IN THE SUPREME COURT OF FLORIDA
Case No. SC15-

In the matter of Standard Jury Instructions (Civil),

Proposed Amendments to Instruction 402.16 -- Emergency Medical Treatment Claims
_____/

Committee Report 15-02

REPORT (NO. 15-02) OF THE COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

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[additional counsel listed on signature page]

July 13, 2015

To the Chief Justice and Justices of the Supreme Court of Florida:

The Committee on Standard Jury Instructions in Civil Cases requests that this Court approve the proposed amendments to instruction 402.16, and the concomitant creation of Appendix D to the standard jury instructions book. These proposals are set forth in Appendix A. This Report is filed pursuant to article V, section 2(a), of the Florida Constitution.

I. INTRODUCTION AND PROCEDURAL NOTE

In March 2010, the Court adopted the Committee's proposal to reorganize the Standard Jury Instructions in Civil Cases and simplify the language used throughout the instructions. *See In re Standard Jury Instructions in Civil Cases Report No. 09-01 (Reorganization of the Civil Jury Instructions)*, 35 So. 3d 666 (Fla. 2010) (Case No. SC09-284). Since that major project was completed, the Committee has continued its work on individual jury instructions that it believes need updating in the light of statutory or decisional developments. One such update is set forth below.

II. DESCRIPTION OF APPENDICES

The following appendices are attached to this Report:

Appendix A:	Proposed Amendments to Instruction 402.16 and proposed Appendix D to the standard jury instructions book.
Appendix B:	August 1, 2013, *Florida Bar News* notice.
Appendix C:	Relevant excerpts from the Committee's minutes.
Appendix D:	Committee materials relevant to these proposals.

III. THE PROPOSED INSTRUCTIONS

As part of its continuing review of the Standard Jury Instructions for Civil Cases, the Committee proposes this amendment the current instruction 402.16, Emergency Medical Treatment Claims. The proposed revisions to these instructions are set forth in Appendix A to this report.

The current version of instruction 402.16 is based on a statute that has since been amended. In particular, effective September 15, 2003, the Florida Legislature amended section 768.13(b)(3), Florida Statutes. The current version of instruction 402.16 does not fit with the amended statute, although it can still be used for claims arising before September 15, 2003. Therefore, the Committee recommends moving the current instruction 402.16 to Appendix D, as a reference source in the back of the standard instructions book.

Over the course of several years, dating back to 2010, the professional malpractice subcommittee has worked on drafting a new instruction 402.16 to correlate with the amended section 768.13(b)(3), Florida Statutes. In that regard, section 768.13, Florida Statutes, reads as follows in relevant part:

> (b)1. Any health care provider, including a hospital licensed under chapter 395, providing emergency services pursuant to obligations imposed by 42 U.S.C. s. 1395dd, s. 395.1041, s. 395.401, or s. 401.45 shall not be held liable for any civil damages as a result of such medical care or treatment unless such damages result from providing, or failing to provide, medical care or treatment under circumstances demonstrating a reckless

> disregard for the consequences so as to affect the life or health of another.
>
> 2. The immunity provided by this paragraph applies to damages as a result of any act or omission of providing medical care or treatment, including diagnosis:
>
> . . . .
>
> b. Which is related to the original medical emergency.
>
> 3. For purposes of this paragraph, "reckless disregard" as it applies to a given health care provider rendering emergency medical services shall be such conduct that a health care provider knew or should have known, at the time such services were rendered, created an unreasonable risk of injury so as to affect the life or health of another, and such risk was substantially greater than that which is necessary to make the conduct negligent.

The subcommittee and the whole Committee repeatedly tried to write a plain English instruction explaining section 768.13(b)(3), Florida Statutes. Eventually, the subcommittee and the whole Committee concluded that they could not do so without rendering an interpretation of legislative intent. The Committee acknowledges that that is beyond its purview.

In the end, the Committee must propose a "placeholder," pending further developments in the law. Specifically, the Committee proposes the substitution of the following language for the existing language of instruction 402.16:

> The Florida Legislature amended *F.S.*768.13(b)(3), effective September 15, 2003. For instructions applicable to causes of action arising prior to that date, see

Appendix D to this book.

