

THE WEEK IN TORTS

A Weekly Summary Of The Latest Case Decisions Critical To Those Helping Victims of Negligence



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Clark Fountain welcomes referrals of personal injury, products liability, medical malpractice and other cases that require extensive time and resources. We handle cases throughout the state and across the country. Since 1997, Florida Bar Board Certified Appellate Attorney, [Julie H. Littky-Rubin](#) has prepared and disseminated The Week In Torts to fellow practitioners. Ms. Littky-Rubin handles trial support and appeals for attorneys throughout the state.



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NOT IMPROPER TO ALLOW THE CO-TREATING OR CONSULTING TREATING PHYSICIAN TO ANSWER HYPOTHETICAL QUESTIONS ABOUT HOW HE WOULD HAVE TREATED THE PATIENT UNDER DIFFERENT CIRCUMSTANCES--BECAUSE PHYSICIAN WAS ACTUALLY INVOLVED IN THE CASE, THE HYPOTHETICALS WERE ACCEPTABLE (AS DISTINGUISHED FROM A SUBSEQUENT TREATING PHYSICIAN ANSWERING HYPOTHETICALLY).

Cantore v. West Boca Medical Center, 40 Fla. Law Weekly D2182 (Fla. 4th DCA September 24, 2015):

In this very tragic case where a twelve-year old suffered a brain herniation before being airlifted to Miami Children's Hospital and is now barely functioning, the jury reached a defense verdict. The main issue in the case was whether the trial court abused its discretion in allowing the on-call pediatric neurosurgeon at Miami Children's Hospital (where the child was airlifted) to testify to hypothetical deposition questions. The trial judge had allowed the testimony based on two decisions (*Ewing v. Sellinger* and *Saunders v. Dickens*). However, both cases were later overruled.

In *Saunders II*, the Florida Supreme Court held that a physician could not insulate himself or herself from liability for negligence by presenting a subsequent treating physician to testify that adequate care by the defendant physician would not have altered the subsequent care. The court found such testimony to be irrelevant and inadmissible,

because the central concern in a medical malpractice case is judged by the reasonably prudent physician's standard at the time the decision is made. In both the overruled versions of *Saunders* and *Ewing*, the subsequent treating physician's care had begun after the negligent care at issue had occurred.

In this case, the Fourth District found that the pediatric neurologist was a "co-treating physician," and thus his role exceeded that of a subsequent treating physician.

Because he played such an influential role in the care at issue, his answers to the hypotheticals posed had bearing on both the original defendant and his own actions as well. Accordingly, when the doctor testified about hypotheticals involving the child's arrival at Miami Children's from West Boca, the doctor was not a subsequent treating physician testifying that adequate care by the defendant would not have altered the subsequent care. Instead, he was explaining his own medical decision making process, and how different decisions made by him would have impacted the child's neurological status and condition, and how it affected his decision to perform the procedures he did.

In order for the jury to determine how a reasonably prudent physician would have acted in this case, it was necessary to hear from the neurosurgeon regarding how he performs procedures on a regular basis. The doctor was asked deposition questions based on record evidence, and his opinions regarding the timing of intervention related directly to his field of expertise. The court found those questions were appropriately admitted. The doctor was also qualified to answer questions which assumed certain facts that had not occurred as experts are allowed to do.

The jury actually heard testimony from the doctor that he himself would have made different recommendations had he been told the child was neurologically deteriorating as the plaintiffs had suggested. The doctor testified as to what he understood the relevant evidence of the child's medical condition to be, not that the care by the pediatrician at West Boca would or would not have altered his treatment after the transfer to Miami Children's. Thus, the testimony was not the type proscribed by *Saunders II*.

The court found that the plaintiffs were able to express their theory of liability to the jury. It then affirmed the final judgment for the defendants, notwithstanding how "sad and heart-wrenching" the case was.

MUST MAKE A SEPARATE MOTION FOR ATTORNEY'S FEES IN THE APPELLATE COURT--A LINE IN A PLEADING IS NOT ENOUGH.

Garcia v. Collazo, 40 Fla. Law Weekly D2189 (Fla. 3rd DCA September 24, 2015)

Kind Regards

A handwritten signature in blue ink, appearing to read "Julie N. O'Quinn-Rubin". The signature is fluid and cursive, with the first name "Julie" being the most prominent.

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