

FABRE AND SUBSEQUENT TREATING PHYSICIANS  
by Ted Babbitt

The Association for Retarded Citizens-Volusia, Inc. v Fletcher, 741 So.2d 520 (Fla. 5<sup>th</sup> DCA 1999) raises the issue of whether a tortfeasor in an ordinary negligence case can plead and prove that plaintiff's subsequent treating physicians are guilty of malpractice and then take advantage of Fla.Stat. 768.81 and the law set forth in Fabre v Marin, 623 So.2d 1182 (Fla. 1993). That contention flies directly in the face of Stuart v Hertz Corp., 351 So.2d 703 (Fla. 1977).

Stuart reaffirmed the long established rule that an original tortfeasor is liable not only for the injuries caused by his negligence but for any aggravation of those injuries created by the health care providers who treat the original injury. Rucks v Pushman, 541 So.2d 673 (Fla. 5<sup>th</sup> DCA), rev. denied 549 So.2d 1014 (Fla. 1989) stated the proposition as follows:

[T]he original (initial or primary) tortfeasor is liable to the victim not only for the original injuries received as a result of the initial tort, but also for the additional (or aggravated) injuries resulting from the subsequent negligence of the health care providers. This is true although the original tortfeasor and the subsequently negligent health care providers are independent tortfeasors and not joint tortfeasors jointly and severally liable for one common injury.

The ARC case, supra, involved a wrongful death suit brought by the mother of a retarded child who drowned in a swimming pool at a summer camp operated by the defendant. The death occurred seven days after the initial drowning and when suit was filed the defendant pled the negligence of plaintiff decedent's physicians. The defendants took the position that Fla.Stat. 768.81 abrogated the law in Stuart v Hertz, et al., supra, by requiring that all tortfeasors share in the damages created by their respective negligent acts and that subsequent treating physicians should be included on the verdict form. The trial court disagreed and granted a summary judgment on behalf of the plaintiff.

At the trial, the court reconsidered its order and allowed a proffer from several expert witnesses on the subject of the physician's negligence. That proffer was successful in showing negligent care on the part of the physicians but failed to establish any causation between that negligence and the death of the decedent. The Fifth District, citing Nash v Wells Fargo Guard Services, Inc., 678 So.2d 1262 (Fla. 1996), held that as a matter of law the Defendant had failed to establish that the nonparty physician's fault had contributed to the ultimate demise of the decedent. The Court, therefore, declined to directly

answer the question of whether a subsequent treating physician can constitute a Fabre defendant. Nevertheless the Court in dicta reviewed the law and concluded that even if causation had been proved a subsequent treating physician should not be placed on the verdict form and could not constitute a Fabre defendant.

In establishing this principle, the Court reviewed the language of Fabre, supra. There the Supreme Court held that:

“Section 768.81 was enacted to replace joint and several liability with a system that requires each party to pay for noneconomic damages only in proportion to the percentage of *fault* by which that defendant contributed to *the accident*.” (Emphasis added in opinion.)

The District Court pointed out that the accident in the ARC case was the swimming pool accident and that the subsequent medical care could not possibly be included within that accident. The Court then opined that Fla.Stat. 768.81 was not intended to include subsequent treating doctors in the Fabre definition. At Page 1424 the Court concluded:

In Emory v Florida Freedom Newspapers, 687 So.2d 846, 847 (Fla. 4<sup>th</sup> DCA 1997), the fourth district restated the common law rule that “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 therefore.’” (quoting Stuart, 351 So.2d at 707). The fourth district reaffirmed this principle in Benchwarmers, Inc. v Gorin, 689 So.2d 1197 (Fla. 4<sup>th</sup> DCA 1997), a case involving the initial tortfeasors’ action against a medical doctor instituted after the original tortfeasor settled the plaintiff’s claim. In that case, the court held that ‘Benchwarmers as the initial tortfeasor, is subject to the total financial burden of [the plaintiff’s] injuries, including those directly attributable to [the doctor’s] subsequent malpractice.’ *Id.* at 1198. We interpret this language to mean that section 768.87 only applies to those parties who negligently contributed to the infliction of the plaintiff’s initial injury, not to medical providers who subsequently aggravated the injury.

ARC is inviting this court to hold for the first time that a defendant in a personal injury lawsuit who is alleged to have negligently caused the plaintiff’s initial injury can require the plaintiff to litigate a medical malpractice claim against medical care providers who subsequently treated the injury. We reject this invitation.

While the Fifth District in ARC, *supra*, does not directly answer the question of whether a subsequent treating physician can be included on the verdict form in an ordinary negligence case, its reasoning is extremely

compelling and since this case is the only opinion on the subject to date, this dicta, while not controlling, is very persuasive.

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