TO: Florida Bar Health Law Section

FROM: Jeanne E. Helton and Mark S. Mitchell[1]

DATE: August 18, 2003

SUBJECT: Summary of Health Law Cases

The following is a summary of significant Florida cases decided since January 1, 2003. The summaries are not intended to be comprehensive; rather they are intended to provide enough information to the reader to permit the reader to determine whether the case has application to his or her practice and, if so, requires a detailed review.

- **Murray v. Haley, M.D., 833 So.2d 877 (Jan. 8, 2003)**

  Patients brought medical malpractice action against surgeon and surgeon's association. Following a jury trial, the trial court entered judgment for the surgeon and surgeon's association. The First District Court of Appeal reversed and remanded the case concluding that the patients satisfied their evidentiary burden in objecting to gender-based peremptory challenge. The trial court's failure to require surgeons to articulate a gender-neutral reason for their peremptory challenges of three female prospective jurors (following the objection of the plaintiff) constituted reversible error.

- **Benson v. Norwegian Cruise Line Limited, 834 So.2d 915 (Jan. 15, 2003)**

  Parents of deceased cruise ship passenger brought wrongful death action against ship and ship's doctor, alleging medical malpractice that occurred 11.7 nautical miles east of the Florida shore. The Circuit Court granted dismissal as to the doctor concluding that the physician was not a Florida resident and that the ship was outside the territorial boundaries of the State of Florida when the alleged malpractice incident occurred. The parents appealed. The Third District Court of Appeal reversed and remanded holding that the alleged act of medical malpractice occurred within Florida's territorial boundaries (based on the definition in the Florida Constitution), and thus the trial court had personal jurisdiction over the physician.

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[1] Mark S. Mitchell was a summer associate at Smith Hulsey & Busey in 2003 and was of significant assistance in researching case law and drafting this memorandum.

- **Derius v. Allstate Indemnity Company (837 So.2d 406) January 16, 2003**

  Insured sought review of affirmation by the District Court of Appeal of summary judgment granted in favor of personal injury protection insurer. The Supreme Court held that (i) the PIP insurer was not required to first obtain a report from another physician to contest reasonableness of treating physician's bill and (ii) the insured was not entitled to attorneys' fees on appeal.

- **Thompson v. Department of Children and Families (835 So.2d 357) January 24, 2003**

  Nursing home resident filed application for Medicaid benefits to cover room and board. The Department of Children and Families denied application and the resident appealed. The Fifth District Court of Appeal held that an $18,250 transfer to resident's sister for the purchase of a life estate in sister's condominium constituted a sham to gain eligibility for benefits.

- **Liberatore v. Kaufman, M.D., 835 So.2d 404 (Feb. 5, 2003)**

  Patient brought medical malpractice action against physician, hospital, and others relating to complications following birth. The jury returned a verdict for the defendants and the plaintiff appealed. The Fourth District Court of Appeal reversed and remanded holding that the defendants could not use literature to bolster expert witness testimony on direct examination (see, Fla. Stat. 90.706), and that physician could not testify that he was recognized as a "top doctor" in a survey.

- **Florida Convalescent Centers v. Somberg, 840 So.2d 998 (Feb. 6, 2003)**

  Personal representative of estate of nursing home patient brought an action against nursing home for wrongful death and violation of Nursing Home Act. The Florida Supreme Court held that the Wrongful Death Act does not limit the damages (for patient's pre-death pain and suffering) recoverable under Nursing Home Act.

- **Schuster v. Blue Cross and Blue Shield of Florida, Inc. (843 So.2d 909) February 19, 2003**

  Insured brought action against medical insurer for unpaid claims. The Circuit Court entered judgment in favor of insurer and the insurer appealed. The Fourth District Court of Appeal held that (i) the insurer did not waive affirmative defense of insureds' lack of standing and (ii) insureds were not entitled to interest on unpaid medical insurance claims.

