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Wrongful Death Medical Malpractice Lawsuits: Standing, Damages, Doctor vs. Hospital Liability

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Wrongful Death and Medical Malpractice

I. Florida Statutes: Florida Statute 768.19 provides a right of action for Wrongful Death.

a. Parties: Florida Statute 768.20 outlines the parties who may bring a Wrongful Death claim. Specifically, the statute requires that a wrongful death action must be brought by the decedent's personal representative. However, many times, especially in medical malpractice actions, the injured party is living at the outset of the case but passes during the pendency of the action. In these instances, the case must be momentarily suspended until the appropriate personal representative is added as the proper Plaintiff. Florida Statute 46.021 provides for a survival statute stating, "No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted, or defended in the name of the person prescribed by law." So while the cause of action does not die with the Plaintiff, the nature of the action does. FL Statute 768.20 provides, "When a personal injury to the decedent results in death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate." The Florida Supreme Court in *Capone v. Philip Morris USA, Inc*., 116 So.3d 363 (Fla. 2013) offered an interpretation of the word "abate" stating, "[Abate] must be interpreted to cause the case to be suspended until the personal representative of the decedent's estate is added as a party to the pending action and receives a reasonable opportunity to amend the complaint to state the damages sought under a wrongful death claim…." Florida Rule of Civil Procedure 1.260(a)(1) provides

the proper procedure for substituting parties. First, following the death of a Plaintiff, a suggestion of death should be filed proceeded by a motion for substitution of parties. The motion to substitute should be made within 90 days of the filing of the suggestion of death.

b. Medical Malpractice Presuit: If the action is founded upon medical negligence, Florida requires that the parties first conduct a presuit investigation prior to filing the complaint.

    i. 90 Day Investigation: FL Statute 766.106(3)(a) provides, "No suit may be filed for a period of 90 days after notice is mailed to any prospective defendant. During the 90-day period, the prospective defendant or the defendant's insurer or self-insurer shall conduct a review as provided in s. 766.203(3) to determine the liability of the defendant. Each insurer or self-insurer shall have a procedure for the prompt investigation, review, and evaluation of claims during the 90-day period."

    ii. Presuit Discovery: During the presuit period, the parties must engage in informal discovery. This discovery may include an unsworn statement, production of documents, and physical examinations. Importantly, there is a privilege for the information provided during this presuit discovery. FL Statute 766.203(5) states, "A statement, discussion, written document, report, or other work product generated by the presuit screening process is not discoverable or admissible in any civil action for any purpose by the opposing party. All participants, including, but not limited to, physicians, investigators, witnesses, and employees or associates of the defendant, are

immune from civil liability arising from participation in the presuit screening process."

iii. Expert Opinion: At the outset of the presuit process, the claimant is required to provide a Notice of Intent to initiate medical negligence litigation. This NOI must include a verified medical expert opinion stating there are reasonable grounds for medical negligence. The prospective defendant must include a verified expert opinion that there is a lack of reasonable grounds for a negligent injury when, and if, the claimant denies the NOI.

II. Liable Parties: Identifying Liable Parties: When dealing with a wrongful death or medical malpractice claim, more than one party may be liable for the injury. It therefore becomes critical to properly identify all liable parties, so they may be joined to the action.

a. Medical Records: The best avenue for determining liability is a careful review of the medical records. This will show what happened to the patient, when the injury occurred, how the injury occurred, and individuals involved in the care of the patient.

i. Florida: As discussed above, Florida requires a presuit investigation where the prospective Plaintiff must provide a Notice of Intent to initiate litigation prior to bringing the actual Complaint. Florida Statute 766.106 requires that the NOI include a list of all known medical providers for the injured party for the past 2 years; all medical records relied upon by the claimant's expert in signing it's probable cause affidavit; as well as an

executed HIPAA authorization form. This means that the Plaintiff attorney must fully review the records prior to initiating a complaint, and this also allows the Defendant an ability to identify other potential liable parties.

b. Vicarious Liability: The Plaintiff should determine whether the Defendant doctor was employed by a corporation, hospital, or even a medical group that places physicians in hospitals. Due to employment or apparent agency, a hospital or business may also be liable.

