauma centers.¹⁰⁰⁸
- Reducing wait-time for patients needing emergency or specialist physician care through improving the availability of physicians at hospitals. Such improved availability of physicians will also reduce the number of medically-necessary transfers between hospitals and will reduce diversion of ambulances due to lack of specialty availability. The increased availability of prompt medical care will benefit patient care.¹⁰⁰⁹
- Ensuring that our first responders (i.e., emergency medicine professionals in and out of the hospital setting) are available in the event of a weapons-of-mass-destruction event.¹⁰¹⁰

Mr. Joel Perwin presented the task force with his reasons why sovereign immunity should not be extended to emergency room physicians or other emergency room healthcare providers.¹⁰¹¹ Mr. Perwin stated that extending the provisions of section 768.28, Florida Statutes, to emergency room physicians created a cap that would be unconstitutional under the case of Smith v. Department of Insurance.¹⁰¹² The Smith case found \$250,000 caps on non-economic damages in medical malpractice unconstitutional unless the Kluger test, which only allowed a preexisting right of access to the courts to be eliminated when the Legislature can show an overpowering public necessity for the abolishment of such right, and can show no alternative method of meeting such public necessity.¹⁰¹³ Mr. Perwin stated that for sovereign immunity to apply "either you're an

¹⁰⁰⁶ Id.

¹⁰⁰⁷ Id.

¹⁰⁰⁸ Id.

¹⁰⁰⁹ Id.

¹⁰¹⁰ George Meros, Florida College of Emergency Physicians, Protecting Access to Emergency Care 7-8 (Dec. 27, 2002).

¹⁰¹¹ Joel Perwin, transcript, Nov. 22, 2002, pgs. 211-217.

¹⁰¹² Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987), reh'g denied.

¹⁰¹³ Kluger v. White, 281 So. 2d 1 (Fla. 1973).

employee of the state in which case you're protected, or an agency, or you are subject to the control of the state in performing a public function."¹⁰¹⁴

Findings and Recommendation

The Task Force finds that to further the public purpose of providing emergency healthcare to citizens and visitors to Florida, healthcare professionals providing services in emergency rooms or trauma centers should be defined as agents of the state.

Recommendation 1. The Legislature should amend section 768.28, Florida Statutes, to define healthcare professionals providing services in emergency rooms or trauma centers as agents of the state for purposes of sovereign immunity.

¹⁰¹⁴ Joel Perwin, transcript, Nov. 22, 2002, pg. 212.

Periodic Payment of Damages

Issue

The Task Force voted at its December 20, 2002, meeting by a 4-1 vote, to examine the following issue with respect to periodic payment of damage awards in the context of medical malpractice cases:

- Should the provisions of section 768.78(2) Florida Statutes, and other Florida laws be amended to require the periodic payment of economic and non-economic damages?

Current Situation

The definition of periodic payments for purposes of medical malpractice claims is set out in section 766.202, Florida Statutes. The section authorizes the payment of an award of future economic damages through structured payments over a period of time. The statute is specifically limited to "future economic damages" and does not address non-economic damages in any manner. The total amount of the payments made through the use of periodic payments must equal the amount of the judgment for future economic damages before it is reduced to present value but after collateral sources are deducted. The order or other agreement related to periodic payments must specify who is to receive the payments, the dollar amount of each periodic payment, the interval between payments, and the number of payments or the period of time over which payments must be made.¹⁰¹⁵

For the court to approve periodic payment of future economic damages, the defendant must post a bond or security or must otherwise assure full payment of the damage awards. The bond must be written by a company authorized to do business in Florida and must be from a company rated as an A+ by Best's. When all periodic payments have been made, the amount of the security remaining may be returned to the defendant. The company issuing the bond may not cancel the bond prior to the completion of all payments without 60 days notice to the court and to the claimant.

In implementing the provisions of this statute, the courts have examined whether limitations are placed on the fact finder when establishing the payment schedule and whether the defendant remains liable for the

¹⁰¹⁵ Section 766.292(8)(c), Florida Statutes.

payments to the plaintiff when an annuity is purchased to make the future payments. In St. Mary's Hospital, Inc. v. Phillipe,¹⁰¹⁶ the district court of appeals held that, based on the provisions of the statute authorizing periodic payments and rules applicable to the arbitration process, the arbitrator (fact finder) had discretion to establish the appropriate period for payment of the economic damages.¹⁰¹⁷

In Tallahassee Memorial Regional Medical Center, Inc. v. Kinsey,¹⁰¹⁸ the court examined whether the defendant could purchase an annuity to cover future payments and have a final judgment entered and no further obligation to the plaintiff. The defendants argued that when the defendant purchased an annuity with an annuitant qualifying under the statute, that the plaintiff could be required to accept that annuity as discharging the obligation of the defendant and the defendant would be relieved of any further liability for damages.¹⁰¹⁹ The court determined there was no expression in the law of the Legislature's intent to relieve the defendant of a future obligation to the plaintiff and had the Legislature wanted such a result, it could have written the law to provide for the relief requested.¹⁰²⁰ Research does not reveal any court that has taken a contrary position to the First District Court of Appeal.

The use of periodic payment of damages varies across states. Ten states have some form of mandatory periodic payment of all damages or just future damages with various thresholds for implementing the provision. Five states mandate periodic payment of some or all of the claimant's economic damages. Thirteen states provide a party may request periodic payment of some or all of the damages or provide for damages to be paid periodically at the discretion of the court.¹⁰²¹

For those states including a periodic payment of damages provision, the specifics vary greatly from state to state. In Arkansas,¹⁰²² Delaware,¹⁰²³ and Colorado,¹⁰²⁴ some or all of the future payments are terminated at the death of the plaintiff. In California, at the death of the plaintiff, the future payments must be continued only to those to whom the plaintiff owed a duty of care.¹⁰²⁵ The amount of the judgment that triggers periodic

¹⁰¹⁶ 699 So. 2d 1017 (Fla. 1st DCA 1997), reh'g denied (Oct. 22, 1997).

¹⁰¹⁷ Id. at 1025.

¹⁰¹⁸ 655 So. 2d 1191 (Fla. 1st DCA 1995), reh'g denied (June 21, 1995), review denied, 622 So. 2d 344 (Fla. 1995).

¹⁰¹⁹ Id. at 1197.

¹⁰²⁰ Id. at 1198.

¹⁰²¹ See National Conference of State Legislatures, State Medical Liability Laws Table.

¹⁰²² See National Conference of State Legislatures, State Medical Liability Laws Table.

¹⁰²³ See National Conference of State Legislatures, State Medical Liability Laws Table.

¹⁰²⁴ Section 13-64-306, Colorado Revised Statutes Annotated (West).

¹⁰²⁵ See National Conference of State Legislatures, State Medical Liability Laws Table.

payments can be a judgment of any amount qualifying for periodic payments, to a requirement that the judgment exceed \$500,000.¹⁰²⁶

The method of securing the periodic payments also varies among the states. Some states, such as Florida, require the defendant to remain liable for the periodic payments until the obligation is paid in full.¹⁰²⁷ In other states, such as Colorado, the defendant can be discharged upon complying with requirements to secure funding of the periodic payments through an annuity.¹⁰²⁸ By providing for an annuity, the determination of the present value of an award is shifted from the jury to the market.¹⁰²⁹

Information Presented to the Task Force

Two speakers presented arguments regarding whether the periodic payment provisions should be expanded to include future non-economic damages. Mr. William Fuller presented the proposal on behalf of the defense bar¹⁰³⁰ and Mr. Neal Roth argued on behalf of the Florida Trial Lawyers Association and plaintiffs.¹⁰³¹

Mr. Fuller argued that there should not be a distinction between future economic and future non-economic damages for purposes of allowing periodic payments. He argued that both compensate the plaintiff for damages in the future and should be treated the same. Mr. Fuller raised concerns and made recommendations from the defense bar regarding the current system of periodic payments for economic damages:

- The plaintiff may live longer than the number of years determined by the jury to be used in awarding periodic damages and may not have sufficient funds.¹⁰³²
- Mr. Fuller recommended this be addressed by having the court determine the life expectancy of the plaintiff and an annuity be purchased to provide payment to the plaintiff for future non-economic and economic damages for as long as the plaintiff lives.¹⁰³³ When an annuity was purchased by the defendant and approved by the court, the defendant would be discharged from the case and no additional bond would be required.¹⁰³⁴

¹⁰²⁶ See National Conference of State Legislatures, State Medical Liability Laws Table.

¹⁰²⁷ Section 766.202, Florida Statutes; Tallahassee Memorial Regional Medical Center, Inc. v. Kinsey, 655 So. 2d 1191 (Fla. 1st DCA 1995), reh'g denied (June 21, 1995).

¹⁰²⁸ Section 13-64-312, Colorado Revised Statutes Annotated (West).

¹⁰²⁹ Patricia M. Danzon, Medical Malpractice: Theory, Evidence, and Public Policy 165 (1985).

¹⁰³⁰ William Fuller, J.D., testimony, Dec. 3, 2002, pgs. 28-35.

¹⁰³¹ Neal Roth, J.D., testimony, Dec. 3, 2002, pgs. 38-43.

¹⁰³² William Fuller, J.D., testimony, Dec. 3, 2002, pg. 29.

¹⁰³³ Id. at 30-34.

¹⁰³⁴ Id.

- The plaintiff may die before the term of the periodic damages for medical care and pain and suffering expires, giving the estate a windfall for damages that were not incurred.¹⁰³⁵
- With payment of periodic damages, the case remains open until the end of the term of the periodic payments or the plaintiff dies and a lump sum payment is made to the estate.¹⁰³⁶

Mr. Roth did not support periodic payment of non-economic damages. He argued the plaintiff has a right to the money once the judgment is entered and it should be the plaintiff's decision as to whether the money is expended immediately or invested in an annuity or some other investment providing periodic payments. Mr. Roth also questioned how this proposal would further the Task Force goals of reducing insurance rates or providing better access to healthcare. He argued that non-economic damages "are supposed to make an injured medical malpractice victim whole, restore some dignity to their lives, allow them to do some things perhaps that either they can't do because of their disability, disfigurement, inability to lead a normal life, and it really should be up to the injured victim as to what they do, when they do it, how much money they care to spend."¹⁰³⁷ Mr. Roth argued that providing for periodic payment of non-economic damages would be "telling the injured victim what to do with their money by legislative fiat, and they should have the right to make those decisions themselves and for their families."¹⁰³⁸

Mr. Marshall Criser questioned why a plaintiff should not be protected from bad advice or bad counsel by providing for periodic payment of all damages.¹⁰³⁹ Mr. Roth disagreed and reiterated his belief that the plaintiff should have the right to make the decision on how to spend non-economic damages since the economic damages were protected through periodic payments.¹⁰⁴⁰

Findings and Recommendations

The Task Force finds that there is no basic distinction between payments for future economic damages and future non-economic damages. Both awards are intended to compensate the victim for damages that have not accrued as of the date the judgment is entered and are based on the jury's determination of what those future injuries will be. There does not appear to be any policy reason for distinguishing between these two types of future damages for purposes of periodic payments. Further, the use of

¹⁰³⁵ *Id.* at 29.

¹⁰³⁶ *Id.*

¹⁰³⁷ Neal Roth, J.D., testimony, Dec. 3, 2002, pg. 40.

¹⁰³⁸ *Id.* at 41.

¹⁰³⁹ Marshall Criser, J.D., testimony, Dec. 3, 2002, pgs. 41-42.

¹⁰⁴⁰ Neal Roth, J.D., testimony, Dec. 3, 2002, pg. 42.

periodic payment of damages for the payment of future non-economic damages may reduce the impact of large non-economic damages on the current assets of an insurance company. When the defendant insurance company makes the future payments it mitigates the impact of large verdicts by smoothing the cash needed to cover those verdicts over the years of the periodic payments.

The Task Force finds that termination of periodic payments of future damages related to medical expenditures and future pain and suffering upon the death of the defendant is appropriate.

Recommendation 1. The Legislature should amend the Florida Statutes to allow the periodic payment of future non-economic damages.

Recommendation 2. The Legislature should amend the Florida Statutes to terminate the payment of future economic and non-economic damages upon the death of the plaintiff.



Pre-Suit Reform

Issue

The Task Force voted at its December 20, 2002 meeting, by a 5-0 vote, to examine the following issue with respect to pre-suit reform in the context of medical malpractice cases:

- Should the pre-suit screening process be strengthened to:
 - o Improve the quality of information exchanged?
 - o Require that the qualifications of the physician providing the affidavit more closely equate with the qualifications of the defendant physician?
 - o Require the physician to review all the medical records to the extent available prior to providing an affidavit and to certify that the records have been reviewed?
 - o Require an attorney to sign all doctor affidavits prepared for the defendant and the patient?

Current Situation

In 1975, an intensive lobbying effort commenced addressing the medical malpractice crisis that had emerged due to the spiraling increases in insurance premiums, and which threatened to curtail the availability of healthcare services.¹⁰⁴¹ The Legislature, in response to this crisis, created the Florida Comprehensive Medical Malpractice Act in 1975, which changed the procedural and substantive aspects of medical malpractice claims.¹⁰⁴² One significant modification was the requirement that claimants submit their claims to an appropriate medical liability mediation panel before filing a cause of action in court.¹⁰⁴³ This requirement was challenged almost immediately, and in Carter v. Sparkman,¹⁰⁴⁴ the Florida Supreme Court determined that the mediation panel was not unconstitutionally violative of a plaintiff's rights.¹⁰⁴⁵ However, in 1980,

¹⁰⁴¹ Jessica Fonseca-Nader, Florida's Comprehensive Medical Malpractice Reform Act: Is it Time for a Change?, 8 St. Thomas Law Review 553 (Spring 1996).

¹⁰⁴² Id. at 553-554.

¹⁰⁴³ Id. at 554.

¹⁰⁴⁴ 335 So. 2d 802 (Fla. 1976).

¹⁰⁴⁵ Jessica Fonseca-Nader, Florida's Comprehensive Medical Malpractice Reform Act: Is it Time for a Change?, 8 St. Thomas Law Review 555 (Spring 1996).

in Aldana v. Holub,¹⁰⁴⁶ the Florida Supreme Court revisited the issue of mediation panels and overturned the Carter ruling, declaring the statute unconstitutional. The Court found "that the application of the statute and its rigid 'jurisdictional periods . . . [h]as proven intrinsically unfair and arbitrary and capricious,'" under the United States and Florida Constitutions.¹⁰⁴⁷

In 1985, amendments to the act substituted mediation panels with a pre-suit screening process.¹⁰⁴⁸ This pre-suit screening process was created to require both the claimant and the defendant, prior to filing a claim or denying liability, to ensure that the potential suit was not a frivolous action.¹⁰⁴⁹ Specifically, the Legislature required claimants to certify in their complaints that they had conducted a reasonable investigation resulting in a good faith belief that sufficient grounds existed to support the filing of the action.¹⁰⁵⁰

In 1988, the Legislature expanded the pre-suit screening statute in response to criticism that the statutory requirements were not alleviating the medical malpractice litigation crisis.¹⁰⁵¹ Amendments were necessary to address the Legislature's conclusion that the "high cost of medical malpractice claims in the state can be substantially alleviated by requiring early determination of the merit of claims . . . thereby reducing delay and attorney's fees . . . while preserving the right of either party to have its case heard by a jury."¹⁰⁵² Sections 766.201 through 766.206, Florida Statutes, enacted in chapter 88-1, Laws of Florida, established criteria to conduct pre-suit investigations of medical negligence claims and defenses of prospective defendants. Chapter 88-277, section 48, Laws of Florida, creating section 766.106, Florida Statutes,¹⁰⁵³ provides that a prospective plaintiff alleging medical malpractice must wait ninety days before filing a lawsuit against any named defendants. And, during the ninety-day period, informal discovery, including obtaining un-sworn statements from parties and witnesses may occur.¹⁰⁵⁴ "Because these designations exist today side

¹⁰⁴⁶ 381 So. 2d 231 (Fla. 1980).