The Committee has attempted to write a plain English instruction for the amended statute, but has been unable to do so. The Committee will consider an appropriate instruction once guidance is provided from decisions of the Florida appellate courts.

In regard to the application of *F.S.*768.13(b)(3), see *Public Health Trust of Miami Dade County v. Rolle*, 88 So.3d 191 (Fla. 3d DCA 2011) and *University of Florida Board of Trustees v. Stone*, 92 So.3d 264 (Fla. 1st DCA 2012).

The Committee also proposes the movement of the current instruction 402.16 to Appendix D of the standard instructions book.

IV. DISSENTING VIEWS FROM THE COMMITTEE

There are no dissenting views from the Committee. The Committee unanimously recommends the publication of the proposed amendments to instruction 402.16, and the concomitant creation of Appendix D to the standard jury instructions book. .

V. COMMENTS RECEIVED AND ACTION TAKEN IN RESPONSE

The proposed amendments were published in *The Florida Bar News* on August 1, 2013. The Committee received no comments.

VI. CONCLUSION

WHEREFORE, for the above reasons, the Committee respectfully requests that the Court approve the proposed amendments to instruction 402.16 and the concomitant creation of Appendix D to the standard jury instructions book.

Respectfully submitted,

/s/Joseph Hagedorn Lang, Jr.
Joseph Hagedorn Lang, Jr.
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July 13, 2015

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this report complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

/s/Joseph Hagedorn Lang, Jr.
Florida Bar Number 059404

APPENDIX A

402.16 EMERGENCY MEDICAL TREATMENT CLAIMS

INTRODUCTORY COMMENT

Instruction 402.16 addresses the provisions of *F.S.* 768.13(2)(b). It applies only to cases described in that statute or to cases in which there is a jury issue as to the applibility of the statute. Instruction 402.16 does not apply to cases involving patients capable of receiving treatment as non-emergency patients, even if treated in an emergency room.

Instruction 402.16a applies to cases in which there is a jury issue as to whether the statute applies. Instruction 402.16b applies to cases in which either the parties agree that the statute applies or the court has ruled that the statute applies as a matter of law.

The applicable part of instruction 402.16 should be preceded by instructions 402.1, 402.2, 402.3, and 403.6. Instruction 402.4 should not be given in the ordinary sequence as it is, to the extent applicable, incorporated in instruction 402.16. If there are any preliminary vicarious liability issues, instructions 402.9 and 402.10 should also be given.

No reported decision construes the legislative intent behind this section. Based upon the definition of "reckless disregard" in *F.S.*768.13(2)(b)3, the committee has concluded that the intent was to limit liability in civil actions for damages arising out of fact situations to which the statute applies to cases where something more than "simple" negligence is established. Therefore, the standard instructions dealing with "simple" negligence are not appropriate for civil damage actions to which the statute applies.

402.16a EMERGENCY MEDICAL TREATMENT — Jury Issue as to Application of F.S. 768.13(2)(b)

(1). Preliminary issue on application of statute:

The first issue for you to decide on (claimant's) **claim against** (defendant) **is whether** (claimant) **was being [cared for] [treated] under emergency circumstances.**

[Care] [treatment] is rendered under emergency circumstances when a [hospital] [physician] renders medical [care] [treatment] required by a sudden, unexpected situation or event that resulted in a serious medical condition demanding immediate medical attention, for which (claimant or

decedent) **initially entered the hospital through its [emergency room] [trauma center], before** (claimant or decedent) **was medically stabilized and capable of receiving [care] [treatment] as a nonemergency patient.**

If the greater weight of the evidence does not support that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances then you shall proceed to decide whether** (defendant) **was negligent in [his] [her] [its] [care] [treatment] of** (claimant or decedent)**.**

However, if the greater weight of the evidence supports that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances, then you shall proceed to decide whether** (defendant) **acted in reckless disregard of the consequences in [his] [her] [its] [care] [treatment] of** (claimant or decedent)**.**

(2). Issues regarding negligence:

[If you find that (claimant's or decedent's) **[care] [treatment] was not being rendered under emergency circumstances,] the [next] issue for you to decide is whether** (defendant) **was negligent in** (describe conduct in question)**; and, if so, whether that negligence was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.**

"Negligence" is the failure to use reasonable care. Reasonable care on the part of a [hospital] [physician] is that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably careful [hospitals] [physicians]. Negligence on the part of a [hospital] [physician] is doing something that a reasonably careful [hospital] [physician] would not do under like circumstances or failing to do something that a reasonably careful [hospital] [physician] would do under like circumstances.