c. Discovery: Both parties should utilize the discovery process at the outset of the action to determine additional liable parties. The Plaintiff should request a complete medical chart to identify additional specialists used by the Defendant or whether any other individual's assisted in the care and treatment of the Plaintiff. The Defendant should likewise request the complete medical records. Additionally, the Defendant should use Interrogatories or depositions to ask the Plaintiff, or Plaintiff's family, exactly how the alleged injury occurred. This may result in identifying parties who are comparably at fault

III. Discovery: Discovery: Parties may use the typical discovery tools of Requests for Production, Interrogatories, and Requests for Admissions as means of obtaining information in a case. However, many times, attorneys must use additional avenues for obtaining records. As such, one must be aware of HIPAA requirements as well as the interstate discovery laws for each state.

a. How to Obtain Medical Records: Clearly, medical records are crucial to obtaining information relative to the cause of death and liability. However, the attorney should exercise caution in obtaining the medical records so as to not violate The

Health Insurance Portability and Accountability Act (HIPAA) or the privacy rights of the injured individual.

i. HIPAA Authorization Form: Perhaps the easiest route to obtaining medical records is to obtain a signed HIPAA authorization form from the patient. This signed form will provide the attorney authorization to acquire the records directly from the hospital or healthcare provider and alleviates the need to utilize a subpoena or follow individual state's interstate discovery laws.

ii. Subpoena Within State: When obtaining records within the same state as the action, one may serve a subpoena upon the healthcare provider. Pursuant to Florida Rule of Civil Procedure 1.351, one must first file a Notice of Production from Non-Party and provide the other parties 15 days to object to the production of records.

iii. Out of State Subpoena: When obtaining records from out of state providers, one must follow interstate discovery laws for that state. As discovery will often lead a party to neighboring states, parties must frequently conduct discovery in a state foreign to where the action is pending. To ease the burdens on parties, uniform interstate deposition laws were created and then adopted by individual states. Therefore, attorneys must look to the actual state in which they wish to conduct discovery and understand that state's specific laws for conducting out of state discovery. This may vary from state to state.

1. The Uniform Foreign Deposition Act (UFDA): Promulgated in 1920, the UFDA provides that a witness in a discovery state may be compelled to testify in a deposition if a writ or commission is issued from a court in the foreign state. Florida has enacted a version of the UFDA in Florida Statute 92.251. Importantly, this statute does not force other state residents to comply with subpoenas pursuant to Florida Statute. Instead, if an out of state party wishes to depose a Florida resident, that party may do so by having that outside state issue a writ or commission for conducting discovery within Florida.
2. The Uniform Interstate Deposition and Discovery Act (UIDDA): In 2007, the UIDDA was drafted by the National Conference of Commissioners on Uniform Law States and recommended for enactment by individual states. Many states have adopted versions of the UIDDA. The UIDDA attempts to create easier avenues for interstate discovery than commissioners or letters of rogatory previously used. Instead, states using the UIDDA typically require attorneys to draft subpoenas for their home states and then provide that subpoena to the District Court Clerk in the district where the deposition or discovery is sought. That foreign clerk will then issue its own subpoena that the attorney may subsequently serve to the prospective deponent or entity. Ohio adopted the UIDDA on June 14, 2016 with Ohio Code 2319.09.

b. Business Record Exception: Initially, medical records are considered inadmissible hearsay evidence. Medical records are out of court statements offered to prove the matter of the truth asserted. As such, unless one can utilize a hearsay exception, medical records are inadmissible. Typically, counsel for both sides will agree and stipulate to the medical record's admission into evidence as both sides frequently intend to utilize the same records. However, should counsel not agree to stipulate to admissibility, a common hearsay exception is the Business Record Exception. Each state will have their own Business Record Exception to hearsay. In Florida, this exception is found at FL Statute 90.803(a).

    i. Standard Business Record Exception: Typically, to properly use the Business Record Exception, one must demonstrate, through testimony, 4 things:

        1. The medical record was made at, or near, the time of the event.
        2. The medical record was made by or from information transmitted by a person with knowledge.
        3. The medical record was kept in the ordinary course of a regularly conducted business activity.
        4. It was a regular practice of that business to make such a record.

    ii. Business Record Exception When Business Sold: Usually, meeting the Business Record Certification is straight forward. However, when a business or hospital is sold, this creates an issue for how a record custodian can testify as to how previous records were created and maintained prior to the current business' purchase of those records. Courts

have utilized caselaw stemming from the mortgage crisis to assist in creating addition requirements for meeting the Business Record Exception.

