

LIABILITY FOR NEGLIGENT SUBSEQUENT TREATMENT

By Ted Babbitt

Stuart v. Hertz Corp., 351 So. 2d 703 (Fla. 1977) is the primary case on the responsibility of a tortfeasor for subsequent medical treatment which is negligently performed and thereby increases the injury to the plaintiff. That case held:

“Where one who has suffered personal injuries by reason of the negligence of another exercises reasonable care in securing the services of a competent physician or surgeon, and in following his advice and instructions, and his injuries are thereafter aggravated or increased by the negligence, mistake, or lack of skill of such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskillful treatment thereof, and holds him liable therefor.”

In Nason v. Shafranski, 35 Fla. L. Weekly D943 (Fla. 4th DCA, April 28, 2010) the Fourth District was faced with a case where the application of the Stuart v. Hertz doctrine was necessary in that case. In this case a jury verdict which was deemed by the plaintiff to be inadequate was appealed alleging error by the trial court in allowing a defendant’s medical expert to testify that the surgeries performed by plaintiff’s treating doctor were unnecessary and worsened his condition and refusing to give a jury instruction outlining the Stuart v. Hertz doctrine. Defendant’s medical expert testified that plaintiff merely suffered a sprain in the automobile accident that should have been treated with

medication and that surgery was not appropriate. In fact, the plaintiff received a discogram, a nucleoplasty, the removal of two herniated discs and the performance of two fusions. Plaintiff's medical bills alone totaled over \$300,000.00 and he was facing an operation for a two level disc replacement. Defendant argued to the jury that the surgeries performed by the treating physician had made the plaintiff worse, that he didn't need the surgery to begin with and that no future surgery was indicated.

While the jury was deliberating, they sent a note to the Judge asking "if the jury felt a provider of medical treatment to the plaintiff was unscrupulous, does that relieve the defendant under the law from liability for the consequences of that treatment?"

The Court refused to give any instruction regarding Stuart v. Hertz either before deliberations or after the jurors sent the above note. The appellate court reversed pointing out that while traditional negligence principals provide that a tortfeasor is responsible for the reasonably foreseeable consequences of the tortfeasor's actions and that the foreseeability of intervening cause is usually a jury question there is an exception with respect to purported medical negligence of a treating physician. Citing Stuart v. Hertz the Court held:

"It has long been the law in Florida that when one who is negligent injures another causing him to seek medical treatment, negligence in the administration of that medical treatment is foreseeable and will not serve to break the chain of causation."

The Court cited Emory v. Florida Freedom Newspapers, 687 So. 2d 846 (Fla. 4th DCA 1997) and Dungan v. Ford, 632 So. 2d 159 (Fla. 1st DCA 1994) both of which support the giving of the requested instruction under these circumstances. The Court rejected defendants' arguments that they never claimed the treating physician was negligent and were merely questioning the reasonableness of the medical charges pointing out that the same arguments had been rejected in Emory and Dungan, supra. The Court cited with approval Dungan, supra, to the effect that reasonableness and necessity as it relates to medical treatment can be established by lay testimony and thus involves a question of necessity from the standpoint of the injured party rather than a medical expert. Thus a defense that attacks the reasonableness of medical treatment on a medical basis is clearly violative of the Stuart v. Hertz doctrine since such a proposition flies in the face of the law enunciated in Stuart v. Hertz that even if medical treatment was ill advised, it still is the responsibility of the initial tortfeasor.

There is no standard jury instruction on this subject and the concurring opinion of Judge Farmer recommends a plain English draft of an appropriate instruction until one is approved by the Supreme Court.

"The next issue for your consideration is the claim that (defendant) is liable for the negligence of (doctor) (hospital) (nurse) in treating (claimant) for injuries he claims to have suffered in (event). A person responsible for negligently injuring another may also be further liable for the ensuing negligence of any health care provider treating the injured party if:

1. injuries caused by the negligence of (defendant) reasonably required medical care or treatment by a health care provider;
2. a health care provider gave (claimant) medical care or treatment for injuries caused by (defendant) in (event); and
3. (Claimant) did not unreasonably fail to comply with that health care provider's medical advice and instruction."

A tortfeasor is responsible for injuries directly caused by negligence if the plaintiff reasonably seeks medical care and that medical care results in an exacerbation rather than alleviation of the plaintiff's injuries. The law of Florida is that the initial tortfeasor remains responsible for the entire injury including any such aggravation.

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