¹⁰⁴⁷ Jessica Fonseca-Nader, Florida's Comprehensive Medical Malpractice Reform Act: Is it Time for a Change?, 8 St. Thomas Law Review 556 (Spring 1996).

¹⁰⁴⁸ Id.

¹⁰⁴⁹ Id.; section 768.495(1), Florida Statutes (1985) ("[N]o action shall be filed for personal injury or wrongful death arising out of medical negligence...unless the attorney filing the action has made a reasonable investigation as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant").

¹⁰⁵⁰ Cohen v. Dauphinee, 739 So. 2d 68, 70 (Fla. 1999).

¹⁰⁵¹ Id.

¹⁰⁵² Section 766.201(1)(d), Florida Statutes.

¹⁰⁵³ Chapter 88-277, section 48, Laws of Florida (renumbered sections 768.57-776.106, Florida Statutes);

see also Cohen v. Dauphinee, 739 So. 2d 68, 71 (Fla. 1999).

¹⁰⁵⁴ Edward L. Holloran, III, Medical Malpractice Litigation in Florida: Discussion of Problems and Recommendations, 26 Nova Law Review 333 (Fall 2001).

by side, it is apparent that the Legislature intended to distinguish between pre-suit screening, covering the period up to the serving of the notice of intent, and pre-suit investigation, covering the period between the serving of the notice of intent and the filing of the suit."¹⁰⁵⁵

Since 1988, the pre-suit statutes have not been significantly modified. In 1996, the Florida Supreme Court observed: "[W]e agree with the proposition that the medical malpractice statutory scheme must be interpreted liberally so as not to unduly restrict a Florida citizen's constitutionally guaranteed access to the courts, while at the same time carrying out the legislative policy of screening out frivolous lawsuits and defenses."¹⁰⁵⁶ The Court in Cohen v. Dauphinee¹⁰⁵⁷ reaffirmed that the Legislature enacted the pre-suit process to "promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding."

The purpose for having a pre-suit statute is to reduce the overall number of lawsuits either by preventing the filing of frivolous claims or by providing opportunities to settle meritorious cases.¹⁰⁵⁸ In adopting chapter 766, Florida Statutes, the Legislature attempted to abate the medical malpractice crisis by requiring pre-suit screenings and investigations.

The notice of intent to initiate litigation is a condition precedent to filing a suit. The medical malpractice claimant must first conduct a "reasonable investigation" to determine there are grounds for a good faith belief that there has been malpractice.¹⁰⁵⁹ This burden to investigate is set forth in section 766.203(2), Florida Statutes, which specifically requires that prior to taking any actions, the claimant and his or her attorney shall conduct an investigation into the reasonable grounds to believe that negligence and resulting injury have occurred.¹⁰⁶⁰ This investigation must be supported by a verified written expert opinion that shall "corroborate reasonable grounds to support the claim of medical negligence."¹⁰⁶¹

When the claimant's investigation is complete, and the corroborating affidavit is done, section 766.106(2), Florida Statutes, requires the claimant to serve all potential defendants with a notice of intent to initiate litigation.¹⁰⁶² In Duffy v. Brooker,¹⁰⁶³ the court stated that "[T]he notice

¹⁰⁵⁵ Cohen v. Dauphinee, 739 So. 2d 68, 71 (Fla. 1999).

¹⁰⁵⁶ Kukral v. Mekras, 679 So. 2d 278, 284 (Fla. 1996).

¹⁰⁵⁷ 739 So. 2d. 68, 70 (Fla. 1999).

¹⁰⁵⁸ Edward L. Holloran, III, Medical Malpractice Litigation in Florida: Discussion of Problems and Recommendations, 26 Nova Law Review 334 (Fall 2001).

¹⁰⁵⁹ John A. Grant, Florida's Pre-suit Requirements for Medical Malpractice Actions, Florida Bar Journal 13-14 (Feb. 1994).

¹⁰⁶⁰ Id. at 14.

¹⁰⁶¹ Id.

¹⁰⁶² Id.

of intent to initiate litigation and the corroborating medical expert opinion, taken together, must sufficiently indicate the manner in which the defendant doctor allegedly deviated from the standard of care, and must provide adequate information for the defendants to evaluate the merits of the claim."¹⁰⁶⁴

The defendant, upon the mailing of the notice of intent to litigate, has ninety days to investigate the claim and provide an appropriate response.¹⁰⁶⁵ Section 766.106(3)(a), Florida Statutes, applies a good faith standard to the defendant to investigate and respond to the claim.¹⁰⁶⁶ The defendant¹⁰⁶⁷ is required, pursuant to the statute, to initially undertake a review of the notice and comply with one or more of the four procedures set forth: (1) an internal review by a duly qualified claims adjuster; (2) creation of a panel comprised of an attorney, a healthcare provider, and a duly qualified claims adjuster; (3) a contractual agreement with a state or local professional society which maintains a peer review committee; and/or, (4) any other similar procedure which fairly and promptly evaluates a pending claim.¹⁰⁶⁸ This review mechanism is only part of the investigation process and is by no means sufficient to satisfy the investigation requirements of chapter 766, Florida Statutes.¹⁰⁶⁹

Section 766.106(7), Florida Statutes, provides for a number of informal discovery options available during the ninety-day investigation period, which have sanctions for failure to comply.¹⁰⁷⁰ For example, the defendant may take un-sworn statements from experts or witnesses that are not discoverable or admissible in any proceeding, propound interrogatories and requests to produce documents, and require the claimant to undergo physical and mental examination.¹⁰⁷¹ Failure by the claimant to comply could result in dismissal of the action or waive the requirement of a corroborating medical opinion for the opposing party.¹⁰⁷²

¹⁰⁶³ 614 So. 2d 539 (Fla. 1st DCA 1993).

¹⁰⁶⁴ John A. Grant, Florida's Pre-suit Requirements for Medical Malpractice Actions, Florida Bar Journal 14 (Feb. 1994).

¹⁰⁶⁵ *Id.*

¹⁰⁶⁶ *Id.*

¹⁰⁶⁷ The statute contemplates that the defendant's insurer or a self-insurer will comply with the pre-suit process.

¹⁰⁶⁸ Section 766.106(3)(a)1-4, Florida Statutes.

¹⁰⁶⁹ John A. Grant, Florida's Pre-suit Requirements for Medical Malpractice Actions, Florida Bar Journal 14 (Feb. 1994).

¹⁰⁷⁰ Section 766.205, Florida Statutes provides grounds for dismissal of an applicable claim or defense asserted in those circumstances where reasonable access to information has not been provided to another party.

¹⁰⁷¹ John A. Grant, Florida's Pre-suit Requirements for Medical Malpractice Actions, Florida Bar Journal 15 (Feb. 1994).

¹⁰⁷² See also section 766.205(3), Florida Statutes.

At or before the conclusion of the ninety-day period, the defendant has four alternatives in response to the complaint. Section 766.106 (3)(b), Florida Statutes, provides that the defendant shall reject the claim; make a settlement offer; make an offer of admission of liability and arbitrate; or do nothing which shall be considered a final rejection of the claim.¹⁰⁷³ Four identified areas of concern have evolved with the creation of the pre-suit process.

Initially, the pre-suit investigations were very informal. Some commentators have indicated that the informal exchange of information does not work because after sharing expert affidavits, un-sworn statements and other discovery tools as set forth in the statutes, none of this information is discoverable or admissible at future proceedings. Time and money is spent pre-filing discovery without yielding any resolution or potential for resolution. In essence, the parties to the lawsuit undergo two discoveries if the matter goes to litigation.¹⁰⁷⁴

Second, as a consequence of the pre-suit investigation, the parties will add an additional eight months to the case because the statute of limitation is tolled during this period.¹⁰⁷⁵

Third, the statute as written has failed to provide reliability and has failed to satisfy the intent of the pre-suit investigative process. The statute does not require any expert witness to certify that all the medical records have been reviewed prior to rendering an opinion. Moreover, the statute does not obligate an attorney representing the claimant or defendant to sign the doctor affidavits to verify compliance with the statutes. And, section 766.202(5), Florida Statutes, defines the expert witness merely to be "a person duly and regularly engaged in the practice of his or her profession who holds a health care professional degree . . ." thus not requiring that similarly-situated experts are reviewing and rendering decisions about the claim.¹⁰⁷⁶ A family general practitioner could give a medical expert opinion about a surgical care event, merely because he or she holds a healthcare professional degree.

Finally, the purpose of the pre-suit investigation was to review potential claims, to verify evidence, presented and to provide an opportunity to settle or pursue litigation. What has occurred, however, is that routinely a claimant has two years (the time period for the statute of limitations) to

¹⁰⁷³ Sections 766.106(3)(b)3, 766.106(3)(c), Florida Statutes.

¹⁰⁷⁴ Jessica Fonseca-Nader, *Florida's Comprehensive Medical Malpractice Reform Act: Is it Time for a Change?*, 8 St. Thomas Law Review 558 (Spring 1996).

¹⁰⁷⁵ Section 766.104, Florida Statutes.

¹⁰⁷⁶ Section 766.202(5), Florida Statutes.

prepare the pre-suit investigation while the defendant has only ninety days to investigate and respond.¹⁰⁷⁷

Information Presented to the Task Force

The stakeholders that testified concurred that strengthening the pre-suit process would improve the quality of the information exchanged. Testimony from the Task Force's November 22, 2002 meeting in Orlando, Florida, concluded that the current pre-suit process was not useful, but could be beneficial with suggested improvements for the early resolution of these type of cases.

First, the expert affidavits that are filed by both the claimant and defendant in the pre-suit process need to be more specific. The intent of the claimant's affidavit is to attest to the fact that there are reasonable grounds to bring a malpractice action against the defendant.¹⁰⁷⁸ While the content of most affidavits is not very detailed, is very conclusory and does not tell specifically what malpractice event occurred, it is clear that a more detailed affidavit, that sets forth the specifics of the malpractice event would address some of the problems that occur.¹⁰⁷⁹ Generally, the affidavit is a bare bones document that does not tell anything in terms of what the physician or hospital did that was inappropriate or what the care was that brought about the harm.¹⁰⁸⁰

Second, the expert affidavit should be filed by an expert whom the plaintiff is "actually going to use at trial."¹⁰⁸¹ During the pre-suit process, the plaintiff can use an affidavit of "somebody . . . they pay a few hundred dollars to" and "you hardly ever see that particular expert witness when it comes to testifying before a jury."¹⁰⁸² And, that expert, even if used at trial, cannot be cross-examined or impeached with the affidavit that they prepared during the pre-suit process.¹⁰⁸³ Therefore, the proposal is to make the expert "real" by allowing him or her to be called as a witness at trial, which would force the claimants to make a decision about the merits of the case at an earlier stage.¹⁰⁸⁴

However, an opposing position suggested that the quality of the expert affidavit may not be the real issue. At the time of the pre-suit evaluation,

¹⁰⁷⁷ John A. Grant, Florida's Pre-suit Requirements for Medical Malpractice Actions, Florida Bar Journal 18 (Feb. 1994).

¹⁰⁷⁸ Bucky Hurt, J.D., testimony, Nov. 22, 2002, pg. 318.

¹⁰⁷⁹ *Id.* at 318-319.

¹⁰⁸⁰ *Id.* at 319.

¹⁰⁸¹ *Id.* at 320.

¹⁰⁸² *Id.*

¹⁰⁸³ *Id.*

¹⁰⁸⁴ *Id.* at 321.

all the facts of the case may not be known to the expert. Generally, it was agreed that the parties want credible experts. However, it was believed that "a credible expert is not going to give you a final opinion under oath without all the facts." And, when a pre-suit affidavit is filed, all the facts are not available yet. "For example, we haven't taken the deposition of the defendant doctor to find out what his defense is going to be. My experts want to know that before they go under oath and say a doctor did something wrong."¹⁰⁸⁵

Moreover, the ninety-day period "is simply not enough time for the defendants to figure out whether they have done something wrong. Sometimes you are limited by the medical records that you receive from the plaintiff attorneys. Sometimes he doesn't have all the medical records. You've got to get those medical records off to independent experts" and 90 days is not enough time.¹⁰⁸⁶ Concerns regarding the ninety-day period in which the parties are suppose to resolve the differences between them, in reality, does not resolve their differences,¹⁰⁸⁷ because what anecdotally happens is that settlement "almost always [occurs] on the courthouse steps."¹⁰⁸⁸ One offered proposal was to allow the defendant a minimum of six months from the date the lawsuit is filed to undergo their investigation.¹⁰⁸⁹

The informal exchange of information does not bring forth the intended end result.¹⁰⁹⁰ Every pre-suit involves much work on both sides at a tremendous expense and the vast majority of the information is privileged and cannot be used.¹⁰⁹¹ To the extent that there are other procedures that might be used to accomplish a similar result, the practical affect would be to either shore up the pre-suit procedures or investigate the use of alternative dispute options.¹⁰⁹²

Findings and Recommendations

The Task Force finds the expert affidavits filed in pre-suit proceedings are not sufficient for the parties to make informed decisions regarding the claim.

¹⁰⁸⁵ Lake Lytal, J.D., testimony, Nov. 22, 2002, pg. 322.

¹⁰⁸⁶ Bucky Hurt, J.D., testimony, Nov. 22, 2002, pg. 321.

¹⁰⁸⁷ *Id.* at 319.

¹⁰⁸⁸ Lake Lytal, J.D., testimony, Nov. 22, 2002, pg. 324.

¹⁰⁸⁹ Bucky Hurt, J.D., testimony, Nov. 22, 2002, pg. 321.

¹⁰⁹⁰ *Id.* at 322.

¹⁰⁹¹ *Id.*

¹⁰⁹² Lake Lytal, J.D., testimony, Nov. 22, 2002, pgs. 326-327.

Further, the Task Force finds there is not sufficient incentive for the parties to provide the most complete expert affidavit when the expert completing the affidavit is generally not called as a witness at trial and, even if called at trial, may not be cross-examined regarding the pre-suit affidavit.

The Task Force has reviewed the pre-suit procedures set forth in sections 766.106 and 766.201-206, Florida Statutes, for the purpose of determining what modifications, if any, are needed to improve the quality of information exchanged.

Recommendation 1. The Legislature should require experts reviewing pre-suit claims and defenses and rendering opinions be qualified, in that they possess similar, if not identical, credentials and expertise in the field of healthcare services of the defendant's particular specialty.

Recommendation 2. The Legislature should require the expert who reviews pre-suit claims and defenses and renders opinions be subject to discovery and his or her testimony be admissible in any future proceeding.

Joint and Several Liability

Issue

The Task Force voted at its December 20, 2002 meeting, by a 5-0 vote, to examine the following issues with respect to joint and several liability in the context of medical malpractice cases:

- Should the Fabre¹⁰⁹³ decision be legislatively overturned?
- Should awards in medical malpractice suits be based solely on proportion of fault and not on Florida's structured joint and several liability provisions in section 768.81, Florida Statutes?

Current Situation

Florida is a state that equates fault with liability.¹⁰⁹⁴ Common sense¹⁰⁹⁵ dictates that tortfeasors are liable only to the extent of their fault.¹⁰⁹⁶ Such a conclusion has taken a long time to articulate¹⁰⁹⁷ and is still incomplete.¹⁰⁹⁸

Florida is a state that recognizes the comparative fault of those tortfeasors who caused an injury,¹⁰⁹⁹ including the plaintiff himself or herself.¹¹⁰⁰ Before 1973, Florida adhered to the rule of contributory negligence, which, when present, completely barred relief for a plaintiff found to be

¹⁰⁹³ Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993).

¹⁰⁹⁴ See Hoffman v. Jones, 280 So. 2d 431, 436 (Fla. 1973).

¹⁰⁹⁵ It is a "common sense notion" that liability should be equated with fault and that a defendant should not have to pay more than his fair share of the liability." Chanta G. Hundley & George N. Meros, Jr., Florida's Tort Reform Act: Keeping Faith with the Promise of Hoffman v. Jones, 27 Florida State University Law Review 461 (Winter 2000).