- **Florida Physicians Union, Inc. v. United Healthcare of Florida, Inc., 837 So.2d 1133 (Feb. 21, 2003)**

  Organization representing medical care providers filed lawsuit against health maintenance organization (HMO), seeking a declaration that various payment methods engaged in by HMO violated the Health Maintenance Organization Act. The Fifth District Court of Appeal held that chapter of HMO Act prohibiting unfair methods of competition and unfair or deceptive acts or practices, including systematic down coding of medical providers' claims with intent to deny reimbursement, did not create private right of action for providers of medical services against HMO.

- **Spuza, M.D. v. Department of Health, 838 So.2d 676 (March 5, 2003)**

  Physician appealed from an order of the Department of Health revoking his license to practice medicine after informal proceeding. The District Court of Appeal held that physician's conviction for conspiracy to defraud the United States, and receiving kickbacks in return for Medicare referrals was not, in itself, sufficient to prove that physician was convicted of crime "which directly relates to the practice of medicine, or to the ability to practice medicine," and thus physician was entitled to a formal administrative hearing before his license to practice medicine could be revoked.

- **Foley v. State of Florida Department of Health 839 So.2d 828 (March 5, 2003)**

  The DOH filed an administrative complaint against appellant to revoke his paramedic's certificate. The DOH filed a motion for default due to the failure of the paramedic to file a timely election of remedies. The paramedic filed an untimely election of remedies. The paramedic was told that the DOH would withdraw the motion for default. Instead, the DOH entered a final order revoking the paramedic's certificate without a hearing. The Fourth District Court of Appeal reversed holding that the DOH was equitably estopped from entering an order revoking the paramedic's certificate without a hearing.

- **Jost v. Lakeland Regional Medical Center, Inc., 844 So.2d 656 (March 12, 2003)**

  Patient's guardian brought medical malpractice action against hospital and doctor. The Circuit Court entered judgment on a jury verdict for defendant. The District Court of Appeal reversed and remanded. On remand, the Circuit Court granted hospital and its insurer's motions to dismiss and appeal was taken. The Second District Court of Appeal held that trial court was entitled to dismiss with prejudice the portion of the complaint alleging concealment of evidence and spoliation of evidence by hospital and claims for destruction of evidence against hospital's insurer were premature (because the underlying

action had not been resolved). The court dismissed the lawsuit based upon a premature destruction of evidence claim and insufficient concealment and spoliation of evidence claims.

- **Kubski, M.D. v. State of Florida, Department of Health, 840 So.2d 376 (March 18, 2003)**

  Department of Health issued emergency order suspending psychiatrist's license pending resolution of disciplinary proceedings, and psychiatrist appealed. The First District Court of Appeal held that the order suspending the physician's license to practice exceeded the scope necessary to protect the public; and furthermore, required remand for the Department of Health to narrowly tailor the order to preclude the psychiatrist from prescribing narcotics until the disciplinary proceedings were completed.

- **Walker, Jr. v. Virginia Insurance Reciprocal, 842 So.2d 804 (March 20, 2003)**

  Hospital's liability insurer brought action against physician and his professional association to recover contribution. The Florida Supreme Court held that a contribution action based on a claim of medical malpractice was subject to medical malpractice statutory presuit screening requirements when liability of alleged joint tortfeasor had not been determined, such that time for filing such contribution action could be tolled by compliance with presuit screening requirements.

- **Fisher v. Smithson, 839 So.2d 788 (March 25, 2003)**

  Patient brought medical malpractice action against physician. The jury returned a verdict of no liability, but the trial court granted the patient's motion for new trial. The Fourth District Court of Appeal held that the Order granting patient's motion for new trial was not an abuse of discretion because the trial judge found that the jury's verdict finding no liability on the part of the physician was against the manifest weight of the evidence.

- **Chester v. Doig, M.D., 842 So.2d 106 (March 26, 2003)**

  Hospital and claimant settled medical malpractice claim and claimant was awarded additional damages against physician in arbitration proceeding. The Florida Supreme Court held that claimant's arbitration award was not subject to setoff by settlement award.