If the greater weight of the evidence does not support this claim, then your verdict [on this claim] should be for (defendant)**.**

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then your verdict [on this claim] should be for** (claimant) **and against** (defendant)**.]**

[However, if the greater weight of the evidence does support (claimant's) **claim, then you should consider the defense(s) raised by** (defendant)**.]**

(3). Issues regarding reckless disregard:

[If you find that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances,] the [next] issue for you to decide is whether** (defendant) **acted with reckless disregard of the consequences in** (describe conduct in question)**; and, if so, whether that reckless disregard was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.]**

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

If emergency circumstances have not been established by the greater weight of the evidence but the greater weight of the evidence supports (claimant's) **claim of negligence, then [your verdict [on this claim] should be for** (claimant) **and against** (defendant)**] [you should consider the defense(s) raised by** (defendant)**].**

(Proceed to instructions 402.14 and 402.15)

[However, if the greater weight of the evidence does not support (claimant's) **claim of negligence, then your verdict [on this claim] should be for** (defendant)**.]**

On the other hand, if emergency circumstances have been established by the greater weight of the evidence and the greater weight of the evidence also supports (claimant's) **claim of reckless disregard of the consequences, then [your verdict [on this claim] should be for** (claimant) **and against** (defendant)**] [you should consider the defense(s) raised by**(defendant)**].**

(Proceed to instructions 402.14 and 402.15)

[However, if the greater weight of the evidence does not support (claimant's) **claim of reckless disregard of the consequences, then your verdict [on this claim] should be for** (defendant) **and against** (claimant)**.]**

402.16b EMERGENCY MEDICAL TREATMENT

(Describe conduct in question) **occurred in the course of [rendering] [or] [failing to render] emergency [care] [treatment] to** (claimant or decedent)**. The issue for you to decide is whether** (defendant) **acted with reckless disregard of the consequences in** (describe conduct in question)**; and, if so, whether that reckless disregard was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.**

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

If the greater weight of the evidence does not support (claimant's) **claim, then your verdict [on this claim] should be for** (defendant)**.**

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then your verdict [on this claim] should be for** (claimant) **and against** (defendant)**.]**

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then you should consider the defense(s) raised by** (defendant)**.]**

(Proceed to instructions 402.14 and 402.15)

NOTES ON USE FOR 402.16

1. Instruction 402.16a should be given when there is a jury issue as to whether the care or treatment was being rendered under emergency circumstances. An appropriate special verdict will be necessary to distinguish between a finding that the care or treatment was not being rendered under emergency circumstances, in which case the standard of care is negligence, and a finding that the care or treatment was being rendered under emergency circumstances, in which case the standard of care is reckless disregard of the circumstances. The verdict should contain instructions to guide the jury depending on their finding as to whether the

~~care and treatment was or was not rendered under emergency circumstances. The burden of proof provisions of instruction 402.16a should also be modified to incorporate the instructions in the special verdict. See Appendix A, Model Jury Instructions.~~

~~2. Instruction 402.16b should be given when the parties agree that the statute applies or when the court has ruled it applies as a matter of law.~~

~~3. Negligence of a patient, which contributes to or causes the medical condition for which treatment is sought, is not available as a defense (as comparative negligence) to subsequent medical negligence which causes a distinct injury. See, e.g., *Norman v. Mandarin Emergency Care Center, Inc.*, 490 So. 2d 76 (Fla. 1st DCA 1986); *Matthews v. Williford*, 318 So. 2d 480 (Fla. 2d DCA 1975); but see Vandergrift v. Fort Pierce Memorial Hospital, Inc., 354 So. 2d 398 (Fla. 4th DCA 1978). Rare circumstances may arise, involving a patient's negligence after emergency care or treatment has begun, in which comparative negligence is a legitimate issue. See generally *Whitehead v. Linkous*, 404 So. 2d 377 (Fla. 1st DCA 1981).~~