¹⁰⁹⁶ "The rule of contributory negligence as a complete bar to recovery was imported into the law by judges. Whatever may have been the historical justification for it, today it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss." Hoffman v. Jones, 280 So. 2d 431, 436 (Fla. 1973).

¹⁰⁹⁷ See Louisville & Nashville Railroad Co. v. Yniestra, 21 Fla. 700 (1886); see also Smith v. Department of Insurance 507 So. 2d 1080 (Fla. 1987) (tracing the history of contributory and comparative negligence).

¹⁰⁹⁸ See Jennings Hurt, Apportionment of Fault, Set-Off and Empty Chair Argument (Oct. 24, 2002); see also Jennings Hurt, testimony, Nov. 22, 2002, pgs. 259-267.

¹⁰⁹⁹ See Hoffman v. Jones, 280 So. 2d 431, 436 (Fla. 1973).

¹¹⁰⁰ See Id.

partly responsible for causing the accident.¹¹⁰¹ By way of contrast, the comparative fault theory is that a plaintiff is only prevented from recovering that portion of the damages that is equal to his or her share of responsibility for the injury.¹¹⁰²

Once the amount of fault of the defendant tortfeasors is established, the exercise becomes one of allocating the liability for the damages among the tortfeasors. Florida has a hybrid system of allocating the liability.¹¹⁰³ The doctrine of joint and several liability has been a part of that system since at least 1914.¹¹⁰⁴ Under joint and several liability, all defendant tortfeasors are responsible for the total of the plaintiff's damages, without respect to the extent of each defendant's fault in causing the harm.¹¹⁰⁵ For example, in 1987, the Supreme Court of Florida heard a case in which the plaintiff sustained injuries following a bumper car collision at Walt Disney World.¹¹⁰⁶ The plaintiff was found to be 14 percent at fault, the other bumper car driver, 85 percent at fault and Disney 1 percent at fault.¹¹⁰⁷ Because of joint and several liability, the court entered judgment against Disney for 86 percent of the damages, while Disney was only 1 percent at fault.¹¹⁰⁸

In 1986, the Florida Legislature enacted several changes to the joint and several liability doctrine as part of the Tort Reform and Insurance Act of 1986.¹¹⁰⁹ The changes included the following:

- Abolished joint and several liability for non-economic¹¹¹⁰ damages over \$25,000.
- Abolished joint and several liability for economic¹¹¹¹ damages except when a defendant's fault equals or exceeds that of the plaintiff.

¹¹⁰¹ *Id.*

¹¹⁰² *Id.* "[T]he jury should apportion the negligence of the plaintiff and the negligence of the defendant; then, in reaching the amount due the plaintiff, the jury should give the plaintiff only such an amount proportioned with his negligence and the negligence of the defendant." *Id.* at 438.

¹¹⁰³ *Walt Disney World Co. v. Wood*, 515 So. 2d 198, 201 (Fla. 1987).

¹¹⁰⁴ *Louisville & Nashville R.R. v. Allen*, 67 Fla. 257, 65 So. 8 (1914).

¹¹⁰⁵ *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).

¹¹⁰⁶ *Walt Disney World Co. v. Wood*, 515 So. 2d 198 (Fla. 1987).

¹¹⁰⁷ *Id.* at 199.

¹¹⁰⁸ *Id.*

¹¹⁰⁹ See chapter 86-160, section 60, Laws of Florida (codified at section 768.81(3), Florida Statutes). In enacting these provisions, the Florida Legislature found that "there is in Florida a financial crisis in the liability insurance industry" and "that the current tort system has significantly contributed to the insurance availability and affordability crisis." *Fabre v. Marin*, 623 So. 2d 1182, 1185 (Fla. 1993) (quoting chapter 86-160, Laws of Florida).

¹¹¹⁰ See Issue on Caps for Non-Economic Damages, *infra*, for definitions of economic and non-economic damages.

¹¹¹¹ *Id.*

Following these legislative changes was the Supreme Court of Florida's decision in the Fabre case, which held that, in determining non-economic damages, fault is apportioned among all the responsible entities who contribute to an accident, whether or not they are officially joined as defendants in the lawsuit.¹¹¹²

In 1999, the Florida Legislature further limited joint and several liability by creating a series of damages caps and fault thresholds.¹¹¹³ The doctrine of joint and several liability to a particular defendant whose fault equals or exceeds that of a particular plaintiff is determined as follows:

- A defendant whose fault is up to 10 percent is not subject to joint and several liability.¹¹¹⁴
- With a defendant whose fault is between 10 and 25 percent, there is no joint and several liability for economic damages over \$200,000¹¹¹⁵ unless the plaintiff is without fault, then there is no joint and several liability for economic damages over \$500,000.¹¹¹⁶
- With a defendant whose fault is between 25 and 50 percent, there is no joint and several liability for economic damages over \$500,000¹¹¹⁷ unless the plaintiff is without fault, then there is no joint and several liability for economic damages over \$1,000,000.¹¹¹⁸
- With a defendant whose fault is over 50 percent, there is no joint and several liability for economic damages over \$1,000,000¹¹¹⁹ unless the plaintiff is without fault, then there is no joint and several liability for economic damages over \$2,000,000.¹¹²⁰

The legislative changes in 1999 also codified the Supreme Court's holding in Fabre.¹¹²¹ Accordingly, section 768.81, Florida Statutes, now contains a procedure¹¹²² and burden of proof¹¹²³ for requesting that a nonparty tortfeasor be placed on the jury verdict form for purposes of allocating

¹¹¹² Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993); Nash v. Wells Fargo Guard Services, Inc., 678 So. 2d 1262 (Fla. 1996).

¹¹¹³ Chapter 99-225, section 27, Laws of Florida (codified at section 768.81, Florida Statutes).

¹¹¹⁴ Sections 768.81(3)(a)(1), (3)(b)(1), Florida Statutes.

¹¹¹⁵ Section 768.81(3)(a)(2), Florida Statutes.

¹¹¹⁶ Section 768.81(3)(b)(2), Florida Statutes.

¹¹¹⁷ Section 768.81(3)(a)(3), Florida Statutes.

¹¹¹⁸ Section 768.81(3)(b)(3), Florida Statutes.

¹¹¹⁹ Section 768.81(3)(a)(4), Florida Statutes.

¹¹²⁰ Section 768.81(3)(b)(4), Florida Statutes.

¹¹²¹ Chapter 99-225, section 27, Laws of Florida.

¹¹²² Section 768.81(3)(d), Florida Statutes.

¹¹²³ Section 768.81(3)(e), Florida Statutes.

fault among the totality of those who caused the injury, whether party defendants or not.

Based on these most recent legislative changes, a defendant can no longer be held jointly liable for a plaintiff's non-economic damages. Joint and several liability still exists under certain circumstances for economic damages, as outlined above. However, a defendant who is less than 10 percent at fault cannot be held jointly and severally liable for all the damages. Finally, there is no longer joint and several liability against a defendant who is found to be less at fault than the plaintiff.

The seminal case for the issue of whether a party pays its fair share is the Fabre case itself.¹¹²⁴ In the Fabre case, the plaintiff, Mrs. Marin, was injured in an accident as a passenger in a car that was driven by her husband.¹¹²⁵ Mrs. Marin sued the Fabres, claiming that their negligent driving caused the accident in which she was injured. During discovery, Mrs. Marin learned that the Fabres' insurance had liability limits of \$10,000.¹¹²⁶ Accordingly, she then also sued State Farm, her uninsured motorist carrier, as a defendant.¹¹²⁷

When the case was presented to the jury, the defendants requested that the verdict form be drafted so as to allow the jury to apportion fault for the accident between Mr. Marin, the driver but an unnamed defendant, and Mrs. Fabre. The court denied the request. But Mrs. Marin agreed to have the issue of Mr. Marin's negligence submitted to the jury subject to a posttrial determination of whether any affirmative finding on that issue would result in a reduction of her recovery. The jury returned a verdict finding Mrs. Fabre and Mr. Marin each 50 percent at fault and awarded Mrs. Marin \$12,750 in economic damages and \$350,000 in non-economic damages. The judge reduced the economic damages by \$5000 but refused to reduce the non-economic damages.¹¹²⁸

The issue before the Supreme Court was "whether the liability for non-economic damages should be apportioned to the Fabres on the basis of the percentage of fault attributed to them."¹¹²⁹ The court answered this question affirmatively. In analyzing this issue, the Supreme Court examined the 1988 version of section 768.81(3), Florida Statutes, which stated as follows:

¹¹²⁴ Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993).

¹¹²⁵ Id. at 1183.

¹¹²⁶ Id.

¹¹²⁷ Id. At the time of this lawsuit, Florida did not allow interspousal claims so Mrs. Marin could not also sue Mr. Marin as the driver of the car.

¹¹²⁸ Id.

¹¹²⁹ Id.

(3) APPORTIONMENT OF DAMAGES – In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.¹¹³⁰

In construing this statutory language, the Third District Court of Appeal, the lower appellate court in Fabre, concluded that Mrs. Marin could not recover damages from her husband because of the doctrine of interspousal tort immunity.¹¹³¹ Accordingly, the Third District Court concluded that in discarding joint and several liability in section 768.81, Florida Statutes, the Florida Legislature did not intend to thwart a fault-free plaintiff's ability to recover her total damages.¹¹³² Rather, according to the Third District, the Legislature intended only to apportion liability among the tortfeasors who were defendants in the lawsuit.¹¹³³

Based on this case law history and the legislative intent¹¹³⁴ of section 768.81, Florida Statutes, the Supreme Court in Fabre concluded that "[b]y [the] clear terms [of the statute] judgment should be entered against each party liable on the basis of that party's percentage of fault."¹¹³⁵ The court reasoned that "[t]he 'fault' which gives rise to the accident is the 'whole' from which the fact-finder determines the party-defendant's percentage of liability. Clearly, the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants."¹¹³⁶ Furthermore, the court declared that "[l]iability is to be determined on the basis of the percentage of fault of each participant to the accident and not on the basis of solvency or amenability to suit of other potential defendants."¹¹³⁷

¹¹³⁰ Section 768.81(3), Florida Statutes (Supp. 1988). The constitutionality of this statute was upheld by the Supreme Court. See Smith v. Department of Insurance, 507 So. 2d 1080, 1091 (Fla. 1987) (noting that the right of access to courts "does not include the right to recover for injuries beyond those caused by the particular defendant").

¹¹³¹ Fabre v. Marin, 623 So. 2d 1182, 1186 (Fla. 1993).

¹¹³² Id.

¹¹³³ Id. at 1184.

¹¹³⁴ The term "party" was not defined by the statute. At the time the Supreme Court decided the Fabre case, there were three judicial theories as to what was meant by "party." The term could refer to: 1) persons involved in the injury; 2) defendants in the lawsuit; or 3) all litigants in the lawsuit. See 6 Fla. Prac., Personal Injury & Wrongful Death Actions, section 5.5 (2002-03 ed.).

¹¹³⁵ Id.

¹¹³⁶ Id.

¹¹³⁷ Id. at 1186.

The result, then, in Fabre was that the court reduced Mrs. Marin's judgment by half of her non-economic damages. There was no reduction in the economic damages because under section 768.81(3), Florida Statutes (Supp. 1988), joint and several liability continued to apply when a defendant's fault equaled or exceeded that of the plaintiff.¹¹³⁸

Following the Fabre case, the Supreme Court in Nash v. Wells Fargo Guard Services, Inc.,¹¹³⁹ outlined the pleading and proof requirements with which a defendant must comply to submit the issue of a nonparty's negligence to the jury.¹¹⁴⁰ In order to include a nonparty on the verdict form under Fabre, the party defendant must plead, as an affirmative defense, the negligence of the nonparty and specifically identify the nonparty.¹¹⁴¹ The party defendant can move to amend the pleading to assert the negligence of a nonparty, subject to the requirements of Florida Rule of Civil Procedure 1.190. However, because the argument that non-economic damages should be apportioned against a nonparty affects both the presentation of the case and the trial court's rulings on evidence, notice before trial is necessary.¹¹⁴² In addition to these pleadings requirements, the party defendant also has the burden of proving that the nonparty's fault contributed to the injury in order to include the nonparty's name on the jury verdict form.¹¹⁴³

The rule adopted by the Supreme Court in Fabre is premised on an application of the comparative fault statute of section 768.81, Florida Statutes. If this statute does not apply, then Fabre does not apply. Accordingly, Fabre does not apply to actions in which the doctrine of joint and several liability applies.¹¹⁴⁴

Information Presented to the Task Force

The problem, as presented to the Task Force, is with deep pocket defendants, like hospitals or physicians with significant amounts of insurance coverage who are minimally liable for the harm to the plaintiff. An example might be if a plaintiff with significant long-term care issues sues the doctor, nurse, and the hospital. The hospital is often the least liable (assume 1 percent) but provides the deepest pocket for the payment of damages. Under the current state of the law, the hospital is still jointly

¹¹³⁸ Id. at 1187.

¹¹³⁹ Nash v. Wells Fargo Guard Services, Inc., 678 So. 2d 1262 (Fla. 1996).

¹¹⁴⁰ See 6 Fla. Prac., Personal Injury & Wrongful Death Actions, section 5.5 (2002-03 ed.).

¹¹⁴¹ Nash v. Wells Fargo Guard Services, Inc., 678 So. 2d 1262, 1264.

¹¹⁴² Id.

¹¹⁴³ Id.

¹¹⁴⁴ See 6 Fla. Prac., Personal Injury & Wrongful Death Actions, section 5.5 (2002-03 ed.).

and severally liable for all the economic damages to the plaintiff.¹¹⁴⁵ Those damages can, in a long-term care situation, amount to \$15,000,000. The hospital, while only 1 percent responsible for the injury is jointly liable for \$15,000,000.¹¹⁴⁶ The recommended solution is to repeal joint and several liability for economic and non-economic damages for all medical malpractice suits.

The Task Force heard testimony in response to the claim that joint liability has been sufficiently limited in Florida.¹¹⁴⁷ It also heard testimony regarding the claim that tort law favors a plaintiff receiving compensation for the injury caused, so that in the event one of the defendants is insolvent the plaintiff should be able to collect the entire amount of damages from a solvent defendant.¹¹⁴⁸

Findings and Recommendations

The Task Force finds that there is a problem with joint liability in the State of Florida and that modern times and fundamental fairness dictate the apportionment of fault among all parties who caused the harm to the plaintiff for both economic and non-economic damages. The fact that one defendant may be insolvent or for other reasons immune from payment of damages should not shift the burden to another defendant to fund the total amount of damages, beyond the degree of fault for that defendant.

Recommendation 1. Joint liability has a negative impact on a medical malpractice insurer's ability to forecast future losses and contributes to the insurer's paid losses. Accordingly, the Legislature should amend section 768.81, Florida Statutes, to provide that a defendant's liability for both economic and non-economic damages be several only.

¹¹⁴⁵ This is the law pre-1999 passage of chapter 99-225, Laws of Florida.

¹¹⁴⁶ See Gail Parenti, testimony, Nov. 22, 2002, pg. 267-68.

¹¹⁴⁷ See Joel Perwin, testimony, Nov. 22, 2002, pg. 276.

¹¹⁴⁸ Fabre v. Marin, 623 So. 2d 1182, 1186 (Fla. 1993).

Set Off of Settlement Proceeds

Issue

The Task Force voted at its December 20, 2002 meeting, by a 5-0 vote, to examine the following issues with respect to set off of settlement proceeds in the context of medical malpractice cases:

- Should the collateral source rule be re-examined to ensure that payments received by the plaintiff that are not required to be repaid from a settlement or judgment are deducted from the award or are considered by the jury?

Current Situation

Under certain conditions, money received by a plaintiff under a settlement agreement with another defendant may be set off from the total damages awarded by a jury. The purpose of these set off laws is to prevent the plaintiff from receiving a windfall by recovering damages in excess of those awarded by the jury. However, these statutes predate Florida's partial abrogation of joint liability. Current case law interpreting these statutes forbids the setting off of the settlement dollars to non-economic damages in any tort action.