- **Villazon v. Prudential Health Care Plan, Inc., 843 So.2d 842 (March 27, 2003)**

  Husband of deceased patient filed a wrongful death action against health maintenance organization (HMO), claiming HMO was vicariously liable for the asserted medical malpractice of patient's treating physicians. The Circuit Court entered summary judgment in favor of HMO. Husband appealed. The District Court of Appeal affirmed. Husband filed application for review. The Florida Supreme Court held that ERISA did not preempt husband's claim and that the HMO Act did not provide a private right of action. Additionally, the Court, in precluding summary judgment, held that genuine issues of material fact existed as to whether patient's treating physicians were HMO's agents, thereby subjecting HMO to vicarious liability.

- **Villazon v. Prudential HealthCare Plan, Inc., 843 So.2d 842 (March 27, 2003)**

  The Florida Supreme Court ruled that an HMO can be held vicariously liable for the acts of an independent contractor physician if the physician is acting either (a) as the actual agent or (b) as the apparent agent of the HMO. The Court also concluded that ERISA did not preempt the plaintiff's claim and that the HMO Act does not provide a private right of action for damages based upon an alleged violation of its requirements.

- **Adventist Health System/Sunbelt, Inc. v. Florida Birth-Related Neurological Injury, 2003 WL 1566505 (March 28, 2003)**

  Parents of child suffering from neurological injury brought a medical malpractice action against healthcare provider. An Administrative Law Judge concluded that the child was not mentally impaired within meaning of the no-fault Birth-Related Neurological Injury Compensation Association Plan and that parents' relief was thus not exclusively compensable under the plan. The Fifth District Court of Appeal reversed, holding that child was "substantially mentally and physically impaired" and was thus limited to compensation under the plan.

- **Bayfront Medical Center v. Division of Administrative Hearings, 841 So.2d 626 (April 4, 2003)**

  After personal representative of newborn infant's estate filed medical malpractice and wrongful death claim against hospital and physicians, parents filed a claim for benefits pursuant to the exclusive remedy provision in Birth-Related Neurological Injury Compensation Plan (the "Plan"). The Division of Administrative Hearings ruled that the hospital was not entitled to the exclusivity of remedy provision under the Plan. The Second District Court of Appeal held that the ALJ's ruling exceeded the scope of its exclusive jurisdiction to determine merely whether the injury was compensable.

- **NME Properties, Inc. v. Rudich, 840 So.2d 309 (April 9, 2003)**

  Personal representative of estate of nursing home resident filed action against nursing home licensee alleging wrongful death. The Circuit Court awarded punitive damages against nursing home licensee. Nursing home licensee appealed the punitive damage award on the basis that it, as the owner and licensee of the nursing home, had delegated responsibility for the management of the home to an independent contractor and therefore could not be liable for punitive damages. The Fourth District Court of Appeal held that nursing home licensee had non-delegable duty to provide adequate care to its residents, even though nursing home was operated by independent contractor, and held the owner and licensee liable for punitive damages based on vicarious liability.

- **Goolsby v. Qazi, M.D., 2003 WL 1855106 (April 11, 2003)**

  Due to physician's failure to diagnose patient with hip dysplasia, parents of the patient brought a medical malpractice action against physician who read their newborn daughter's x-rays. The Circuit Court entered a directed verdict in favor of the physician. The parents appealed. The Fifth District Court of Appeal reversed holding that whether a correct reading of child's x-rays would have influenced pediatrician's care of child was a question for the jury.

- **Rayburn v. Orange Park Medical Center, 842 So.2d 985 (April 15, 2003)**

  Patient brought a medical malpractice action against medical center alleging that medical center was vicariously liable for negligence of emergency room physician. The Circuit Court granted summary judgment in favor of medical center and the patient appealed. The First District Court of Appeal reversed holding that notice provided to patient by medical center failed to comply with the requirements of the statute immunizing hospitals from vicarious liability as result of actions of employees or agents of the Board of Regents. The Court determined that the actual form of notice supplied by the hospital (and reprinted in the opinion) was neither separate nor conspicuous as required by Fla. Stat. 240.215.

- **Ramos v. Preferred Medical Plan, Inc., 842 So.2d 1006 (April 16, 2003)**

  Members of health maintenance organization (HMO) brought medical malpractice action against HMO, hospital, and surgeon who performed surgery on members' minor son. The Circuit Court granted the HMO's motion for summary judgment. The Third District Court of Appeal reversed, holding that a genuine issue of material fact existed as to whether the surgeon was the apparent agent of HMO.