~~4. Pending further developments in the law, the committee reserves the issue of whether comparative negligence is a defense when the reckless disregard standard is in effect. If the court decides that comparative negligence is a defense, then an instruction on simple negligence should be given.~~

~~5. "Reckless disregard," as defined and used in the context of *F.S.* 768.13(2)(b), does not appear to have the same meaning as reckless disregard when used in the context of standards for punitive damages. See Fla. Std. Jury Instr. (Civ.) 501.12 and 501.13.~~

The Florida Legislature amended *F.S.* 768.13(b)(3), effective September 15, 2003. For instructions applicable to causes of action arising prior to that date, see Appendix D to this book.

The committee has attempted to write a plain English instruction for the amended statute, but has been unable to do so. The committee will consider an appropriate instruction once guidance is provided from decisions of the Florida appellate courts.

In regard to the application of *F.S.* 768.13(b)(3), see *Public Health Trust of Miami Dade County v. Rolle*, 88 So. 3d 191 (Fla. 3d DCA 2011), and *University of Florida Board of Trustees v. Stone*, 92 So. 3d 264 (Fla. 1st DCA 2012).

APPENDIX D

402.16 EMERGENCY MEDICAL TREATMENT CLAIMS INSTRUCTIONS FOR CAUSES OF ACTION ARISING PRIOR TO SEPTEMBER 15, 2003

INTRODUCTORY COMMENT

Instruction 402.16 addresses the provisions of *F.S.* 768.13(2)(b). It applies only to cases described in that statute or to cases in which there is a jury issue as to the applicability of the statute. Instruction 402.16 does not apply to cases involving patients capable of receiving treatment as non-emergency patients, even if treated in an emergency room.

Instruction 402.16a applies to cases in which there is a jury issue as to whether the statute applies. Instruction 402.16b applies to cases in which either the parties agree that the statute applies or the court has ruled that the statute applies as a matter of law.

The applicable part of instruction 402.16 should be preceded by instructions 402.1, 402.2, 402.3, and 403.6. Instruction 402.4 should not be given in the ordinary sequence as it is, to the extent applicable, incorporated in instruction 402.16. If there are any preliminary vicarious liability issues, instructions 402.9 and 402.10 should also be given.

No reported decision construes the legislative intent behind this section. Based upon the definition of "reckless disregard" in *F.S.* 768.13(2)(b)3, the committee has concluded that the intent was to limit liability in civil actions for damages arising out of fact situations to which the statute applies to cases where something more than "simple" negligence is established. Therefore, the standard instructions dealing with "simple" negligence are not appropriate for civil damage actions to which the statute applies.

402.16a EMERGENCY MEDICAL TREATMENT — Jury Issue as to Application of *F.S.* 768.13(2)(b)

(1). Preliminary issue on application of statute:

The first issue for you to decide on (claimant's) **claim against** (defendant) **is whether** (claimant) **was being [cared for] [treated] under emergency circumstances.**

[Care] [treatment] is rendered under emergency circumstances when a [hospital] [physician] renders medical [care] [treatment] required by a sudden, unexpected situation or event that resulted in a serious medical condition demanding immediate medical attention, for which (claimant or decedent) **initially entered the hospital through its [emergency room] [trauma center], before** (claimant or decedent) **was medically stabilized and capable of receiving [care] [treatment] as a nonemergency patient.**

If the greater weight of the evidence does not support that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances then you shall proceed to decide whether** (defendant) **was negligent in [his] [her] [its] [care] [treatment] of** (claimant or decedent).

However, if the greater weight of the evidence supports that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances, then you shall proceed to decide whether** (defendant) **acted in reckless disregard of the consequences in [his] [her] [its] [care] [treatment] of** (claimant or decedent).