Florida law provides that settlement proceeds received by a plaintiff may, in certain circumstances, be credited toward or "set off" from the total damages awarded by a jury at trial.¹¹⁴⁹ However, such set off allowances only apply to economic damages in a tort action, including a medical malpractice case; they do not apply to non-economic damages.¹¹⁵⁰

Florida's jurisprudence contains two cases that directly impact the issue of set offs. The first was decided by the Supreme Court in 1995.¹¹⁵¹ In Wells v. Tallahassee Memorial Regional Medical Center, Mrs. Wells sued TMRMC, Dr. Alford, and Anesthesiology Associates and its employees Raymond Johns and Dr. Sell, for the wrongful death of her husband.¹¹⁵² Before trial, Mrs. Wells settled with Dr. Alford for \$250,000, \$50,000 of

¹¹⁴⁹ See sections 46.015(2), 768.041(2), 768.31(5), Florida Statutes.

¹¹⁵⁰ See Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So. 2d 249 (Fla. 1995); Gouty v. Schnepel, 795 So. 2d 959 (Fla. 2001).

¹¹⁵¹ Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So. 2d 249 (Fla. 1995).

¹¹⁵² Id. at 250.

which were economic damages and \$200,000 of which were non-economic damages. Mrs. Wells also settled with Anesthesiology Associates and its employees for \$50,000, without apportionment between economic and non-economic damages. Accordingly, TMRMC was the sole defendant at trial.¹¹⁵³

The trial court instructed the jury to apportion fault, if any, among all the defendants, including those that had settled before trial. The jury returned the following verdict: TMRMC 90 percent at fault, Dr. Alford 5 percent at fault, and Anesthesiology Associates 5 percent at fault. The jury assessed the damages at \$575,853: \$202,853 in economic damages, and \$371,000 in non-economic damages. The court awarded Mrs. Wells \$508,467.70 in damages; 90 percent of \$573,852, plus \$9,000 in costs, less \$17,000 social security benefits.¹¹⁵⁴

After the award was announced, TMRMC asked the court to reduce the judgment. TMRMC argued that the judgment should be reduced by \$300,000. This was the total amount paid by the settling defendants to Mrs. Wells before trial. The court denied the request.¹¹⁵⁵

One question that was presented to the Supreme Court was whether a non-settling defendant, in a case tried under section 768.81(3), Florida Statutes, is entitled to a set off of his or her apportioned share of the damages based on amounts paid by settling defendants in excess of their apportioned liability as determined by the jury. The Supreme Court was also asked to determine whether the rule of set off applied equally to economic and non-economic damages.¹¹⁵⁶

Mrs. Wells argued to the court that with respect to non-economic damages, "the notion that each party is only responsible for his or her share of the damages dictates that payment by one tortfeasor should only extinguish that tortfeasor's liability and have no effect on another tortfeasor's liability."¹¹⁵⁷ She further argued that the set off statutes¹¹⁵⁸ apply only when there is common (i.e., joint) liability, like with economic damages.¹¹⁵⁹ Therefore, Mrs. Wells argued, when a jury determined liability is a percentage of fault, section 768.81(3), Florida Statutes, the comparative fault statute, applied and there is no set off.¹¹⁶⁰ In response, TMRMC argued that the purpose of set off is to "prevent duplicate or

¹¹⁵³ Id.

¹¹⁵⁴ Id.

¹¹⁵⁵ Id.

¹¹⁵⁶ Id.

¹¹⁵⁷ Id. at 251.

¹¹⁵⁸ See sections 768.041(2), 46.015(2), 768.31(5)(a), Florida Statutes.

¹¹⁵⁹ Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So. 2d 249, 251 (Fla. 1995).

¹¹⁶⁰ Id.

overlapping compensation for identical damages."¹¹⁶¹ Without set off, Mrs. Wells would recover a monetary amount in excess of her damages, as determined by the jury.¹¹⁶²

The Supreme Court was persuaded by other states that had abolished joint and several liability but had not legislatively extended set off requirements to the proportional liability setting.¹¹⁶³ The court also examined the statutory language of sections 768.81(3), 46.015, and 768.041, Florida Statutes (1989), and concluded that the set off statutes did not apply to non-economic damages.¹¹⁶⁴ However, the court held that the set off statutes do apply to economic damages for which parties continue to be subject to joint and several liability.¹¹⁶⁵

Once the Supreme Court determined set off did not apply to non-economic damages, the court had to determine how to divide the settlement proceeds between economic and non-economic damages.¹¹⁶⁶ The court decided to divide the damages in the same proportion as the jury award.¹¹⁶⁷ Accordingly, the economic damages were 35.349 percent of the total award. Applying this percentage to the total of the settlement resulted in \$106,047 of the \$300,000 in settlement proceeds being designated as economic damages. Thus, \$106,047 was set off against the \$202,953 award of economic damages. Because of collateral sources related to economic damages, the hospital received an additional set off of \$17,000. This made the resulting award for economic damages to be \$79,806. In addition, Mrs. Wells was entitled to recover the full non-economic damages, less 10 percent, for her comparative fault, which amounted to \$333,900, as well as \$9,000 in costs. Therefore, the total judgment entered in favor of the plaintiff was \$422,706.¹¹⁶⁸

This formula for determining the non-settling defendant's right to a set off allows for a double recovery by the plaintiff. Both the settlement and the damages awarded by the jury were for the same harm (i.e., the wrongful death of Mrs. Wells' husband). The jury determined that the full value of damages for the wrongful death was \$573,853. However, because the court only allowed that portion of the settlement attributable to economic damages to be used as a set off, Mrs. Wells' total recovery (settlement plus jury award) was \$722,706 (\$422,706 + \$300,000). This amount was

¹¹⁶¹ *Id.*

¹¹⁶² *Id.*

¹¹⁶³ *Id.* at 252.

¹¹⁶⁴ *Id.* at 252-253.

¹¹⁶⁵ *Id.* at 253.

¹¹⁶⁶ *Id.*

¹¹⁶⁷ *Id.* at 254.

¹¹⁶⁸ *Id.*

\$180,892 more than the full value of the wrongful death as determined by the jury.¹¹⁶⁹

After this decision was issued, the question remained as to whether a defendant would be entitled to a set off against both economic and non-economic damages if that defendant essentially waived section 768.81, Florida Statutes, and did not ask the jury to apportion fault among nonparties. The reason for this question was that if there was no apportionment of fault to the settling defendant, then section 768.81, Florida Statutes, and the set off formula in Wells arguably would not apply.¹¹⁷⁰ Instead, the set off statutes (sections 46.105(2), 768.31(5)(a), and 768.041(2), Florida Statutes) would control. These statutes authorized a dollar-for-dollar set off for settlements entered into before the enactment of section 768.81, Florida Statutes. The Fourth District Court of Appeal hinted that such an outcome might be possible.¹¹⁷¹

However, in September 2001, the Supreme Court issued its opinion in Gouty v. Schnepel,¹¹⁷² which had the effect of requiring a defendant to place all settling defendants on the jury verdict form and request an apportionment of fault by the jury before any set off for economic damages would be allowed based on an earlier settlement.¹¹⁷³

In Gouty v. Schnepel, the plaintiff, Gouty, was shot and injured by a gun owned and operated by Schnepel and manufactured by Glock, Inc.¹¹⁷⁴ Gouty sued both Schnepel and Glock. Before trial, Glock settled Gouty's claim, paying Gouty \$137,500 in exchange for a release and dismissal of its claim. However, Glock was listed on the jury verdict form for the purpose of apportioning fault among the parties. The jury returned a verdict, finding Schnepel 100 percent liable, exonerating Glock altogether. The jury awarded damages of \$250,000 total, \$125,000 economic damages, \$125,000 non-economic damages. Schnepel asked the court to reduce the verdict by the settlement amount, but the request was denied.¹¹⁷⁵

On appeal to the Supreme Court, the question was whether the set off statutes can be used in circumstances when a jury finds a non-settling defendant liable for economic damages but finds that the settling defendant is not liable.¹¹⁷⁶ The court decided that without joint and several liability, the set off statutes do not apply to reduce a non-settling

¹¹⁶⁹ Jennings Hurt, Apportionment of Fault, Set-Off and Empty Chair Argument (Oct. 24, 2002).

¹¹⁷⁰ Id.

¹¹⁷¹ Id.; see also Anderson v. Ewing, 768 So. 2d 1161 (Fla. 4th DCA 2000).

¹¹⁷² Gouty v. Schnepel, 795 So. 2d 959 (Fla. 2001).

¹¹⁷³ See Jennings Hurt, Apportionment of Fault, Set-Off and Empty Chair Argument (Oct. 24, 2002).

¹¹⁷⁴ Id. at 960.

¹¹⁷⁵ Id.

¹¹⁷⁶ Id. at 961.

defendant's payment for liability.¹¹⁷⁷ In so concluding, the court noted "as long as a defendant does not pay more than his or her percent of fault, that defendant is not entitled to contribution from another tortfeasor or entitled to a set off from a settling defendant."¹¹⁷⁸ "However, if the defendant is required to pay damages on the basis of joint and several liability, that defendant's rights of contribution and set off remain unchanged."¹¹⁷⁹

The court essentially viewed this issue of set off vis-a-vis joint and several liability as an issue to be decided by the Florida Legislature. The court reasoned "the applicability of the set off statutes is predicated on the existence of other tortfeasors who are liable for the same injury as the settling party."¹¹⁸⁰ The court recognized that the Legislature amended section 768.81(3), Florida Statutes, in 1999, but that the Legislature enacted the set off statutes before it enacted the comparative fault statute and the language of the set off statutes has not changed since Wells.¹¹⁸¹

In conclusion, then, the court confirmed that Schnepel was 100 percent liable for Gouty's injuries and the jury expressly found that Glock was not liable at all (i.e., it was not a joint tortfeasor). Thus, the judgment against Schnepel for both economic and non-economic damages was not based upon joint and several liability, but on Schnepel's percentage of fault, which was found to be 100 percent. Accordingly, Schnepel was not entitled to the benefit of a set off from the award of economic damages.¹¹⁸²

As a result of the statutory scheme on set off, the partial legislative abrogation of joint and several liability in section 768.81, Florida Statutes, and the pronouncements of the Supreme Court of no set offs where there is no joint liability, plaintiffs are in the position to receive a double recovery for the same injury.¹¹⁸³ Most medical malpractice cases involve plaintiffs suing multiple healthcare providers.¹¹⁸⁴ At least some of the defendants in that suit will settle with the plaintiffs prior to trial.¹¹⁸⁵ Assuming for example that \$2,000,000 is paid in settlement dollars to the plaintiffs by other defendant doctors and the least culpable defendant doctor proceeds to trial, loses, and the plaintiff is awarded \$2,000,000 for the same injury, for which he has already received \$2,000,000, the plaintiff has received a double recovery.¹¹⁸⁶ According to testimony

¹¹⁷⁷ Id.

¹¹⁷⁸ Id. at 964.

¹¹⁷⁹ Id.

¹¹⁸⁰ Id. at 965.

¹¹⁸¹ Id. at 965-966.

¹¹⁸² Id. at 966.

¹¹⁸³ See Jennings Hurt, Apportionment of Fault, Set-Off and Empty Chair Argument (Oct. 24, 2002); see also Jennings Hurt, testimony, Nov. 22, 2002, pgs. 259-267.

¹¹⁸⁴ Id.

¹¹⁸⁵ Id.

¹¹⁸⁶ See Jennings Hurt, testimony, Nov. 22, 2002, pgs. 259-267.

provided to the Task Force, the only way to avoid that result is to place the settling defendants on the jury verdict form. The remaining, non-settling defendant does not get to tell the jury that the others have settled but that defendant must prove that the settling defendants were negligent.¹¹⁸⁷ Essentially, the defense is turned into a plaintiff at this point: the doctor in the courtroom is forced to prove that the injury was caused by a nurse who is not there to defend himself or herself.¹¹⁸⁸

Information Presented to the Task Force

The Task Force heard testimony that plaintiffs are currently in a position to receive a double recovery for a single injury when a defendant settles prior to trial and no set off is allowed by the court to the ultimate jury award of damages for the previous settlement amount paid.¹¹⁸⁹ Other testimony to the Task Force also highlighted practical defense problems because of the set off law in Florida. A remaining, non-settling defendant can often find himself or herself on the eve of trial having to "blame" another defendant who is no longer part of the litigation and not present in the courtroom because of a last minute settlement.¹¹⁹⁰ The recommended solutions were legislative changes to the current set off statutes to allow set off of settlement proceeds from a jury verdict of damages for both economic and non-economic damages.¹¹⁹¹

According to testimony provided to the Task Force, under the evolving hybrid system of apportionment of fault in the State of Florida, a defendant more closely pays according to his or her fault than was the case years ago. The plaintiffs' bar testified that when joint and several liability was in full force, set offs were allowed because each defendant, regardless of fault, was jointly liable for all other defendants' harm as well. Therefore, any payment received by the plaintiff from a defendant was set off against the ultimate award of damages because the damages were not assigned to any particular defendant. When joint liability is removed, each defendant is, in theory, paying only for his or her own fault. The payment, by another defendant, does not lessen the damages that should be paid by a remaining defendant.¹¹⁹²

¹¹⁸⁷ *Id.*

¹¹⁸⁸ *Id.*

¹¹⁸⁹ See Jennings Hurt, Apportionment of Fault, Set-Off and Empty Chair Argument (Oct. 24, 2002); see also Jennings Hurt, testimony, Nov. 22, 2002, pgs. 259-267, 286-291; see also Gail Parenti, testimony, Nov. 22, 2002, pgs. 267-269.

¹¹⁹⁰ See Jennings Hurt, Apportionment of Fault, Set-Off and Empty Chair Argument (Oct. 24, 2002); see also Jennings Hurt, testimony, Nov. 22, 2002, pgs. 266-67.

¹¹⁹¹ See Jennings Hurt, Apportionment of Fault, Set-Off and Empty Chair Argument (Oct. 24, 2002); see also Jennings Hurt, testimony, Nov. 22, 2002, pgs. 259-267, 286-291; see also Gail Parenti, testimony, Nov. 22, 2002, pgs. 269-70.

¹¹⁹² See Joel Perwin, testimony, Nov. 22, 2002, pgs. 274-282.

Findings and Recommendation

The Task Force finds that there is fundamental unfairness in a system that allows the possibility of a double recovery to a plaintiff for the same harm when there has to be a good faith belief on the part of the plaintiff that all named defendants participated in causing the harm. The Task Force further finds that it is not inconsistent to have a system that allows for several liability only and permits set off for settlement moneys received for the same harm that is also compensated by a jury.

Chief Justice Anstead has even recognized the Legislature's role on this issue. "It would be far better, however, since this is an area in which the legislature has broad discretion and authority, and has been very active, for the legislature to expressly indicate the limitations on the continuing use of the contribution scheme, including the set off provisions of sections 46.015(2), 768.31(5)(a), and 768.041(2)," he stated.¹¹⁹³

Recommendation 1. The Legislature should amend the set off statutes, sections 46.015 and 768.041, Florida Statutes, to clarify that set off amounts should be applied to jury damage awards, including both economic and non-economic damages, even when fault is several only.

¹¹⁹³ Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So. 2d 249, 256 (Fla. 1995) (Anstead, J., specially concurring).

Chapter 9 - Alternative Dispute Resolution

"[C]hange is difficult. Even with the most enlightened leadership, creating a non-punitive atmosphere is a major challenge. The urge to punish is deeply entrenched. . . . If there is any lesson to be learned, it is that fear of reprisal and punishment produce not safety but defensiveness, secrecy and personal anguish."

Lucien L. Leape, M.D., Can We Make Health Care Safe?, (2000)

Mandatory Mediation

Issue

The Task Force voted at its December 20, 2002 meeting, by a 5-0 vote, to examine the following issues with respect to mandatory mediation in the context of medical malpractice cases:

- Should medical mediation panels be established to divert medical malpractice cases to either mediation or arbitration?
- Should the mediation panel be in addition to the current pre-suit process, or in lieu of the current process?
- If created, should the panel consist of one attorney and three physicians?