- **Romine v. Florida Birth-Related NICA, 842 So.2d 148 (April 16, 2003)**

  Parents, individually and as next friends of child who suffered birth-related neurological injury, appealed the decision of the Division of Administrative Hearings dismissing with prejudice their petition for benefits under the Birth-Related Neurological Injury Compensation Plan (NICA). The Fifth District Court of Appeal reversed and remanded holding that the doctrine of elections of remedies did not bar parents from settling their case against obstetrician and hospital and then seeking NICA benefits, and additionally, the amendment to NICA, precluding claimant from asserting a NICA claim and making a civil recovery, did not apply retroactively to bar payment of NICA benefits to parents.

- **Colonnade Medical Center, Inc. v. Agency for Health Care Administration (2003 WL 1917293 - April 23, 2003)**

  The Medicaid institutional provider handbook states that a provider can obtain additional funding for treatment of AIDS patients provided certain prerequisites are met. The nursing home received the additional benefits but did not comply with the prerequisites. AHCA demanded the full amount repaid as an overpayment. The Fourth District Court of Appeal determined that AHCA had the authority to order repayment and that AHCA was not unjustly enriched by the recovery of the payments.

- **Becker v. Hooshmand, M.D., 841 So.2d 561 (April 24, 2003)**

  Doctor brought defamation action against foreign resident alleging that she defamed doctor through her internet "chat room" activities. Foreign resident brought motion to dismiss based on alleged lack of personal jurisdiction. The Circuit Court denied the motion. The Fourth District Court of Appeal affirmed holding that the doctor's affidavit satisfied the threshold to long arm jurisdiction (by alleging that the defendant committed a tortuous act within the State of Florida - physical presence is not required to commit a tort - use of telephone, electronic or written communications is sufficient), and that the Circuit Court was entitled to deny foreign resident's motion to dismiss based on alleged lack of personal jurisdiction.

- **Puentes v. Tenet Hialeah HealthSystem, 843 So.2d 356 (April 30, 2003)**

  Patient sued hospital for negligence after she received a nonhypoallergenic diet during hospitalization that caused her allergic-reaction symptoms to worsen. The Circuit Court dismissed the patient's complaint with prejudice for failure to comply with presuit notice requirements for medical-malpractice actions. The patient appealed. The Third District Court of Appeal affirmed holding that patient's diet was part of her medical treatment,

and thus patient's claim against the hospital was a medical malpractice action requiring presuit notice.

- **McFeely v. Prudential HealthCare Plan Inc., 843 So.2d 1023 (May 6, 2003)**

  Parents of minor patient sued health-care insurance company for medical malpractice, seeking to hold company vicariously liable for physician's alleged negligence. The trial court entered summary judgment in favor of the insurance company. The First District Court of Appeal reversed, holding that a genuine issue of material fact existed as to whether company exercised sufficient control over physician, such that physician became company's agent and company was subject to vicarious liability for physician's alleged negligence.

- **Coral Gables Hospital v. Veliz, 2003 WL 21075446 (May 14, 2003)**

  Hospital appealed the final judgment of the Circuit Court and the denial of hospital's post trial motions in wrongful death action. The Third District Court of Appeal affirmed holding that whether decedent, and not the reputed father, was the true biological father of the two minor children, so as to entitle the children to an award of damages as survivors under the Wrongful Death Act, was an issue for jury. The Third District Court of Appeal concluded that there was no reason that the issue of paternity could not be adjudicated in the wrongful death suit. This conflicts with *Achumba v. Neustein*, 793 So.2d 1013 (Fla. 5th DCA 2001) and the conflict was certified.

- **Bratt v. Laskas, M.D., 845 So.2d 964 (May 21, 2003)**

  Child and his parents initiated medical malpractice action against pediatric gastroenterologist, among others, for failure to diagnose child's medical condition as Lyme's disease. The trial court entered summary judgment in favor of the gastroenterologist. The Fourth District Court of Appeal reversed holding that genuine issues of material fact existed precluding summary judgment on the issue of whether the gastroenterologist's failure to diagnose and treat Lyme's disease was the proximate cause of the child's injury. The Court also held that a pediatrician was properly allowed to testify regarding the gastroenterologist's breach of standard of care.