(2). Issues regarding negligence:

[If you find that (claimant's or decedent's) **[care] [treatment] was not being rendered under emergency circumstances,] the [next] issue for you to decide is whether** (defendant) **was negligent in** (describe conduct in question); **and, if so, whether that negligence was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made).

"Negligence" is the failure to use reasonable care. Reasonable care on the part of a [hospital] [physician] is that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably careful [hospitals] [physicians]. Negligence on the part of a [hospital] [physician] is doing something that a reasonably careful [hospital] [physician] would not do under like circumstances or failing to do something that a reasonably careful [hospital] [physician] would do under like circumstances.

If the greater weight of the evidence does not support this claim, then your verdict [on this claim] should be for (defendant).

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then your verdict [on this claim] should be for** (claimant) **and against** (defendant).]

[However, if the greater weight of the evidence does support (claimant's) **claim, then you should consider the defense(s) raised by** (defendant).]

(3). Issues regarding reckless disregard:

[If you find that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances,] the [next] issue for you to decide is whether** (defendant) **acted with reckless disregard of the consequences in** (describe conduct in question)**; and, if so, whether that reckless disregard was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made).]

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

If emergency circumstances have not been established by the greater weight of the evidence but the greater weight of the evidence supports (claimant's) **claim of negligence, then [your verdict [on this claim] should be for** (claimant) **and against** (defendant)] **[you should consider the defense(s) raised by** (defendant)**].**

(Proceed to instructions 402.14 and 402.15)

[However, if the greater weight of the evidence does not support (claimant's) **claim of negligence, then your verdict [on this claim] should be for** (defendant).]

On the other hand, if emergency circumstances have been established by the greater weight of the evidence and the greater weight of the evidence also supports (claimant's) **claim of reckless disregard of the consequences, then [your verdict [on this claim] should be for** (claimant) **and against** (defendant)] **[you should consider the defense(s) raised by** (defendant)**].**

(Proceed to instructions 402.14 and 402.15)

[However, if the greater weight of the evidence does not support (claimant's) **claim of reckless disregard of the consequences, then your verdict [on this claim] should be for** (defendant) **and against** (claimant).]

402.16b EMERGENCY MEDICAL TREATMENT

(Describe conduct in question) **occurred in the course of [rendering] [or] [failing to render] emergency [care] [treatment] to** (claimant or decedent). **The issue for you to decide is whether** (defendant) **acted with reckless disregard of the consequences in** (describe conduct in question); **and, if so, whether that reckless disregard was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made).

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

If the greater weight of the evidence does not support (claimant's) **claim, then your verdict [on this claim] should be for** (defendant).

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then your verdict [on this claim] should be for** (claimant) **and against** (defendant).]

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then you should consider the defense(s) raised by** (defendant).]

(Proceed to instructions 402.14 and 402.15)

NOTES ON USE FOR 402.16

1. Instruction 402.16a should be given when there is a jury issue as to whether the care or treatment was being rendered under emergency circumstances. An appropriate special verdict will be necessary to distinguish between a finding that the care or treatment was not being rendered under emergency circumstances,

in which case the standard of care is negligence, and a finding that the care or treatment was being rendered under emergency circumstances, in which case the standard of care is reckless disregard of the circumstances. The verdict should contain instructions to guide the jury depending on their finding as to whether the care and treatment was or was not rendered under emergency circumstances. The burden of proof provisions of instruction 402.16a should also be modified to incorporate the instructions in the special verdict. See Appendix A, Model Jury Instructions.

2. Instruction 402.16b should be given when the parties agree that the statute applies or when the court has ruled it applies as a matter of law.

3. Negligence of a patient, which contributes to or causes the medical condition for which treatment is sought, is not available as a defense (as comparative negligence) to subsequent medical negligence which causes a distinct injury. See, *e.g.*, *Norman v. Mandarin Emergency Care Center, Inc.*, 490 So. 2d 76 (Fla. 1st DCA 1986); *Matthews v. Williford*, 318 So. 2d 480 (Fla. 2d DCA 1975); but see *Vandergrift v. Fort Pierce Memorial Hospital, Inc.*, 354 So. 2d 398 (Fla. 4th DCA 1978). Rare circumstances may arise, involving a patient's negligence after emergency care or treatment has begun, in which comparative negligence is a legitimate issue. See generally *Whitehead v. Linkous*, 404 So. 2d 377 (Fla. 1st DCA 1981).