Current Situation

Medical malpractice litigants have several options set out in law for settling the law suit prior to litigation. Section 766.108, Florida Statutes, establishes a mandatory pre-trial settlement conference for medical malpractice cases and section 768.79, Florida Statutes, sets out the process for offers of judgment available in any civil action for damages.

Section 766.108, Florida Statutes, provides the court must require a settlement conference at least three weeks before the date set for trial in all medical malpractice cases. The attorneys who will conduct the trial, the parties and any person having the authority to settle the case must attend

this conference and must be excused by the court, for good cause shown, if they will not attend.

Section 768.79, Florida Statutes, sets out the procedures for either party to make an offer of judgment to settle the litigation. Either party may make an offer of settlement to the opposing party, which if not accepted within thirty days can result in the party not accepting the offer paying the offering parties attorney fees and costs from the date of the offer. If the plaintiff makes the offer that is not accepted then the defendant will owe the plaintiff's attorney fees and costs from the date of the offer if the final judgment obtained by the plaintiff is 25 percent higher than the offer. If the defendant makes the offer and the plaintiff rejects it then the defendant will be entitled to attorney fees and costs from the date of the offer if the judgment is one of no liability or is at least 25 percent lower than the offer. The amount of the offer is not admissible at trial but may be admitted for purposes of enforcing this section within thirty days after the entry of the judgment or voluntary or involuntary dismissal of the case. In making the determination as to the amount of the attorney fees and costs to be awarded, the statute provides specific criteria to be considered by the court, in addition to the standards generally considered by the court in awarding fees and costs. These criteria include:

- The apparent merit or lack of merit in the claim.
- The number and nature of offers made by the parties.
- The closeness of questions of fact and law at issue.
- Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.
- Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
- The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.
- Evidence of an offer is admissible only in proceedings to enforce an accepted offer or to determine the imposition of sanctions under this section.¹¹⁹⁴

Information Provided to the Task Force

Mr. Perry Odom¹¹⁹⁵ testified to the Task Force regarding his experience with mediation and its use early in the litigation process. He testified that the advantage of mediation over other dispute resolution processes is that

¹¹⁹⁴ Section 768.79 (7)(b), Florida Statutes.

¹¹⁹⁵ Perry Odom, J.D., North Florida Mediation and Arbitration Services.

the decision rests with the parties not with a third party.¹¹⁹⁶ The purpose of the mediator is to assist the parties in narrowing the issues and understanding the strengths and weaknesses of the case.¹¹⁹⁷ Early mediation can serve to substantially reduce the cost of the case and can allow the parties to meet and discuss settlement before "acrimony" between the parties has built.¹¹⁹⁸ While some object to early mediation because of a lack of information about the case, Mr. Odom stated even at an early point, the plaintiff has a lot of information about the case and the insurance companies have a lot of experience on which to base an early assessment of the worth of the case.¹¹⁹⁹

Mr. Odom proposed a pre-suit mediation process as follows:¹²⁰⁰

At the conclusion of the pre-suit screening period and any pre-suit informal discovery, but before the claimant files suit, the parties shall submit the matter to pre-suit mediation as follows:

- A certified circuit court mediator to be selected by mutual agreement of the parties shall conduct the pre-suit mediation. If the parties are unable to agree on a mediator within fifteen days after the claimant requests pre-suit mediation, a mediator shall be appointed by the general counsel of the Department of Health from the list of certified circuit court mediators maintained by the chief judge of the circuit in which the suit may be filed.
- Within thirty days after the mediator is selected, the mediation conference shall be scheduled by the mediator after conferring with the parties or their attorneys to determine a mutually acceptable date, time, and place, whereupon the mediator shall promptly give written notice to all parties of the date, time, and place of the mediation conference at least fifteen days prior to the scheduled mediation conference. Unless otherwise agreed by all of the parties, the pre-suit mediation shall be concluded within sixty days after the mediator is selected.
- The personal attendance of all parties at the pre-suit mediation conference is essential and required, unless excused by mutual agreement of all of the parties. Parties shall have absolute authority to settle the matter. If a party is a corporation, the corporate representative shall be either an officer of the corporation or a delegated representative, either of whom must have authority to bind the corporation to a settlement agreement. In the case of an insurance

¹¹⁹⁶ Perry Odom, J.D., testimony, Dec. 3, 2002, pg. 234.

¹¹⁹⁷ *Id.*

¹¹⁹⁸ *Id.* at 235.

¹¹⁹⁹ *Id.* at 236.

¹²⁰⁰ Language provided to Task Force by Perry Odom, J.D.

carrier or self-insurer, the representative of the insurance carrier or self-insurer shall be empowered to resolve the matter for the lower of the demand of the claimant or the limits of coverage.

- Section 44.107, Florida Statutes, regarding judicial immunity for the mediator and Rule 1.700, et seq., Florida Rules of Civil Procedure shall apply to the pre-suit mediation.
- Each party involved in the pre-suit mediation process has a privilege to refuse to disclose, and to prevent any person present at the pre-suit mediation conference from disclosing, communications made during the pre-suit mediation conference. All oral or written communications in the pre-suit mediation proceedings, other than an executed settlement agreement, shall be exempt from the requirements of chapter 119 and shall be confidential and inadmissible in any subsequent legal proceedings, unless all parties agree otherwise.
- The statute of limitations is tolled as to all possible defendants until conclusion of the pre-suit mediation proceedings.
- Unless all parties agree otherwise, the parties shall share the fee or other costs charged by the mediator equally.
- If pre-suit mediation terminates in an impasse declared by the mediator, and the claimant thereafter files suit, nothing contained herein shall prevent the court from ordering the parties to submit to court-ordered mediation pursuant to chapter 44, Florida Statutes.

The Academy of Florida Trial Lawyers, in response to the discussion at the December 3, 2002 Task Force meeting, proposed the following language to provide for early mandatory mediation with sanctions but not pre-suit mediation.¹²⁰¹

- Within 120 days of suit being filed, the parties shall conduct mandatory mediation in accordance with section 44.102, Florida Statutes, if binding arbitration under sections 766.106 or 766.207, Florida Statutes, has not been agreed to by the parties. The Florida Rules of Civil Procedure shall apply to mediation held pursuant to this section. During the mediation, each party shall make a demand for judgment or an offer of settlement. At the conclusion of the mediation, the mediator shall record the final demand and final offer to provide to the court upon the rendering of a judgment.

¹²⁰¹ Id.

- If a claimant rejecting the final offer of settlement made during the mediation does not obtain a judgment more favorable than the offer, the court shall assess the mediation costs and reasonable costs, expenses, and attorneys fees which were incurred after the date of mediation. The assessment shall attach to the proceeds of the claimant and attributable to any defendant whose final offer was more favorable than the judgment.
- If the judgment obtained at trial is not more favorable to a defendant than the final demand for judgment made by the claimant to the defendant during mediation, the court shall assess the mediation costs, and reasonable costs, expenses, and attorneys fees that were incurred after the date of mediation. Prejudgment interest at the rate established in section 55.03, Florida Statutes, from the date of the final demand shall also be assessed. The defendant and the insurer of the defendant, if any, shall be liable for the costs, fees, and interest awardable under this section.
- The final offer and final demand made during the mediation required in this section shall be the only offer and demand considered by the court in assessing costs, expenses, attorneys fees, and prejudgment interest under this section. No subsequent offer or demand by either party shall apply in the determination of whether sanctions will be assessed by the court under this section.
- Notwithstanding any law to the contrary, sections 45.061 and 768.79, Florida Statutes, shall not be applicable to medical negligence or to wrongful death cases arising out of medical negligence causes of action.

Findings and Recommendations

The Task Force finds encouraging the parties to seriously provide for early case evaluation and to mediate the case as soon as possible in the litigation process will reduce the litigation costs related to medical malpractice suits, thus reducing some of the medical malpractice litigation costs.

The Task Force finds the parties are currently free to mediate a case at any point but the confidentiality provisions currently available in chapter 44, Florida Statutes, do not cover any pre-suit mediation.

The Task Force finds mandatory mediation does not occur early enough in the litigation process to significantly reduce litigation costs and without sanctions for failure to mediate in good faith early mediation can be useless if the parties appear but are not ready or willing to work toward a settlement of the case.

Recommendation 1. The Legislature should encourage pre-suit mediation by providing for confidentiality of any pre-suit mediation in a medical malpractice case in the same manner as is provided for mediation occurring after suit is filed.

Recommendation 2. The Legislature should amend the mandatory mediation provisions of section 766.108, Florida Statutes, to require mediation within 120 days of filing suit and to provide sanctions if a good faith offer of settlement is refused.

Recommendation 3. The Legislature should not make admissible at trial the fact that mandatory mediation occurred or that offers of settlement were made, but should make this fact admissible for purposes of enforcing the attorney fees and costs. The mediator should maintain a report of the issues and facts presented at the mediation and the final settlement offers of each party at the mandatory mediation.

Recommendation 4. The Legislature should enact specific criteria similar to those in the offer of judgment statute to be considered by the court in making the determination as to how close in amount the judgment must be to the offer and the criteria to be used in evaluating the amount of the attorney fees and costs to be awarded in addition to the standards generally considered in awarding fees and costs.

Recommendation 5. The Legislature should require the court to consider, in addition to all other criteria, whether the issues and facts presented at mediation were significantly the same issues presented at trial.

Voluntary Binding Arbitration

Issue

The Task Force voted at its January 8, 2003 meeting, by a 5-0 vote, to examine the following issues with respect to voluntary binding arbitration in the context of medical malpractice cases:

- Should the optional arbitration program be eliminated?
- Should the definition of the caps established in the voluntary arbitration process be clarified to apply a cap of \$250,000 per incident regardless of the number of survivors (claimants)?

Current Situation

Chapter 766, contains two separate arbitration provisions: (1) section 766.106, Florida Statutes, and (2) sections 766.207-766.212, Florida Statutes. While both section 766.106, Florida Statutes, and sections 766.207 through 766.212, Florida Statutes, concern arbitration, they are two separate and distinct arbitration procedures. Parties cannot employ some of the provisions of section 766.106, Florida Statutes, and some of the provisions of section 766.207, Florida Statutes, to create a hybrid of arbitration.¹²⁰²

Section 766.106, Florida Statutes

Section 766.106, Florida Statutes, was enacted as part of the Medical Malpractice Reform Act of 1985.¹²⁰³ Under this statute, the defendant may make an offer to arbitrate and the statute expressly contemplates an admission of liability with arbitration being conducted on the damages issue. More specifically, its provisions permit "an offer of admission of liability and for arbitration on the issue of damages" in response to a notice of intent to initiate medical malpractice litigation.¹²⁰⁴

According to Gail Parenti, whose Coral Gables firm primarily represents hospitals, "I have never seen an arbitration proceed under 766.106 because there, frankly, is no reason to. It has done nothing but generate confusion

¹²⁰² Platman v. Holmes Regional Medical Center, Inc., 683 So. 2d. 671 (Fla. 5th DCA 1996), *rev. denied*, 687 So. 2d. 1305 (Fla. 1997); *see also Tallahassee Memorial Regional Medical Center, Inc. v. Kinsey*, 655 So. 2d 1191 (Fla. 1st DCA 1995), *rev. denied*, 662 So. 2d. 344 (Fla. 1995).

¹²⁰³ Chapter 85-175, section 14, at 1199-1202, Laws of Florida.

¹²⁰⁴ See section 766.106(3)(b)3, Florida Statutes.

because it gives rise to arguments that an attempt to make an offer under 766.207 is somehow invalid because it's confusing."¹²⁰⁵

Sections 766.207 through 766.212, Florida Statutes

In 1988, the Legislature was again asked to turn its attention to medical malpractice, enacting what is now chapter 766, Florida Statutes.¹²⁰⁶ While amendments changed some of what is now section 766.106, Florida Statutes, and added additional subsections, the substance of the provisions relating to admission of liability and voluntary binding arbitration of damages remained unchanged.

Instead, the Legislature adopted a completely separate set of procedures for admission of liability and binding arbitration of damages.¹²⁰⁷ Those provisions were subsequently codified as sections 766.207 through 766.212, Florida Statutes. While the motivation for enactment of those provisions is explained in section 766.201(2)(b), Florida Statutes, no reference is made to the provisions regarding admission of liability and voluntary binding arbitration of damages already set forth in section 766.106, Florida Statutes, or to the intended interplay between section 766.106, Florida Statutes, and sections 766.207 through 766.212, Florida Statutes.

Section 766.201(1), Florida Statutes, expressly sets forth the Legislature's intent to provide a mechanism for the prompt resolution of medical malpractice claims through mandatory pre-suit investigation and voluntary binding arbitration of damages.

Sections 766.203 through 766.206, Florida Statutes, set out the pre-suit investigation procedure that both the claimant and defendant must follow before a medical negligence case may be filed in circuit court. The first step in the pre-suit investigation is for the claimant to determine whether reasonable grounds exist to believe that a defendant acted negligently in the claimant's care or treatment, and to determine whether this negligence caused the claimant's injury.¹²⁰⁸ This section also requires that the medical negligence claim be corroborated by a "verified written medical expert opinion" from a medical expert as defined in section 766.202(5), Florida Statutes. Copies of any medical records relevant to the litigation must be provided to the claimant or defendant.¹²⁰⁹ From there, each party shall provide to the other party reasonable access to information within its

¹²⁰⁵ Gail Parenti, J.D., testimony, Nov. 22, 2002, pg. 206; but see Neal Roth, J.D., testimony, Nov. 22, 2002, pg. 207 (recalling an offer, later revoked, to arbitrate under section 766.106, Florida Statutes).

¹²⁰⁶ Chapter 88-1, sections 48-87, at 164-186, Laws of Florida; chapter 88-277, sections 26-49, at 1473-1495, Laws of Florida.

¹²⁰⁷ Chapter 88-1, sections 54-59, at 169-173, Laws of Florida; chapter 88-277, sections 30-35, at 1476-1482, Laws of Florida.

¹²⁰⁸ Section 766.203(2), Florida Statutes.

¹²⁰⁹ Section 766.204(1), Florida Statutes.

possession or control in order to facilitate evaluation of the claim¹²¹⁰ before giving notice to a defendant. After the completion of the pre-suit investigation by the parties pursuant to sections 766.203 through 205, Florida Statutes, with preliminary reasonable grounds for a medical negligence claim intact, the parties may elect to have damages determined by arbitration.

This arbitration mechanism is found in sections 766.207 through 766.212, Florida Statutes. If the claimant's reasonable grounds for the medical negligence claim are intact at the completion of the pre-suit investigation, either party may request that a medical arbitration panel determine the amount of damages.¹²¹¹

The 1988 Legislature initially contemplated that these provisions would provide benefits to both a claimant and a defendant, the logic being that the claimant benefits from the requirement that a defendant quickly determine the merit of any defenses and the extent of its liability. The claimant also saves the costs of attorney and expert witness fees, which would be required to prevail in a civil trial. Moreover, a claimant who accepts a defendant's offer of voluntary binding arbitration receives the following additional benefits: (1) a relaxed evidentiary standard for arbitration proceedings; (2) joint and several liability of multiple defendants in arbitration; (3) prompt payment of damages after the determination by the arbitration panel; (4) interest penalties against the defendant for failure to promptly pay the arbitration award; and (5) limited appellate review of the arbitration award.

Likewise, a defendant benefits in that he or she is relieved of punitive damages and is assured that there will not be an award greater than \$250,000 in non-economic damages. This limitation was intended to provide liability insurers with the ability to improve the predictability of the outcome of claims for the purpose of loss planning in risk assessment of medical malpractice premiums. At the same time, the arbitration mechanism forces parties to settle their disputes.

