

COMPARATIVE NEGLIGENCE IN MEDICAL MALPRACTICE  
CASES AND THE GENERIC LISTING OF WITNESSES

The law in Florida is settled that actions of a Plaintiff in a malpractice case which precede the negligence of the Defendant, even though those actions contribute to the condition for which the Plaintiff seeks treatment, cannot be used as a defense by the Defendant when the malpractice causes a distinct subsequent injury. See *Matthews v Williford*, 318 So.2d 480 (Fla. 2nd DCA 1975) and *Whitehead v Linkous*, 404 So.2d 377 (Fla. 1st DCA 1981). The theory of those cases is that whatever creates the initial injury in no way alters the appropriate treatment for that injury and thus is irrelevant to the issues to be decided in the malpractice case. Indeed, those cases hold that the cause of the initial injury is not even admissible in the malpractice action.

To the contrary, a Plaintiff's negligence in the failure to follow medical advice can constitute comparative negligence on the part of the Plaintiff. See *Chess v Wright*, 602 So.2d 673 (Fla. 4th DCA 1992) and *Nordt v Wenck*, 653 So.2d 450 (Fla. 3rd DCA 1995).

Both of these principles were recently reaffirmed in *Healthsouth Sports Medicine and Rehabilitation Center of Boca Raton, Inc. v Roark*, 723 So.2d 314 (Fla. 4th DCA 1998). That case arose out of a malpractice case in which the Plaintiff suffered a broken bone, was operated upon and then acquired an

infection in the bone. Despite his doctor's instruction to stop smoking, Plaintiff continued to do so and the Defendant offered expert testimony which concluded that Plaintiff's failure to stop smoking delayed the healing of his wounds. The jury accepted that testimony and found Plaintiff 20% comparatively negligent. The trial court set aside that finding and the Fourth District reversed. In an opinion authored by Judge Klein, the aforementioned principles were reviewed and confirmed. Judge Klein concluded that conduct which occurs prior to the medical condition which led to the alleged negligent medical treatment cannot be used by the Defendant in a malpractice case as alleged comparative negligence. On the other hand, where as here, Defendant is able to present witnesses who conclude that Plaintiff's failure to follow medical advice was a contributing cause to Plaintiff's injury, such failure on the part of the Plaintiff may well constitute comparative negligence.

This case is also important for a separate issue. In that case, the Defendant was precluded from calling as a witness its administrator because she had not been specifically listed on a witness list required by the trial court's pretrial order. Instead, the Defendant had listed "all parties to this action and/or their authorized representatives." Defendant relied for reversal on the

Third District case of *Casa de Alabanza v Bus Service, Inc.*, 669 So.2d 338 (Fla. 3rd DCA 1996). In *Casa de Alabanza*, the Third District held that the Defendant's representative must be allowed to testify on the basis of a witness list which included "any and all parties to this lawsuit." Judge Klein's decision disagrees with and refuses to follow the *Casa de Alabanza* case, concluding that such a holding flies in the face of modern disclosure requirements. At page 317, the Fourth District Opinion holds:

Allowing parties to comply with witness exchange requirements by listing unnamed 'authorized representatives' only encourages trial by ambush. It can result in additional hearings before trial court judges to either strike such a designation or require more detailed information. It can also

result in additional interrogatories and depositions. We should be attempting to make discovery less burdensome, rather than more burdensome, and requiring specific names and addresses will further that goal. We conclude that listing an 'authorized representative' does not comply with a pretrial order requiring the exchange of names and addresses of fact witnesses. Nor does the listing of the generic term 'party,' except where the party is an identifiable person. We thus disagree with Casa de Alabanza.

While the Fourth District certified conflict with the opinion of the Third District in Casa de Alabanza, supra, for now, in this District, if a party wishes to call a specific representative, it is necessary that that representative be individually named on a witness list.

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