4. Pending further developments in the law, the committee reserves the issue of whether comparative negligence is a defense when the reckless disregard standard is in effect. If the court decides that comparative negligence is a defense, then an instruction on simple negligence should be given.

5. "Reckless disregard," as defined and used in the context of *F.S.* 768.13(2)(b), does not appear to have the same meaning as reckless disregard when used in the context of standards for punitive damages. See Fla. Std. Jury Instr. (Civ.) 501.12 and 501.13.

APPENDIX B

The Florida Bar News
August 1, 2013

Amendments to Jury Instructions in Civil Cases

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes to amend Instruction 402.16 as set forth below. Interested parties have until September 1, 2013, to submit comments electronically to Judge James Manly Barton II, committee chair, at bartonjm@fljud13.org, with a copy to the committee liaison, Jodi Jennings at jjenning@flabar.org. After reviewing all comments, the committee may submit its proposals to the Florida Supreme Court.

402.16 EMERGENCY MEDICAL TREATMENT CLAIMS

~~INTRODUCTORY COMMENT~~

~~Instruction 402.16 addresses the provisions of *F.S.* 768.13(2)(b). It applies only to cases described in that statute or to cases in which there is a jury issue as to the applibility of the statute. Instruction 402.16 does not apply to cases involving patients capable of receiving treatment as non-emergency patients, even if treated in an emergency room.~~

~~Instruction 402.16a applies to cases in which there is a jury issue as to whether the statute applies. Instruction 402.16b applies to cases in which either the parties agree that the statute applies or the court has ruled that the statute applies as a matter of law.~~

~~The applicable part of instruction 402.16 should be preceded by instructions 402.1, 402.2, 402.3, and 403.6. Instruction 402.4 should not be given in the ordinary sequence as it is, to the extent applicable, incorporated in instruction 402.16. If there are any preliminary vicarious liability issues, instructions 402.9 and 402.10 should also be given.~~

~~No reported decision construes the legislative intent behind this section. Based upon the definition of "reckless disregard" in *F.S.*768.13(2)(b)3, the committee has concluded that the intent was to limit liability in civil actions for damages arising out of fact situations to which the statute applies to cases where something more than "simple" negligence is established. Therefore, the standard instructions dealing with "simple" negligence are not appropriate for civil damage actions to which the statute applies.~~

402.16a EMERGENCY MEDICAL TREATMENT
Jury Issue as to Application of *F.S.* 768.13(2)(b)

(1). Preliminary issue on application of statute:

The first issue for you to decide on (claimant's) **claim against** (defendant) **is whether** (claimant) **was being [cared for] [treated] under emergency circumstances.**

[Care] [treatment] is rendered under emergency circumstances when a [hospital] [physician] renders medical [care] [treatment] required by a sudden, unexpected situation or event that resulted in a serious medical condition demanding immediate medical attention, for which (claimant or decedent) **initially entered the hospital through its [emergency room] [trauma center], before** (claimant or decedent) **was medically stabilized and capable of receiving [care] [treatment] as a nonemergency patient.**

If the greater weight of the evidence does not support that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances then you shall proceed to decide whether** (defendant) **was negligent in [his] [her] [its] [care] [treatment] of** (claimant or decedent)**.**

However, if the greater weight of the evidence supports that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances, then you shall proceed to decide whether** (defendant) **acted in reckless disregard of the consequences in [his] [her] [its] [care] [treatment] of** (claimant or decedent)**.**

(2). Issues regarding negligence:

[If you find that (claimant's or decedent's) **[care] [treatment] was not being rendered under emergency circumstances,] the [next] issue for you to decide is whether** (defendant) **was negligent in** (describe conduct in question)**; and, if so, whether that negligence was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.**

"Negligence" is the failure to use reasonable care. Reasonable care on the part of a [hospital] [physician] is that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably careful [hospitals] [physicians]. Negligence on the part of a [hospital] [physician] is doing something that a reasonably careful

[hospital] [physician] would not do under like circumstances or failing to do something that a reasonably careful [hospital] [physician] would do under like circumstances.