During the course of testimony, this Task Force heard from Gail Leverett Parenti. Ms. Parenti noted that at the time of the Echarte decision (to be discussed below), the Division of Administrative Hearings (DOAH) reported a total of 132 medical arbitration cases had been filed in the fourteen years since the enactment of the voluntary binding arbitration provisions. Of these cases, 106 had been resolved without a hearing.¹²¹² In other words, they had been settled. Ms. Parenti explained that voluntary binding arbitration was a highly-effective means of achieving the

¹²¹⁰ Section 766.205(1), Florida Statutes.

¹²¹¹ Section 766.207, Florida Statutes.

¹²¹² Gail Parenti, J.D., testimony, Nov. 22, 2002, pg. 184.

Legislature's stated goal of early settlement of medical malpractice cases. However, Ms. Parenti went on to further note that these statistics cannot capture the number of cases in which an offer to arbitrate has resulted in a settlement before the parties actually initiated arbitration proceedings, or those in which a credible threat to offer to arbitrate resulted in a settlement before the conclusion of the pre-suit period.¹²¹³

The Task Force heard conflicting testimony from defense and plaintiff's attorneys regarding the extent to which arbitration under sections 766.207 through 766.212, Florida Statutes, is actually used. Ms. Parenti, citing the above-mentioned figures, stated that although settlements are actually taking place, the number of these settlements is lower than it should be because too few parties are taking advantage of the offer to arbitrate.¹²¹⁴ Tommy Dukes, who is with the Florida Defense Lawyers Association, stated that, of the hundreds of malpractice cases he has handled, he has recommended arbitration in just two instances. Mr. Dukes explained that because the statute has been interpreted as allowing \$250,000 per claimant (rather than per claim), and because the defendant must, in essence, admit liability to participate, arbitration under this section is simply not a viable option.¹²¹⁵ However, Neal Roth, representing the Academy of Florida Trial Lawyers, countered the above testimony, stating he and his colleagues were seeing more and more offers to arbitrate.¹²¹⁶ He also cited a recent survey of his group, which indicates that, in fact, arbitration was offered in at least fifty cases in the last two years.¹²¹⁷

University of Miami v. Echarte

The constitutionality of the voluntary binding arbitration provisions was ruled on in the seminal case of University of Miami v. Echarte.¹²¹⁸ In Echarte, the claimants argued the voluntary binding arbitration provision had the effect of limiting the amount of non-economic damages they may recover for the defendant's neglect. The claimants argued the arbitration provision replaced their common law remedy of all damages proximately flowing from the neglect of the defendant. After reviewing the legislative history as well as the findings of the 1988 task force, the Florida Supreme Court expressly upheld the statutory scheme against an attack that the arbitration provision was an insufficient substitute for the common law right of an ordinary damages action. In so doing, the Florida Supreme Court explained:

¹²¹³ Id. at 184-185.

¹²¹⁴ Id. at 184.

¹²¹⁵ Tommy Dukes, J.D., testimony, Oct. 21, 2002, pgs. 240-242.

¹²¹⁶ Neal Roth, J.D., testimony, Nov. 22, 2002, pg. 195.

¹²¹⁷ Neal Roth, J.D., testimony, Oct. 21, 2002, pg. 272.

¹²¹⁸ 618 So. 2d 189, 196 (Fla. 1993), cert. denied, 510 U.S. 915, 114 Sup. Ct. 304 (1993).

The initial question in the instant case is whether the arbitration statutes, which include the non-economic damage caps found in sections 766.207 and 766.209, provide claimants with a "commensurate benefit" for the loss of the right to fully recover non-economic damages. Sections 766.207 and 766.209 only limit a claimant's right to recover non-economic damages after a defendant agrees to submit the claimant's action to arbitration. The defendant's offer to have damages determined by an arbitration panel provides the claimant with the opportunity to receive prompt recovery without the risk and uncertainty of litigation or having to prove fault in a civil trial. A defendant or the defendant's insurer is required to conduct an investigation to determine the defendant's liability within ninety days of receiving the claimant's notice to initiate a malpractice claim.

Before the defendant may deny the claimant's reasonable grounds for finding medical negligence, the defendant must provide a verified written medical expert opinion corroborating a lack of reasonable grounds to show a negligent injury. § 766.203(3)(b). The claimant benefits from the requirement that a defendant quickly determine the merit of any defenses and the extent of its liability. The claimant also saves the costs of attorney and expert witness fees which would be required to prove liability. Further, a claimant who accepts a defendant's offer to have damages determined by an arbitration panel receives the additional benefits of:

- the relaxed evidentiary standard for arbitration proceedings as set out by section 120.58, Florida Statutes (1989);
- joint and several liability of multiple defendants in arbitration;
- prompt payment of damages after the determination by the arbitration panel;
- interest penalties against the defendant for failure to promptly pay the arbitration award; and
- limited appellate review of the arbitration award requiring a showing of "manifest injustice."¹²¹⁹

The court went on to reject the claimant's assertion that the medical malpractice arbitration statute did not provide the claimant with a

¹²¹⁹ University of Miami v. Echarte, 618 So. 2d 189, 194 (Fla. 1993).

commensurate benefit.¹²²⁰ After the holding in Echarte, it appeared the intent of the voluntary binding arbitration statute would be implemented.

However, after the Florida Supreme Court's decision in St. Mary's Hospital, Inc. v. Phillipe,¹²²¹ it appears there is no future for voluntary binding arbitration. The Task Force heard testimony that most defendants will not consider voluntary binding arbitration in light of the St. Mary's decision.¹²²² As Ms. Parenti noted, "Because I've been talking to defense lawyers for the last seven years about arbitration and they come to me and say, 'Gail, after [the Supreme Court rulings], I just can't do it. I cannot recommend to my client that they go to a forum where there's that risk.'"¹²²³

St. Mary's Hospital, Inc. v. Phillipe

The St. Mary's decision was actually two separate cases that were consolidated for review: (1) St. Mary's Hospital, Inc. v. Phillipe,¹²²⁴ and (2) Frazen v. Mogler.¹²²⁵ Both were medical malpractice wrongful death cases in which the defendants conceded liability.

The facts of St. Mary's Hospital v. Phillipe were as follows: Juslin Phillipe died while giving birth to her daughter, Ecclesianne. Ecclesianne was born severely brain damaged. Charles Phillipe, Juslin's husband and the personal representative of her estate, brought a medical malpractice wrongful death action against St. Mary's Hospital on behalf of himself and the decedent's four surviving children.¹²²⁶

St. Mary's conceded liability and the case proceeded under that arbitration process on the issue of damages. The independent personal injury action of the brain-damaged child, Ecclesianne, was not part of the arbitration process.¹²²⁷

After a hearing, the arbitrators awarded the following damages: \$250,000 in non-economic damages to both Charles, the husband, and Ecclesianne, the daughter; \$175,000 in non-economic damages to each of the remaining children; \$2,284,804 to the family in economic damages for loss of services; \$943,000 in economic damages for loss of special services to Ecclesianne; \$3,398 in funeral expenses; and \$510,632 in

¹²²⁰ Id. at 197.

¹²²¹ 769 So. 2d 961 (Fla. 2000).

¹²²² Gail Parenti, J.D., testimony, Nov. 22, 2002, pg. 184.

¹²²³ Id.

¹²²⁴ 699 So. 2d 1017 (Fla. 4th DCA 1997).

¹²²⁵ 699 So. 2d 1026 (Fla. 4th DCA 1997).

¹²²⁶ St. Mary's Hospital v. Phillipe, 769 So. 2d 961, 963 (Fla. 2000).

¹²²⁷ Id.

attorneys' fees. The total amount of the arbitration award was \$4,766,834.¹²²⁸

St. Mary's argued that the arbitrators' total award of non-economic damages in the amount of \$1,025,000 exceeded the \$250,000 cap. That provision provides that "[n]on-economic damages shall be limited to a maximum of \$250,000 per incident." St. Mary's asserted that the term "per incident" reflected that the limit applies in the aggregate to all claimants, rather than separately to each wrongful death beneficiary.¹²²⁹ The district court agreed with St. Mary's. The court concluded the plain language of the statute indicates "there can be no more than \$250,000 in non-economic damages awarded by the arbitrators under section 766.207, Florida Statutes, no matter how many different people may have a direct benefit in the award, or the source of their entitlement to share in the award."¹²³⁰ The district court reversed the arbitration award of non-economic damages, and remanded for the reduction of such damages to \$250,000.¹²³¹

St. Mary's also argued that the award of economic damages for the decedent's loss of earning capacity was improper because such damages are not available under the Wrongful Death Act. The district court disagreed, however, holding that the elements of economic damages available in a voluntary binding arbitration of a medical malpractice claim are controlled by the voluntary binding arbitration statute.¹²³²

The facts of Franzen v. Mogler were as follows: Michael Mogler, a minor, died following treatment from Dr. Dirk Franzen. The parents of Michael Mogler brought a medical malpractice wrongful death claim on behalf of themselves and their son's estate against Dr. Franzen.¹²³³ As in Phillipe, the parties voluntarily chose to proceed under the voluntary statutory arbitration process. Dr. Franzen conceded liability, and the issue of damages proceeded to arbitration. After a hearing, the arbitrators awarded the following damages to Henry Mogler: \$250,000 in past and future non-economic damages; \$9,125 for past medical expenses; \$29,750 for future medical expenses; and \$7,950 for past and future loss of services.¹²³⁴ The arbitrators awarded the following damages to Donna Mogler: \$250,000 in past and future non-economic damages; \$46,593 for past medical expenses; \$46,000 for future medical expenses; \$57,636 for past wage loss; \$304,189 for future wage loss; and \$7,950 for past and future loss of

¹²²⁸ Id.

¹²²⁹ Id. at 964.

¹²³⁰ Id.

¹²³¹ Id.

¹²³² Id.

¹²³³ Id.

¹²³⁴ Id.

services.¹²³⁵ The Estate of Michael Mogler was awarded the following damages: \$3,078 for funeral expenses; \$5,084 for medical expenses; and \$388,272 for lost wages.¹²³⁶ The arbitrators also awarded attorneys' fees and costs in the amount of \$210,844.¹²³⁷

The total amount of the arbitration award was \$1,616,471.¹²³⁸ Following its decision in Phillipe, the district court reversed the award of non-economic damages and affirmed the award of economic damages.¹²³⁹

In the consolidated appeal, the Florida Supreme Court framed the controversy in terms of three separate issues:

ISSUE I: Stay pending review of medical malpractice arbitration award.¹²⁴⁰ The court disposed of this issue by rejecting the claim of unconstitutionality, and reasoned that both parties agreed to participate in voluntary binding arbitration. The court noted: "When a party voluntarily agrees to enter binding arbitration under this statutory alternative process, the party has bound itself to the statutory terms of that process."¹²⁴¹

The Task Force does not take issue with this particular finding. Instead, this Task Force is of the opinion that the results of the next two issues were much more troubling.

ISSUE II: Meaning of the clause "non-economic damages shall be limited to a maximum of \$250,000 per incident." The second issue involved whether the \$250,000 "per incident" limitation of non-economic damages in the arbitration provision limits the total recovery of all claimants in the aggregate to \$250,000 or limits the recovery of each claimant individually to \$250,000.¹²⁴² The court reasoned that the legislative intent behind the statute should be gathered from consideration of the statute as a whole rather than from any one section.¹²⁴³ The court noted that for purposes of the statute, "claimant" was clearly defined as "any person who has a cause of action arising from medical negligence."¹²⁴⁴ The court further noted that the statute was perfectly clear when it referred to multiple parties.¹²⁴⁵ Likewise, the court noted that the Legislature had previously been clear when it intended to limit claimants' damages in the aggregate in other

¹²³⁵ Id.

¹²³⁶ Id.

¹²³⁷ Id.

¹²³⁸ Id.

¹²³⁹ Id.

¹²⁴⁰ Id. at 964.

¹²⁴¹ Id. at 967.

¹²⁴² Id. at 965.

¹²⁴³ Id. at 967-968.

¹²⁴⁴ Id. at 968.

¹²⁴⁵ Id. at 969.

contexts.¹²⁴⁶ For example, The court reasoned that in the Wrongful Death Act, the limitation read as follows: "Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of \$100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies . . ."¹²⁴⁷ Thus, the court concluded section 766.207(b), Florida Statutes, was neither unclear nor unambiguous.¹²⁴⁸

The court concluded, that each claimant's non-economic damages must be independently determined.¹²⁴⁹ "Differentiating between a single claimant and multiple claimants bears no rational relationship to the Legislature's stated goal of alleviating the financial crisis in the medical liability insurance industry."¹²⁵⁰ As a final caveat, the court concluded that were it to interpret the non-economic damages cap to apply to all claimants in the aggregate, such an interpretation would create an equal protection problem.¹²⁵¹

ISSUE III: Economic Damages. The final issue involved the question of whether the elements of economic damages awardable in the voluntary binding arbitration or a medical malpractice wrongful death claim are controlled by the Wrongful Death Act.¹²⁵² Unlike the voluntary binding arbitration statute, the Wrongful Death Act does not provide claimants with a full range of economic damages.¹²⁵³ The court ruled that the arbitration provisions of the voluntary binding arbitration statute expressly specify the elements of all the damages available when the parties agree to binding arbitration, regardless of whether the medical malpractice action involves a wrongful death.¹²⁵⁴ The court reasoned that the legislative intent of the voluntary binding arbitration statute was to enact reforms to prevent soaring non-economic damage awards, rather than the more predictable economic damage awards.¹²⁵⁵ The court concluded: "If the Legislature intended for the Wrongful Death Act to control the elements of damages available in a medical malpractice arbitration, it could have specifically provided for the application of the provisions of the Act in the [voluntary binding arbitration statute]. It has not done so."¹²⁵⁶

¹²⁴⁶ Id.

¹²⁴⁷ Id.

¹²⁴⁸ Id.

¹²⁴⁹ Id. at 971.

¹²⁵⁰ Id.

¹²⁵¹ Id.

¹²⁵² Id.

¹²⁵³ Id. at 973.

¹²⁵⁴ Id.

¹²⁵⁵ Id.

¹²⁵⁶ Id.

Findings and Recommendations

As a result of the St. Mary's decision, the Task Force has found that defendants are no longer using arbitration as a means of resolving claims.¹²⁵⁷ In sum, the St. Mary's opinion has made it impossible for defendants to offer to arbitrate in wrongful death cases.¹²⁵⁸ Those defendants that agree to arbitrate now find themselves at risk of arbitrators awarding damages that are not compensable under Florida law. One speaker to the Task Force cogently noted: "As a result of the St. Mary's decision, the universe of claims in which an offer to arbitrate can reasonably be considered will be limited to these cases with a single claimant, or a decedent with no statutory survivors; with little or no economic damages; ironically, the cases which should not need the assistance of the arbitration mechanism to settle."¹²⁵⁹ The Task Force finds that voluntary binding arbitration in Florida is effectively dead as a result of the St. Mary's case.

Recommendation 1. The Legislature should amend the definitions of "economic damages" and "non-economic damages" as provided in sections 766.202 and 766.207, Florida Statutes, to provide that such damages are recoverable in voluntary binding arbitration only if the claimant has the right to recover such damages under general law, including the Wrongful Death Act.

Recommendation 2. The Legislature should provide for an aggregate cap on non-economic damages in arbitrated cases of multiple defendants.

¹²⁵⁷ Gail Parenti, J.D., testimony, Nov. 22, 2002, pg. 191.

¹²⁵⁸ Gail Parenti, The Bells of St. Mary: Tolling the End of Voluntary Binding Arbitration of Medical Malpractice Claims, 19(4) Trial Advocate Quarterly 11 (Fall 2000).

¹²⁵⁹ Id.

Chapter 10 - Insurance Reform

"Malpractice fears and high premiums can contribute to 'excessive' service (such as unnecessary cesarean sections and diagnostic tests) or insufficient service (such as physicians no longer assisting in the birth of babies, especially to mothers who are uninsured or have only Medicaid coverage)."