1. *The Bank of New York v. Calloway*, 157 So.3d 1064 (4th DCA 2015):
    a. Facts: The Bank of New York filed a complaint seeking to foreclose on a mortgage executed by the Borrower. Bank of New York called a litigation foreclosure specialist to testify for the Bank's servicer, Resurgent Capital Services. The foreclosure specialist testified that Resurgent became the fourth servicer. The prior servicer, Bank of America, transferred the original loan documents along with business records chronicling the loan payment history. Bank of New York, via the foreclosure specialist, sought to introduce into evidence the Borrower's payment history. As the foreclosure specialist never worked for Bank of America, the issue became whether she had the knowledge necessary to testify as to Bank of America's record keeping process.
    b. Rule 1: Where a business takes custody of another business' records and integrates them within its own records, the acquired records are treated as having been made by the successor business, such that both records constitute the successor business' singular business record.

c. Rule 2: Since records crafted by a separate business lack the hallmarks of reliability inherent in a business' self-generated records, proponents must demonstrate not only that the other requirements of the Business Record Exception are met, but also that the successor business relies upon those records and the circumstances indicate the records are trustworthy.

c. Business Record Certification: Instead of deposing a record custodian or having that custodian testify at trial, one may wish to utilize a business record certification. In Florida, the requirements are found in Florida Statute 90.902(11), which requires that a custodian, or qualified person may certify that a record

i. Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;

ii. Was kept in the course of the regularly conducted activity; and

iii. Was made as a regular practice in the course of the regularly conducted activity, provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed

IV. Standard of Care:

a. Basic Standard of Care in Medical Negligence: Florida Statute 766.102(1) provides that the standard of care for a healthcare provider is "that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is

recognized as acceptable and appropriate by reasonably prudent similar health care providers."

b. Standard of Care in Emergency Settings: Florida's Good Samaritan Act, found at Florida Statute 768.13(2)(b)(1) provides that healthcare providers providing emergency services "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." The Good Samaritan Statute then defines "reckless disregard" as those instances when the emergency medical provider "knew or should have known, at the time such services were rendered, created an unreasonable risk of injury so as to affect the life or health of another, and such risk was substantially greater than that which is necessary to make the conduct negligent." While commonly thought of as immunity, the statute "merely imposes a heightened standard of proof on the plaintiff in cases where the statutory prerequisites are met." *University of Florida Board of Trustees v. Stone,* 92 So.2d 264 (Fla. 1st DCA 2012). The Florida Supreme Court explained, "Based upon the definition of reckless disregard in F.S. 768.13(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." In re: *Standard Jury Inst. Civ. Cases* 09-01, 35 So3d 666(Fla. 2010).

c. Establishing Standard of Care: The standard of care in a medical negligence or wrongful death claim will be established through the testimony of an expert.
    i. Expert Qualifications: Florida Statute 766.102 (5) states that "a person may not give expert testimony concerning the prevailing professional standard of care unless the person is a health care provider who holds an active and valid license and conducts a complete review of the pertinent medical records and meets the following criteria"
        1. If the health care provider against whom or on whose behalf the testimony is offered is a specialist, the expert witness must
            a. Specialize in the same specialty as the health care provider against whom or on whose behalf the testimony is offered; and
            b. Have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to
                i. The active clinical practice of, or consulting with respect to, the same specialty;
                ii. Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same specialty; or
                iii. A clinical research program that is affiliated with an accredited health professional school or accredited

residency or clinical research program in the same specialty

2. If the health care provider against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness must have devoted professional time during the 5 years immediately preceding the date of the occurrence that is the basis for the action to:
    a. The active clinical practice or consultation as a general practitioner;
    b. The instruction of students in an accredited health professional school or accredited residency program in the general practice of medicine; or
    c. A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the general practice of medicine.
3. If the health care provider against whom or on whose behalf the testimony is offered is a health care provider other than a specialist or a general practitioner, the expert witness must have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to
    a. The active clinical practice of, or consulting with respect to, the same or similar health profession as the health care

provider against whom or on whose behalf the testimony is offered;

b. The instruction of students in an accredited health professional school or accredited residency program in the same or similar health profession in which the health care provider against whom or on whose behalf the testimony is offered; or

c. A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered.

ii. Additionally, pursuant to Florida Statute 766.102(12), if the expert is not licensed to practice in Florida, that expert must obtain a valid expert witness certification.