If the greater weight of the evidence does not support this claim, then your verdict [on this claim] should be for (defendant).

[However, if the greater weight of the evidence does support (claimant's) claim on these issues, then your verdict [on this claim] should be for (claimant) and against (defendant).]

[However, if the greater weight of the evidence does support (claimant's) claim, then you should consider the defense(s) raised by (defendant).]

(3). Issues regarding reckless disregard:

[If you find that (claimant's or decedent's) [care] [treatment] was being rendered under emergency circumstances,] the [next] issue for you to decide is whether (defendant) acted with reckless disregard of the consequences in (describe conduct in question); and, if so, whether that reckless disregard was a legal cause of the [loss] [injury] [or] [damage] to(claimant, decedent or person for whose injury claim is made).]

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

If emergency circumstances have not been established by the greater weight of the evidence but the greater weight of the evidence supports (claimant's) claim of negligence, then [your verdict [on this claim] should be for (claimant) and against (defendant)] [you should consider the defense(s) raised by (defendant)].

(Proceed to instructions 402.14 and 402.15)

[However, if the greater weight of the evidence does not support (claimant's) claim of negligence, then your verdict [on this claim] should be for (defendant).]

On the other hand, if emergency circumstances have been established by the greater weight of the evidence and the greater weight of the evidence also supports (claimant's) **claim of reckless disregard of the consequences, then [your verdict [on this claim] should be for** (claimant) **and against** (defendant)**] [you should consider the defense(s) raised by**(defendant)**].**

(Proceed to instructions 402.14 and 402.15)

[However, if the greater weight of the evidence does not support (claimant's) **claim of reckless disregard of the consequences, then your verdict [on this claim] should be for** (defendant) **and against** (claimant)**.]**

402.16b EMERGENCY MEDICAL TREATMENT

(Describe conduct in question) **occurred in the course of [rendering] [or] [failing to render] emergency [care] [treatment] to** (claimant or decedent)**. The issue for you to decide is whether** (defendant) **acted with reckless disregard of the consequences in** (describe conduct in question)**; and, if so, whether that reckless disregard was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.**

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

If the greater weight of the evidence does not support (claimant's) **claim, then your verdict [on this claim] should be for**(defendant)**.**

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then your verdict [on this claim] should be for** (claimant) **and against** (defendant)**.]**

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then you should consider the defense(s) raised by** (defendant)**.]**

~~*(Proceed to instructions 402.14 and 402.15)*~~

~~NOTES ON USE FOR 402.16~~

~~1. Instruction 402.16a should be given when there is a jury issue as to whether the care or treatment was being rendered under emergency circumstances. An appropriate special verdict will be necessary to distinguish between a finding that the care or treatment was not being rendered under emergency circumstances, in which case the standard of care is negligence, and a finding that the care or treatment was being rendered under emergency circumstances, in which case the standard of care is reckless disregard of the circumstances. The verdict should contain instructions to guide the jury depending on their finding as to whether the care and treatment was or was not rendered under emergency circumstances. The burden of proof provisions of instruction 402.16a should also be modified to incorporate the instructions in the special verdict. See Appendix A, Model Jury Instructions.~~

~~2. Instruction 402.16b should be given when the parties agree that the statute applies or when the court has ruled it applies as a matter of law.~~

~~3. Negligence of a patient, which contributes to or causes the medical condition for which treatment is sought, is not available as a defense (as comparative negligence) to subsequent medical negligence which causes a distinct injury. See, *e.g.*, *Norman v. Mandarin Emergency Care Center, Inc.*, 490 So.2d 76 (Fla. 1st DCA 1986); *Matthews v. Williford*, 318 So.2d 480 (Fla. 2d DCA 1975); but see *Vandergrift v. Fort Pierce Memorial Hospital, Inc.*, 354 So.2d 398 (Fla. 4th DCA 1978). Rare circumstances may arise, involving a patient's negligence after emergency care or treatment has begun, in which comparative negligence is a legitimate issue. See generally *Whitehead v. Linkous*, 404 So.2d 377 (Fla. 1st DCA 1981).~~