Randall R. Bovbjerg et al., Obstetrics and Malpractice: Evidence on the Performance of a Selective No-Fault System, 265(21) *Journal of the American Medical Association* 2836

Florida Birth-Related Neurological Injury Compensation Act

Issue

The Task Force voted at its January 8, 2003 meeting, by a 5-0 vote, to examine the following issues with respect to the Florida Birth-Related Neurological Injury Compensation Act (NICA) in the context of medical malpractice cases:

- Should the criteria for a claim to qualify for referral to NICA be expanded to include lower birth weights?
- Should the criteria for a claim to qualify for referral to NICA be expanded to allow claims for mental and physical impairment rather than requiring both?

Current Situation

Two issues arise from the historical operation of the Florida No-Fault Compensation Plan created by the Florida Legislature in sections 766.301-316, Florida Statutes. First, whether the act has met its original purpose and continues to have value for that purpose. Second, whether the operation of the act is satisfactory, or whether changes are needed to enhance the purpose of the act.

Throughout the 1980s, a serious and highly-publicized crisis evolved regarding the costs of medical malpractice insurance for physicians. In 1987, the problem was specifically determined to be most serious for obstetricians, who were experiencing some of the highest insurance premium rates in the country.¹²⁶⁰

Newspapers reported rising costs for malpractice insurance and the devastating effects these costs were having on physicians in their daily practices and on the patients who were unable to secure adequate medical attention. For example, a sample of the antidotal evidence reported clearly illustrates the scope of this crisis. One article appearing in the Sun-Sentinel written by the United Press International, stated that "most doctors are paying 81 percent more for medical malpractice insurance between 1982 and 1985, but that obstetrics and gynecologists paid as much as 113 percent more."¹²⁶¹ A reporter for the St. Petersburg Times, noted that in "Broward and Dade County obstetricians' premiums will jump from \$113,631 to \$166,355 as of July 1."¹²⁶² Another article in the St. Petersburg Times declared that the only one in 55 obstetricians in Palm Beach County was still accepting new patients.¹²⁶³ And, in Florida, two maternity wards were closed, one in Collier County and the other in Lake County.¹²⁶⁴

In the State of Florida alone, the malpractice premium rates for obstetrics and gynecology rose 395 percent from 1980 to 1986.¹²⁶⁵ Florida experienced the effects of the problem more severely than most other states.

In an effort to address the mounting malpractice crisis, the Tort and Insurance Act of 1986 created the 1987 Academic Task Force for Review of the Insurance and Tort Systems, a task force to evaluate the state's tort and insurance laws.¹²⁶⁶ This task force was asked to examine the emergent problems facing the healthcare delivery systems, including

¹²⁶⁰ House of Representatives, Council for Healthy Communities, Committee on Health Promotion, A Review of the Legislative History and Financial Status of the Florida Birth-Related Neurological Injury Compensation Association (NICA) 2 (Apr. 2001).

¹²⁶¹ Malpractice Rates Still Skyrocketing: Insurance Premiums Up 81% for Most Doctors, Sun-Sentinel, Aug. 1987.

¹²⁶² Mark Journey, Malpractice Insurer Raises Rates, St. Petersburg Times, June 27, 1987, at 3B.

¹²⁶³ Patients Get Left Behind as Costs Push Doctors Out of the Delivery Rooms, St. Petersburg Times, June 9, 1987, at 4B.

¹²⁶⁴ Elizabeth Wasserman, Lake County Obstetrics Crisis Reaches Critical Condition, Orlando Sentinel, Dec. 23, 1987, at 3.

¹²⁶⁵ House of Representatives, Council for Healthy Communities, Committee on Health Promotion, A Review of the Legislative History and Financial Status of the Florida Birth-Related Neurological Injury Compensation Association (NICA) app. 1 (Apr. 2001).

¹²⁶⁶ Academic Task Force for Review of the Insurance and Tort Systems, Preliminary Fact-Finding Report on Medical Malpractice 1 (Aug. 6, 1987).

physicians, hospitals, and other medical personnel and to make recommendations for reforms, where appropriate. The task force noted that the impact of the medical malpractice problems varied considerably among medical specialties.¹²⁶⁷ As a case in point, the task force found that:

- Obstetricians were more likely than other physicians to have claims filed against them;
- Obstetricians' malpractice premiums were among the highest; and
- The recent increases in malpractice premiums for obstetricians were much greater than for other physicians.¹²⁶⁸

The task force noted that a generation ago abnormal births were regarded as an inherent risk of childbirth. They observed in 1986, most childbirth injuries resulted in increased claims against the obstetrician.¹²⁶⁹ Thus, the task force determined that, for birth related neurological injuries, distinctive treatment was warranted.¹²⁷⁰

That 1987 task force was the first to propose the Florida Birth-Related Neurological Injury Compensation Act. Its November 6, 1987 report recommended the adoption of a no-fault compensation plan for birth-related neurological injuries.¹²⁷¹ Accordingly, in 1988, the Legislature enacted section 766.301, Florida Statutes,¹²⁷² (entitled Legislative Findings and Intent), and determined that physicians practicing obstetrics were high-risk medical specialists for whom malpractice insurance premiums were escalating.¹²⁷³ These medical specialists were found to be the most-severely affected group in the medical malpractice arena.¹²⁷⁴ Moreover, the costs of birth-related neurological injury claims for custodial care and rehabilitation were determined to be particularly high, thus warranting the establishment of a limited system of compensation that was irrespective of fault.¹²⁷⁵ The Florida Birth-Related Neurological Injury Compensation Plan was instituted with the intent to provide compensation to a limited class of catastrophically-injured infants on a no-fault basis to help alleviate the malpractice insurance crisis facing

¹²⁶⁷ *Id.* at 12.

¹²⁶⁸ *Id.*

¹²⁶⁹ *Id.*

¹²⁷⁰ *Id.*

¹²⁷¹ Academic Task Force for Review of the Insurance and Tort Systems, *Medical Malpractice Recommendations* (Nov. 6, 1987); see *Galen of Florida, Inc. v. Braniff*, 696 So. 2d 308, 310 (Fla. 1997).

¹²⁷² Chapter 88-1, section 60, Laws of Florida.

¹²⁷³ Section 766.301(1)(a), Florida Statutes.

¹²⁷⁴ Section 766.301(1)(b), Florida Statutes.

¹²⁷⁵ Section 766.301(1)(d), Florida Statutes.

physicians practicing obstetrics. This no-fault compensation plan also provided participating physicians finite liability.¹²⁷⁶

Sections 766.301 through 766.316, Florida Statutes, outline the components necessary to implement the no-fault compensation structure for participating physicians and eligible claimants.¹²⁷⁷

The terms that are applicable to sections 766.301 through 766.316, Florida Statutes, are defined in section 766.302, Florida Statutes. The terms define the limitations expressed in this narrow compensation plan.

The critical definition as to "eligibility" for participation in the act is provided in section 766.302(2), Florida Statutes. This section defines "birth-related neurological injury" as an injury to the brain or spinal cord of a live infant weighing at least 2500 grams for a single gestation or, in a multiple gestation, a live infant weighing at least 2000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired.¹²⁷⁸

Section 766.302(3), Florida Statutes, identifies the persons who are authorized to file a claim on behalf of the infant. The claimant is a person who files a claim pursuant to section 766.305, Florida Statutes, for compensation for a birth-related neurological injury to an infant. Such a claim may be filed by any legal representative on behalf of an injured infant; and, in the case of a deceased infant, the claim may be filed by an administrator or personal representative, or legal representative.¹²⁷⁹

A "participating physician" is a Florida physician who practices obstetrics or performs obstetrical services and who had paid or was exempted from payment at the time of the injury the assessment required for participation in the birth related neurological injury compensation plan for the year in which the injury occurred.¹²⁸⁰ This definition is found in section 766.302(7), Florida Statutes.

¹²⁷⁶ Historically, since the establishment of NICA, some medical malpractice insurers have offered discounts on premiums for obstetricians who participated in the program. House of Representatives, Council for Healthy Communities, Committee on Health Promotion, A Review of the Legislative History and Financial Status of the Florida Birth-Related Neurological Injury Compensation Association (NICA) (Apr. 2001).

¹²⁷⁷ Several revisions to the 1988 statute have been made since the inception of NICA. For a historical evolutionary discussion on the changes, see House of Representatives, Council for Healthy Communities, Committee on Health Promotion, A Review of the Legislative History and Financial Status of the Florida Birth-Related Neurological Injury Compensation Association (NICA) (Apr. 2001).

¹²⁷⁸ Section 766.302(2), Florida Statutes.

¹²⁷⁹ Section 766.302(3), Florida Statutes.

¹²⁸⁰ Section 766.302(7), Florida Statutes.

Section 766.303, Florida Statutes, provides for the exclusiveness of remedies for the eligible claimants through administrative procedures except where there is evidence of bad faith, malicious purpose, or a willful and wanton disregard.¹²⁸¹

Exclusive jurisdiction vests with an administrative law judge. Section 766.304, Florida Statutes, provides that a claimant can no longer bring a civil action against a participating physician unless an administrative law judge from the Division of Administrative Hearings determines that the birth-related injury does not fall within the no-fault compensation plan.¹²⁸²

Determination of the claims and the nature of the findings that may result are set forth in section 766.309, Florida Statutes. Subsections (1)(a), (b), and (c) provide the findings that shall be made as to: (a) whether the injury is birth-related neurological injury; (b) the obstetrical service is delivered by a participating physician in the course of labor; and (c) how much compensation, if any, is awardable.¹²⁸³

For a determination that the infant has been found to have sustained a birth-related neurological injury, such an award to the parents or legal guardian shall not exceed \$100,000; funeral expenses shall not exceed \$1,500; and attorney fees shall be assessed per the criteria set forth in section 766.309(1)(c), Florida Statutes. Section 766.31(1)(b), Florida Statutes, set forth the maximum awards.¹²⁸⁴

No claim may be filed more than five years after the birth of the injured infant, under section 766.313, Florida Statutes.

Terminally, section 766.316, Florida Statutes, requires that each hospital with a participating physician and all participating physicians must provide notice on the forms, furnished by the Association, to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries.¹²⁸⁵

The Florida Legislature, in creating an assessment formula, has set forth requirements that initial assessments into the program and yearly

¹²⁸¹ Barden v. Haddox, 695 So. 2d 1271 (5th DCA 1997) (right to receive compensation under NICA, exclusive relief available to victims, is a substitute for common law rights which are otherwise available and as a result forecloses civil lawsuit against a doctor in the plan).

¹²⁸² Since O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, 757 So. 2d 624 (Fla. 5th DCA 2000), following the Florida Legislature amendment of section 766.304, Florida Statutes, correcting any confusion resulting from the decision in Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So. 2d 974 (Fla. 1996), as to where jurisdiction reposed.

¹²⁸³ Section 766.309(1)(a-c), Florida Statutes.

¹²⁸⁴ Section 766.31(1)(b), Florida Statutes.

¹²⁸⁵ Galen of Florida V. Braniff, 696 So. 2d 308 (Fla. 1997).

assessments to remain in the program be made. Section 766.314, Florida Statutes, sets out monetary obligations for such assessments and provides for additional assessments when, under subsection (7)(b), the Department of Insurance finds that the plan cannot be maintained on an "actuarially sound basis".¹²⁸⁶

Information Presented to the Task Force

Complaints about insurance costs are not new, however, increases since 1999 have shown that the availability of a million or more dollar of coverage has escalated premium costs so high that the dollar insurance amounts are beyond the reach of many physicians.¹²⁸⁷ The Professional Medical Insurance Services, Inc., underwriters for Florida physicians, estimates that, in 2003, for OB/GYNs who presently have coverage, costs for \$1 million dollar of coverage will average between \$70,000 and \$110,000 per year; \$250,000 of coverage will cost between \$50,000 and \$60,000 per year. For OB/GYNs seeking new insurance in 2003, estimates show that \$1 million dollars in coverage will cost \$150,000 per years and \$250,000 in coverage will cost between \$90,000 and \$107,000 per year.¹²⁸⁸ As a result of these escalating costs, physicians are simply either under insuring or becoming uninsured with regard to their practices.¹²⁸⁹ Indeed, some experts suggest that Florida has reached a crisis status and some obstetricians and surgeons will be paying over \$200,000 annually for premiums.¹²⁹⁰

Evidence shows for example that OB/GYN physicians in areas such as Jacksonville are either retiring early, becoming college faculty members to obtaining sovereign immunity, or operating without insurance instead of meeting high premiums for adequate coverage. In Orlando, 20-25 percent of the OB/GYNs will operate without insurance and similar numbers exist in Tampa. In Miami, evidence reflects that 80 percent of the OB/GYNs carry no insurance and those who do are paying over \$207,000 per year for \$1 million dollars worth of coverage. Tallahassee's Neonatology

¹²⁸⁶ Section 766.314 (5)(b), Florida Statutes, authorizes the transfer of no more than \$20 million from the Department of Insurance, Insurance Commissioner's Regulatory Trust Fund if the assessments collected are insufficient to maintain the plan on an actuarially-sound basis. In 1988, The Florida Legislature appropriated \$40 million of the Insurance Commissioner's Regulatory Trust Fund in the Department of Insurance for NICA. Twenty million dollars of this appropriation has been set aside in case of actuarial need and the other twenty million dollars funded NICA's establishment. See House of Representatives, Council for Healthy Communities, Committee on Health Promotion, A Review of the Legislative History and Financial Status of the Florida Birth-Related Neurological Injury Compensation Association (NICA) 5 (Apr. 2001).

¹²⁸⁷ Robert W. Yelverton, M.D., testimony, Oct. 21, 2002, pgs. 55-56.

¹²⁸⁸ Robert W. Yelverton, M.D., PowerPoint presentation, Oct. 21, 2002.

¹²⁸⁹ C. Howard Hunter, testimony, Nov. 22, 2002, pg. 139.

¹²⁹⁰ Eleanor Kinney, J.D., testimony, Nov. 4, 2002; Eleanor Kinney, J.D., written statement, Legal Reforms Addressing Affordability and Availability of Medical Liability Insurance: Past Experience and Future Directions, Nov. 4, 2002.

Group at the local hospital has been unable to find insurance and is considering closing the neonatal intensive care unit.¹²⁹¹

Experts acknowledge that NICA, a second-generation level reform of the insurance liability issue, functions as intended according to empirical evidence. It was, however, never intended to be a cure to insurance rates, but rather, was intended to maintain lower insurance premiums.¹²⁹² Based upon its intended purpose, NICA has been a success, however, adoption of no fault returns has been limited to Florida and Virginia and other countries like Sweden and New Zealand where it has been more fully developed.¹²⁹³ Because the exposure of these no-fault compensation plans is limited to a very few states, any empirical data may be skewed and therefore the total success of a no-fault compensation plan has not been embraced.¹²⁹⁴

Clearly, attempts to reduce or maintain reasonable liability insurance costs may not stop doctor-flight without global reform or adoption of uniform insurance policies from state to state. The insurance liability crisis is not unique to Florida and the causes as well as solutions will likewise not be unique to Florida. Unavailable and unaffordable insurance will result in under-insured or uninsured practitioners and those who are injured will seek deeper pockets, because when liability is without restraints, it becomes unpredictable and can result in excessive payouts.¹²⁹⁵

NICA provides for no-fault compensation that results in most stakeholders gaining some benefit.¹²⁹⁶ Instead of almost half of a settlement award going to attorney's fees, reports reflect that, under NICA, less than 1 percent is distributed to plaintiff's attorneys. As a result, a greater percentage of resources are distributed to the child in need of care.¹²⁹⁷

In the fourteen years NICA has been in place, 161 cases have been accepted and there are presently eighty-seven current open cases. Reports reflect an average of \$3 million dollars per case is set aside based on actuarial data evaluating the lifetime care of the child, the medical fragility of a child, and the premise that as the child ages, care becomes more expensive.¹²⁹⁸

¹²⁹¹ Robert W. Yelverton, M.D., PowerPoint presentation, Oct. 21, 2002.

¹²⁹² Eleanor Kinney, J.D., testimony, Nov. 4, 2002, pg. 180.

¹²⁹³ Robert Berenson, M.D., testimony, Nov. 4, 2002, pg. 219.