- **Crowell, M.D. v. Kaufman, M.D., 845 So.2d 325 (May 21, 2003)**

  In medical malpractice action against surgeon and anesthesiologist, the Circuit Court granted summary judgment for the surgeon. Anesthesiologist appealed (attempting to preserve the possibility of including a Fabre defendant on a verdict form). The Second District Court of Appeal reversed and remanded holding that anesthesiologist's motion to

continue hearing on motion for summary judgment should have been granted so he would have the opportunity to oppose the motion.

- **Greenberg v. Miami Children's Hospital Research Institute, Inc., 2003 WL 21246347 (May 29, 2003)**

  Donors of human tissue and fluids, physician doing research on Canavan disease, and private organizations sued a physician who had received materials, used them to isolate gene-causing disease, and then obtained patent and attempted to license patent. The claimants also sued the hospital where the physician worked. The physician and hospital moved to dismiss. The District Court held that: (1) physician receiving materials was not required to obtain donors' informed consent; (2) physician did not breach any fiduciary duty owed to donors; (3) claimants stated claim of unjust enrichment; (4) claim of fraudulent concealment was not stated; (5) there was no conversion; (6) statute imposing penalties when informed consent of persons being genetically analyzed was not obtained was inapplicable; and (7) no claim was stated for misappropriation of trade secrets.

- **Grenitz, M.D. v. Tomlian, 2003 WL 21290887 (Fla.) (June 5, 2003)**

  Parents brought medical malpractice action on behalf of their son, who was born with cerebral palsy. The Circuit Court entered judgment on jury verdict for defense. The District Court of Appeal reversed. Upon further appeal, the Florida Supreme Court held that (i) neuropsychologist was not competent under statutory definition of psychology to testify regarding medical causes of organic brain damage, abrogating *Broward County School Board v. Cruz*, 761 So.2d 388; (ii) neuropsychologist was competent to testify as an expert with regard to temporal stages of organic brain development as reflected in and through behavioral and functional conditions and evaluations and (iii) the two-issue rule did not apply to this case because the issues comprised separate elements of proofs necessary to prevail on a single cause of action.

- **Cheeks v. Dorsey, M.D., 2003 WL 21014391 (June 27, 2003)**

  Personal representative of estate of automobile accident victims brought a wrongful death action against methadone clinic, alleging that the clinic failed to screen for other drugs prior to administering methadone to the patient, before patient drove his vehicle. The Circuit Court granted summary judgment to clinic. The personal representative appealed. The Fourth District Court of Appeal precluded summary judgment holding that material issues of fact existed as to whether the patient was impaired prior to the treatment.

- **Chua, M.D. v. Hilbert, 846 So.2d 1179 (June 27, 2003)**

  Patient filed a medical malpractice suit against an eye surgeon, alleging that the surgeon was negligent in performing procedure, negligent in failing to monitor and provide appropriate treatment in connection with the procedure, and additionally, that surgeon failed to obtain informed consent. The Circuit Court entered judgment for the patient upon a general jury verdict as to liability. The surgeon appealed. The Fourth District Court of Appeal affirmed holding (i) that "two-issue rule" barred appeal of an admission of allegedly surprise testimony by patient's expert, (ii) subsequent corrective surgery was a reasonably foreseeable consequence of the earlier procedure and (iii) evidence supported verdict for the patient based upon lack of informed consent.

- **Shands Teaching Hospital and Clinic, Inc. v. Juliana, II, 2003 WL 21522781 (July 8, 2003)**

  Parents of infant patient brought action against hospital on a theory of vicarious liability for the negligence of a perfusionist during patient's surgery. The Circuit Court granted parents partial summary judgment on theory of liability, and after trial on damages, entered judgment in parents' favor. The First District Court of Appeal held that perfusionist's status as independent contractor did not raise dispute as to hospital's vicarious liability for his negligence.

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