

Subsequent Treater's Conduct

By Ted Babbitt

In *Ewing v. Sellinger*, 758 So. 2d 1196 (Fla. 4th DCA 2000), the Fourth District ruled that a directed verdict in favor of a physician in a malpractice case was warranted because the course of treatment which plaintiff's experts opined was necessary to meet the standard of care should have been carried out by a physician who testified that even if he were alerted to the need for the care, he would not have provided that care. At page 1003, the Court stated:

"Dr. Anderson, who *was* the on-call physician at the hospital on the night of Ewing's labor, testified that based upon his review of the patient, if he had been asked at any point during her labor to intervene in Ewing's care and had reviewed the fetal monitor strips, he would not have elected to perform a c-section, as the labor was progressing adequately. Thus, what Ewing failed to do, i.e., continue Ewing's supervision under the care of a physician, would not have affected the outcome in the instant case because the physician who was available to intervene and perform a c-section testified that he would not have done so."

That opinion ignores the strong feelings that physicians have regarding malpractice and the penchant for some physicians to testify favorably on behalf of other physicians even if it means saying that they themselves would not have met the standard of care. It is a simple matter for a physician who has no fear of being sued because the statute of limitations has passed to give an opinion, whether genuine or not, that the course of conduct he would have followed had he been alerted to the need to provide care would not have altered the outcome of plaintiff's injury. If the Fourth District's opinion stands, it provides a convenient insulation for doctors regarding their malpractice.

The Fifth District has now joined the Third District in rejecting this interpretation of the law. In *Goolsby v. Qazi*, 847 So. 2d 1001 (Fla. 5th DCA 2003), a directed verdict was rendered on behalf of a radiologist who apparently misread a newborn's x-rays as ruling out congenital hip dysplasia. In fact, the child had the dysplasia and because she never had the appropriate treatment to reduce her hip joints properly, she had numerous operations and will require more in the future. The trial judge granted Qazi's motion for directed verdict on the grounds that the plaintiff failed to show that the pediatrician who received Qazi's report did not testify that had she been informed of the correct diagnosis, her treatment would have changed. Qazi cited the *Ewing* case, *supra*, in support of his position that the directed verdict was required in the absence of testimony which would have shown that the physician would have altered her treatment had the correct diagnosis been made. The Fifth District reversed, refusing to follow *Ewing* and instead relying upon the Third District's opinion in

Munoz v. South Miami Hospital, Inc., 764 So. 2d 854 (Fla. 3rd DCA 2000) holding that it is not plaintiff's responsibility to prove that the correct treatment would have been offered if the standard of care had been followed. The *Goolsby* Court held:

"We disagree with *Ewing* if it means that the negligent failure to diagnose a condition cannot be the cause of damages if a subsequent treater testifies that he would have shrugged off the correct diagnosis. . . .

Instead, we agree with the majority in *Munoz v. South Miami Hospital, Inc.*, 764 So.2d 854 (Fla. 3rd DCA 2000):

And it is not for the defendants, who putatively violated their standard of care by failing to warn, to argue that their not doing so had no effect on the situation, when their doing the appropriate thing would have removed all doubt. As was said in *Seley v. G.D. Searle & Co.*, [67 Ohio St.2d 192, 423 N.E. 2d 831 (Ohio 1981)]:

[O]nly speculation can support the assumption that an adequate warning, properly communicated, would not have influenced the course of conduct adopted by a physician, even where the physician had previously received the information contained therein. 'What the doctor might or might not have done had he been adequately warned is not an element plaintiff must prove as a part of her case.'

(citing cases). *Id.* at 857.

We reverse the judgment in favor of Qazi because the *Goolsbys* were not obliged to prove that the pediatrician would not have been negligent, or the precise steps the pediatrician would have taken to insure the health of her patient, if Qazi's reading had been positive for hip dysplasia."

The Fourth District's opinion in *Ewing* is troubling because it invites physicians to come to their colleague's aid by testifying in a manner which insulates them from liability. For now, it is the law of this District. Eventually the Supreme Court will have to resolve the apparent conflict between that case and the *Goolsby* and *Munoz* cases cited above.

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