¹²⁹⁴ Eleanor Kinney, J.D., testimony, Nov. 4, 2002, pg. 180.

¹²⁹⁵ C. Howard Hunter, PowerPoint presentation, Nov. 22, 2002.

¹²⁹⁶ Kenney Shipley, testimony, Nov. 22, 2002, pgs. 20-21.

¹²⁹⁷ *Id.*

¹²⁹⁸ *Id.* at 21.

Findings and Recommendation

To suggest that the current structure of the NICA program should remain unchanged¹²⁹⁹ is not uniformly embraced by all stakeholders.¹³⁰⁰ Indeed, modifications as to eligibility requirements, including birth weight and changes to proof of "mental and physical impairment" to "mental or physical impairment,"¹³⁰¹ may quiet many of the concerns expressed with regard to the willingness to participate.¹³⁰² The broadening of the definition of eligible claimants¹³⁰³ may provide a reasonable alternative and likewise create a stopgap to the insurance crisis facing physicians providing obstetrical services.

As a potential consequence of any changes made to NICA, financial assessments of hospitals and all physicians may need to be evaluated.¹³⁰⁴ However, at some time in the future, it is reasonable to assume that escalation of costs may level off for obstetricians as well as all physicians because of this no-fault system and the fact that other medical disciplines may be encouraged to urge passage of other no-fault compensation plans.

The Task Force, after hearing extensive input from a variety of experts, believes that the issues relating to the NICA program warrants further consideration and study. Additional hearings and testimony from experts are necessary for this worthy program.

Recommendation 1. The Legislature should maintain the NICA program because of its success and should further consider and study the issues for broadening the NICA program, as discussed in this report.

¹²⁹⁹ William Brewster, testimony, Dec. 3, 2002, pgs. 134-136.

¹³⁰⁰ Theodore Babbitt, J.D., testimony, Dec. 3, 2002, pgs. 120-125.

¹³⁰¹ Only when the infant meets the definitional criteria established by this section, will the exclusive remedies provided for by this limited no-fault compensation plan be available. The Florida Supreme Court in Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 686 So. 2d 1349, 1355 (Fla. 1997), stated that because the NICA plan is a statutory substitute for common law right and liabilities, it should be strictly construed to include only those subjects that clearly embrace in its terms. Additionally, the court further narrowed the application of this statute by affirming the well-settled rules of statutory construction concluding that the word "and" in the phrase "permanently and substantially mental and physically impaired" should be read in the conjunctive. To do so does not lead to either an absurd result nor does it undermine the legislative policy of limiting the class. Therefore, an eligible infant to avail themselves of the no-fault compensation system must be at least 2500 grams weight and permanently and substantially mentally and physically impaired.

¹³⁰² Tommy Dukes, J.D., testimony, Dec. 3, 2002, pgs. 108-113.

¹³⁰³ Mr. Dukes' proposal that modification to the definition of the "birth-related neurological injury" to allow the birth weight to be lowered to some number other than 2500 grams, would increase the number of infants eligible for NICA. *Id.* at 108-110.

¹³⁰⁴ William Brewster, J.D., testimony, Dec. 3, 2002, pgs. 139-143.

Bad Faith

Issue

The Task Force voted at its December 20, 2002 meeting, by a vote of 5-0, to examine the following issues with respect to bad faith claims in the context of medical malpractice cases:

- Should a bad faith cause of action be limited to a right of the insured and not extend to third-party claimants?
- Should criteria or standards be established for insurer conduct that constitutes bad faith and the duty of good faith when dealing with an insured and limited to protect the assets of the insured from judgment?

Current Situation

In Florida, there are two causes of action for bad faith claims by third parties to the insured/insurer relationship (e.g., injured plaintiffs). One of these causes of action arises out of common law and is therefore a creation of judicial case law. The other cause of action arises out of judicial interpretation of statute. At its fundamental core, the bad faith cause of action is intended to promote the following purposes:¹³⁰⁵

- To economically protect the defendant insured from an excess judgment when the insurer has control of the defense and settlement;
- To make available to injured persons specified dollar limits that are available as compensation; and
- To encourage insurers to behave responsibly by making them liable for the financial damage that is caused by their breach of good faith duties.

By judicial interpretation of both the common law bad faith cause of action and the statutory law bad faith cause of action, "any person aggrieved" may sue an insurer for the insurer's alleged improper conduct in medical malpractice cases. Accordingly, in Florida, an insurer can be held liable to pay an entire judgment against its insured even when the

¹³⁰⁵ See Vincent Rio, J.D., testimony, Nov. 22, 2002, pgs., 116-117.

judgment exceeds the limits of the insurance for which the insured has contracted.

In Thompson v. Commercial Union Ins. Co. of New York, the Supreme Court of Florida declared: "It is established in Florida that an insured has the right to sue and recover damages against his own insurer for an excess judgment on the basis of fraud or bad faith in the conduct of the insured's defense by the insurer."¹³⁰⁶ The Thompson court also extended the third-party beneficiary doctrine to allow injured plaintiffs to directly sue a defendant's insurer "for recovery of the judgment in excess of the policy limits, based upon the alleged fraud or bad faith of the insurer in the conduct or handling of the suit."¹³⁰⁷ This extension had the effect of enlarging the limits of liability of the insurer beyond those in the stated insurance policy at issue.¹³⁰⁸ Since Thompson, the law in Florida has placed very few limits on that liability.

In 1980, the Supreme Court of Florida decided the case of Boston Old Colony Ins. Co. v. Gutierrez.¹³⁰⁹ That case explains many of the principles on which the cause of action by a third party against an insurer for bad faith exists and outlines the Court's understanding of the problems raised thereby. In Boston Old Colony, the plaintiff and defendant were involved in a head-on collision. Both men claimed that the accident was the other's fault. Brown, the defendant in the original case, had a liability policy that covered him up to a limit of \$10,000 in damages. However, because of Brown's recollection of the accident and some corroborating evidence, Boston Old Colony hired an accident reconstruction expert to further investigate the cause of the accident. That expert determined that Gutierrez, the plaintiff in the original suit, was on the wrong side of the road at the time of accident impact. Despite this evidence, Boston Old Colony's adjuster knew that there was still a question of Brown's liability and that Gutierrez's injuries were extensive. Therefore, there was a possibility of an excess judgment in the case. The adjuster warned Brown of these matters and suggested that an offer to settle the case be made. Brown refused. He had counterclaimed against Gutierrez for his own injuries and did not want to make the admission of fault that is implied in an offer to settle. Boston Old Colony then had Brown execute a "hold harmless" agreement, in which Brown assumed responsibility for any excess judgment.¹³¹⁰

¹³⁰⁶ Thompson v. Commercial Union Ins. Co. of New York, 250 So. 2d 259, 260 (Fla. 1971); see also Auto Mutual Indemnity Co. v. Shaw, 184 So. 2d 713 (Fla. 1969).

¹³⁰⁷ Id. at 264.

¹³⁰⁸ Id. at 260 (quoting Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969)).

¹³⁰⁹ Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980).

¹³¹⁰ Id. at 784.

Before the trial, Gutierrez offered to take the policy limits of \$10,000 in settlement of his claim against Brown. Boston Old Colony responded by denying liability. Then, Brown settled his counterclaim against Gutierrez and his insurer. Boston Old Colony offered Gutierrez the policy limits as settlement of the claim. Gutierrez refused. The trial resulted in a judgment against Brown for \$1,400,000. Gutierrez then sued Boston Old Colony, alleging bad faith on its part because of its failure to settle the claim for policy limits when it had the opportunity. Gutierrez prevailed and obtained a judgment against Boston Old Colony for \$1,400,000.¹³¹¹

The question before the Supreme Court was whether the common law in Florida¹³¹² authorized "a bad faith action against an insurance company when that company [had] refused to settle a claim at the express direction of its own insured who obtains a settlement of his claim and the insurance company thereafter offers to settle for its policy limits before trial?"¹³¹³ The court answered "no."

In analyzing this issue, the court noted that "[a]n insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business."¹³¹⁴ The insurer assumes a duty to exercise "such control and made such decisions in good faith and with due regard for the interests of the insured" when the insured surrenders all control over the handling of the claim, including all decisions in the litigation and settlement to the insurer.¹³¹⁵

This good faith duty obligates the insurer to advise the insured of settlement opportunities, of the probable outcome of the litigation, of the possibility of an excess judgment, and of any steps the insured might take to avoid such a judgment. The insurer "must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so."¹³¹⁶

Justice Alderman wrote specially to voice his opinion on the issues of the bad faith cause of action in the Boston Old Colony case. He opined that an injured plaintiff should not be allowed to sue the defendant's insurer for bad faith failure to settle a claim. According to Justice Alderman, the good faith duty to settle is between the insurer and insured. "In the 'Alice-in-Wonderland' world created by the [common law] rule, it is to the

¹³¹¹ Id. at 784-785.

¹³¹² See Thompson v. Commercial Union Ins. Co. of New York, 250 So. 2d 259 (Fla. 1971).

¹³¹³ Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 784 (Fla. 1980).

¹³¹⁴ Id. at 785.

¹³¹⁵ Id.

¹³¹⁶ Id.

injured party's benefit if the insurer breaches its duty to its insured and to his detriment if there is no breach."¹³¹⁷ This result exists because "if the insurer settles, the plaintiff will receive no more than the policy limits, but if it does not, the plaintiff may end up with both the policy limits and an excess judgment."¹³¹⁸ Accordingly, the common law rule induces a plaintiff not to settle.¹³¹⁹

While in Boston Old Colony, the Supreme Court found that the third party (Gutierrez) had failed to prove bad faith on the part of the insurer (Boston Old Colony), the Court continued to extend the common law cause of action itself to persons beyond the insured/insurer contract relationship. Furthermore, the same result has been reached by the courts with respect to the statutory cause of action for bad faith by an insurer.¹³²⁰

Section 624.155, Florida Statutes, describes who may bring a civil action for bad faith and outlines the Insurance Code violations that subject the insurer to such suits. This section states that "[a]ny person may bring a civil action against an insurer when such person is damaged [by the enumerated provisions of the Insurance Code]."¹³²¹ In 1995, the Supreme Court had the opportunity to interpret the phrase, "any person" in the context of a third-party bad faith claim against an insurer.¹³²² The court concluded that these words were "precise and their meaning unequivocal. By choosing this wording the legislature has evidenced its desire that all persons be allowed to bring civil suit when they have been damaged by [statutorily] enumerated acts of the insurer."¹³²³

Even though the Supreme Court interpreted "any person" to include those people beyond the insured/insurer contractual relationship, the court recognized the premonition of other courts that such an interpretation of this phrase would achieve an unreasonable result. Permitting a third party such a cause of action against the insurer any time the insurer allegedly

¹³¹⁷ Id. at 786 (Alderman, J., concurring specially).

¹³¹⁸ Id.

¹³¹⁹ Id.; see also Judge Carroll, in Canal Insurance Company of Greenville, South Carolina v. Sturgis, 114 So. 2d 469 (Fla. 1st DCA 1959), aff'd, 122 So. 2d 313 (Fla. 1960):

No one can today question the legal right of the insured to sue the insurer for negligence or bad faith in failing to settle a claim within the policy limits for, if he has had to pay a part of the judgment, he had indeed suffered damages because of such failure of the insurer; but, when the judgment creditor directly so sues the insurer for an amount above such limits, a vastly different situation exists in the eyes of the law. The judgment creditor has not suffered because of the insurer's failure, but has, if anything, gained thereby. The judgment creditor would be in an anomalous position, for typically he would be claiming damages for the insurer's failure to settle the case for much less than the verdict he himself actually won.

¹³²⁰ See, e.g., Auto-Owners Ins. Co. v. Conquest, 658 So. 2d 928 (Fla. 1995), State Farm Fire & Casualty Co. v. Zebrowski, 706 So. 2d 275 (Fla. 1997).

¹³²¹ Section 624.155(1)(a)(1), Florida Statutes.

¹³²² See Auto-Owners Ins. Co. v. Conquest, 658 So. 2d 928 (Fla. 1995).

¹³²³ Id. at 929.

failed to settle in good faith could result in undesirable social and economic effects (such as multiple litigation, unwarranted bad faith claims, coercive settlements, excessive jury awards, and escalating insurance, legal, and other transaction costs).¹³²⁴

In addition to a cause of action under section 624.155(1)(a), Florida Statutes, as interpreted in Auto-Owners Ins. Co. v. Conquest,¹³²⁵ a bad faith cause of action also exists under section 624.155(1)(b), Florida Statutes. This provision states, in pertinent part, as follows:

(1) Any person may bring a civil action against an insurer when such person is damaged:

(b) By the commission of any of the following acts by the insurer:

- 1) Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests;
- 2) Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or
- 3) Except as to liability coverages, failing to promptly settle claims, when the obligation to settle a claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

In 1997, the Supreme Court interpreted this additional cause of action in section 624.155(1)(b), Florida Statutes, and reasoned as follows:

In subsection (1)(a) there are no specified limitations upon claims for violation of any of the enumerated statutes. However, in subsection (b), the cause of action is predicated on the failure of the insurer to act "fairly and honestly toward its insured and with due regard for his interest." The duty runs only to the insured. Therefore, in the absence of any excess judgment, a third-party plaintiff cannot demonstrate that the insurer breached a duty toward its insured.¹³²⁶

¹³²⁴ Id. at 930 (quoting Cardenas v. Miami-Dade Yellow Cab Co., 538 So. 2d 491, 496 (Fla. 3d DCA 1989)).

¹³²⁵ Auto-Owners Ins. Co. v. Conquest, 658 So. 2d 928 (Fla. 1995).

¹³²⁶ State Farm Fire & Casualty Co. v. Zbrowski, 706 So. 2d 275, 277 (Fla. 1997).

Accordingly, section 624,155(1)(b), Florida Statutes, allows a third party to sue a liability insurer for bad faith, without an assignment by the insured when the third party obtains a judgment in excess of the insured's policy limits. This result provides the basis for alleging a breach of duty to the insured.

While the Boston Old Colony case discussed above was decided in favor of the defendant insurer, the case demonstrates various issues facing insurers in fulfilling their obligations to defend their insureds.

First, insurers must remember that, despite their best efforts on behalf of their insured, they are still subject to a bad faith claim brought by the injured third party. Because the claim is brought after the jury returns a verdict in excess of policy limits against the insured, and given the inherent sympathy afforded to the injured plaintiff in a medical malpractice suit, the insurer faces a rather daunting obstacle in defending a bad faith action. Such a defense can require the insurer to maintain that, despite the plaintiff's serious injuries, and with the hindsight knowledge that the underlying suit resulted in a large jury award that exceeded the insured's policy limits, the insurer not only acted reasonably in not settling the underlying medical malpractice suit, but continues to act appropriately in refusing to pay the jury's award.

Second, the insurer has a duty to try to settle the case where a reasonably prudent person facing the prospect of paying the total judgment would do so. This is the simple negligence standard and makes the insurer's position more untenable. At least two standard jury instructions used by Florida judges¹³²⁷ charge the jury with the task of determining whether, under the totality of the circumstances, the insurer was reasonable in deciding to proceed to trial, rather than settle the claim. This standard, combined with the statutory "reasonable person" standard, seems to guarantee the success of a bad faith claim¹³²⁸ submitted to a jury, given its hindsight regarding the outcome of the already-decided underlying case.

The third issue from Boston Old Colony comes from language at the close of the Supreme Court's opinion there:

By way of caveat, we point out that the "hold harmless" agreement in this case was not a determining factor in our

¹³²⁷ See Fla. Std. Jury Instr. MI 3.1, 3.2.

¹³²⁸ Originally in Florida, bad faith cases fell within the same category of wrongs as frauds. See, e.g., Thompson v. Commercial Union Ins. Co. of New York, 250 So. 2d 259, 264 (Fla. 1971) (holding that a third-party plaintiff could directly sue an insurer for "alleged fraud or bad faith of the insurer in the conduct or handling of the suit"). By way of contrast, reasonable person standards are those that govern innocent (without malice) mistakes (i.e., basic negligence).