

## SANDBAGGING

Belmont v North Broward Hospital District, 727 So.2d 992 (Fla. 4<sup>th</sup> DCA 1999) stands for the proposition that a party may not be permitted to alter testimony after discovery is concluded and the trial commences. Such a practice has been termed “sandbagging,” a term derived from a surprise attack from behind with a sandbag.

In the case under discussion, Plaintiffs’ decedent died as a result of the failure of physicians to recognize her starvation and dehydration as well as allegedly because the doctors perforated her aorta while performing a diagnostic procedure. The hospital record confirmed tears in the patient’s aorta as a result of this procedure and both Defendant doctors testified during their depositions about these tears. One of the doctors was called by the Plaintiffs in their case in chief and testified that he operated after the procedure was performed and not only found the tears but repaired them. The other Defendant’s deposition was read in the Plaintiffs’ case in chief and he confirmed the existence of the perforations.

Unbeknownst to the Plaintiffs, in the middle of trial, the defense counsel had the doctors examine the aortic specimen that they had testified

contained the punctures. Based upon this secret examination and without any notice to the Plaintiffs' attorney, they concluded that their original testimony was in error and the punctures did not exist. On their direct examination during the Defendants' case, they completely changed their testimony and contended that the aorta had never been perforated and their prior testimony was in error because it was based on information from the record rather than actual examination of the aorta. The resulting defense verdict was confirmed by the trial court and the Fourth District reversed.

In the Fourth District's opinion, Judge Klein, writing for a unanimous Court, relied upon Grau v Branham, 626 So.2d 1059 (Fla. 4<sup>th</sup> DCA 1993). In that case, Plaintiff's counsel had two of his experts examine the Plaintiff during the trial and give testimony contrary to their deposition testimony. In reversing the resulting verdict for the Plaintiff the Court held:

Clearly, except under extraordinary circumstances which do not exist here, the lawyers have a right to expect that once a trial commences, discovery and examinations must cease. The lawyers who make the opening statement must have a reasonably firm idea of what the evidence will show. Liberal rules of discovery assure this . . . . All the discovery rules and the extensive efforts of the parties to discover the other party's case would be for naught if one side were able to wait until trial started to establish key pieces of evidence such as what occurred in this case.

The Court also relied on Office Depot, Inc. v Miller, 584 So.2d 587, 590 (Fla. 4<sup>th</sup> DCA 1991). There the Court opined: “A party can hardly prepare for an opinion that it doesn’t know about, much less one that is a complete reversal of the opinion it has been provided.”

Realistically it would be impossible to prepare for trial in any case, medical malpractice or not, if you always had to worry that a party or a witness could change his or her testimony based upon some facts which post-date the depositions. This is particularly true in medical malpractice and product liability cases because experiments could always take place after discovery was concluded which could materially alter a witness’ testimony. This case stands for the proposition that once discovery is concluded the party or witness may not change their testimony and be permitted to testify contrary to their former sworn testimony.

NOTE: BECAUSE A NUMBER OF PEOPLE HAVE REQUESTED COPIES OF PAST ARTICLES, A COMPILATION OF THESE ARTICLES IS NOW AVAILABLE TO MEMBERS OF THE PALM BEACH COUNTY BAR ASSOCIATION, FREE OF CHARGE BY CALLING (561) 684-2500.