

## APPLICATION OF STUART v HERTZ IN MALPRACTICE CASES

Ordinarily a tortfeasor is responsible for only the reasonably foreseeable consequences of his or her actions. Stark v Holtzclaw, 105 So. 330 (Fla. 1925) and Cole v Leach, 405 So.2d 449 (Fla. 4<sup>th</sup> DCA 1981). An independent unforeseeable intervening act may break the causal connection and prevent the tortfeasor from being responsible for damages caused by that independent act. Gibson v Avis Rent-A-Car Sys., Inc., 386 So.2d 520 (Fla. 1980); Bosket v Broward County Hous. Auth., 676 So.2d 72 (Fla. 4<sup>th</sup> DCA 1996).

An exception to this general law applies in the area of subsequently caused injury due to medical malpractice. A tortfeasor who causes an injury which is later aggravated by medical malpractice is liable, as a matter of law, for that subsequent injury so long as the plaintiff has not been negligent in choosing his physician who causes the aggravation or in following the directions of that physician. J. Ray Arnold Lumber Corp. of Olustee v Richardson, 141 So. 133 (Fla. 1932); Texas & Pacific Ry. Co. v Hill, 237 U.S. 208 (1915).

In Stuart v Hertz Corp., 351 So.2d 703 (Fla. 1977), the Florida Supreme Court enunciated the doctrine as follows:

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 therefore.

In 1986, the Legislature passed the Tort Reform Insurance Act of 1986, Chapter 86-160, Laws of Florida, which contains Fla.Stat. 768.81(1)(3) requiring that any judgment should be entered against a party based on that party's percentage of fault and not on the basis of joint and several liability. In Fabre v Marin, 623 So.2d 1182 (Fla. 1993) overruled on other grounds Wells v Tallahassee Mem. Med. Center, 659 So.2d 249 (Fla. 1995), the Florida Supreme Court held that Fla.Stat. 768.81(3) applies to all persons or entities who "contributed to the accident" and required an allocation of the percentage of fault among all parties whether or not they were actually named in the suit.

In Letzter v Cephas, 26 F.L.W. D293 (Fla. 4<sup>th</sup> DCA, Jan. 24, 2001), the Court discussed the question of whether Stuart v Hertz applies when two physicians are sued for acts of negligence and where it is alleged that the second physician's acts aggravated the injury. In that case, the plaintiff went to one hospital and was treated by a physician for a lesion on his toe. It was alleged that by failing to operate on a timely basis, the treating physician created a medical condition which required treatment by a subsequent physician who, in turn, performed the wrong operation and, as a consequence, plaintiff's leg was amputated. The trial court gave an instruction consistent with Stuart v Hertz and the jury found both doctors liable.

The first question to come before the Court was whether the trial court erred in giving the Stuart v Hertz instruction potentially making the first physician responsible for the second physician's negligence. The Fourth District held that the instruction was appropriately given. The Fourth District, in discussing that issue, concluded that Stuart v Hertz does not apply where two defendants are joint tortfeasors.

We agree that, by its very definition, the rule in *Stuart v Hertz*, which contemplates an initial negligent act causing injury followed by negligent medical treatment for that injury, does not apply to joint tortfeasors. . . .

'Joint tortfeasors' are defined as '[t]hose who act together in committing wrong, or whose acts if independent of each other, unite in causing single injury. (citing cases). 'In order to be joint tortfeasors in fact, each tortfeasor must have committed some wrong which results in an injury or damage to another. Although there is but a single damage done, there are several wrongs. (citing authority). Whether or not defendants are joint tortfeasors is a question of fact determined by the circumstances of the particular case. . . . Letzter v Cephas, at 295.

The Court concluded, however, that since the facts of this case were amenable to a finding that the two doctors could or could not be considered joint tortfeasors, the instruction should have been given.

Inherent in this conclusion is the assumption that the issue of whether or not parties are joint tortfeasors or not is almost always a question for the jury.

Where inconsistent theories of causation exist, it is error not to instruct on all theories and that medical malpractice plaintiff was entitled to a *Stuart v Hertz*

instruction where the case involved 'a single injury of disputed causation.' Haas v Zaccaria, 629 So.2d 1130 (Fla. 4<sup>th</sup> DCA 1995) (citing and quoting *Barrios*). Letzter v Cephas, at 295.

In the case under discussion, the trial court failed to permit the jury to determine whether the two defendant doctors were joint tortfeasors but the Fourth District found that to be harmless error because the jury had to conclude that the two defendants were joint tortfeasors based upon the instructions that were given.

The Fourth District then found that the trial judge erred in refusing to apportion noneconomic damages in accordance with Fla.Stat. 768.81. The Court's conclusion is premised upon the assumption that Fla.Stat. 768.81 only applies to joint tortfeasors. That conclusion is consistent with the current case law. See Haas v Zaccaria, 659 So.2d 1130 (Fla. 4<sup>th</sup> DCA 1995); Barrios v Darrach, 629 So.2d 211 (Fla. 3<sup>rd</sup> DCA), rev. denied 637 So.2d 324 (Fla. 1994); Ruykas v Halifax Hospital District, 657 So.2d 967 (Fla. 5<sup>th</sup> DCA 1995).

While the Fourth District has certified the questions raised in this case to the Supreme Court, at least for now the law is that when there are two acts of negligence that cause a single injury such that a factual issue exists as to whether the two defendants are joint tortfeasors, the jury instruction under Stuart v Hertz, *supra*, is appropriate and the jury should be asked to decide whether the defendants are, in fact, joint tortfeasors. If they are not, Stuart v Hertz applies and the first defendant who created the circumstances by which treatment was rendered by the second defendant which in turn caused an aggravation of a pre-

existing injury renders that first defendant liable not only for the injury caused by his or her negligence but also for the subsequent aggravation of that injury by the second defendant.