~~4. Pending further developments in the law, the committee reserves the issue of whether comparative negligence is a defense when the reckless disregard standard is in effect. If the court decides that comparative negligence is a defense, then an instruction on simple negligence should be given.~~

~~5. "Reckless disregard," as defined and used in the context of *F.S.* 768.13(2)(b), does not appear to have the same meaning as reckless disregard when used in the context of standards for punitive damages. See Fla. Std. Jury Instr. (Civ.) 501.12 and 501.13.~~

The Florida Legislature amended *F.S.* 768.13(b)(3), effective September 15, 2003. For instructions applicable to causes of action arising prior to that date, see Appendix D to this

book.

The committee has attempted to write a plain English instruction for the amended statute, but has been unable to do so. The committee will consider an appropriate instruction once guidance is provided from decisions of the Florida appellate courts.

In regard to the application of *F.S.* 768.13(b)(3), see *Public Health Trust of Miami Dade County v. Rolle*, 88 So.3d 191 (Fla. 3d DCA 2011), and *University of Florida Board of Trustees v. Stone*, 92 So.3d 264 (Fla. 1st DCA 2012).

APPENDIX D

402.16 EMERGENCY MEDICAL TREATMENT CLAIMS INSTRUCTIONS FOR CAUSES OF ACTION ARISING PRIOR TO SEPTEMBER 15, 2003

INTRODUCTORY COMMENT

Instruction 402.16 addresses the provisions of *F.S.* 768.13(2)(b). It applies only to cases described in that statute or to cases in which there is a jury issue as to the applibility of the statute. Instruction 402.16 does not apply to cases involving patients capable of receiving treatment as non-emergency patients, even if treated in an emergency room.

Instruction 402.16a applies to cases in which there is a jury issue as to whether the statute applies. Instruction 402.16b applies to cases in which either the parties agree that the statute applies or the court has ruled that the statute applies as a matter of law.

The applicable part of instruction 402.16 should be preceded by instructions 402.1, 402.2, 402.3, and 403.6. Instruction 402.4 should not be given in the ordinary sequence as it is, to the extent applicable, incorporated in instruction 402.16. If there are any preliminary vicarious liability issues, instructions 402.9 and 402.10 should also be given.

No reported decision construes the legislative intent behind this section. Based upon the definition of "reckless disregard" in *F.S.*768.13(2)(b)3, the committee has concluded that the intent was to limit liability in civil actions for damages arising out of fact situations to which the statute applies to cases where something more than "simple" negligence is established. Therefore, the standard instructions dealing with "simple" negligence are not appropriate for civil damage actions to which the statute applies.

402.16a EMERGENCY MEDICAL TREATMENT — Jury Issue as to Application of *F.S.* 768.13(2)(b)

(1). Preliminary issue on application of statute:

The first issue for you to decide on (claimant's) **claim against** (defendant) **is whether** (claimant) **was being [cared for] [treated] under emergency circumstances.**

[Care] [treatment] is rendered under emergency circumstances when a [hospital] [physician] renders medical [care] [treatment] required by a sudden, unexpected situation or event that resulted in a serious medical condition demanding immediate medical attention, for which (claimant or decedent) **initially entered the hospital through its [emergency room] [trauma center], before** (claimant or decedent) **was medically stabilized and capable of receiving [care] [treatment] as a nonemergency patient.**

If the greater weight of the evidence does not support that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances then you shall proceed to decide whether** (defendant) **was negligent in [his] [her] [its] [care] [treatment] of** (claimant or decedent)**.**

However, if the greater weight of the evidence supports that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances, then you shall proceed to decide whether** (defendant) **acted in reckless disregard of the consequences in [his] [her] [its] [care] [treatment] of** (claimant or decedent)**.**

(2). Issues regarding negligence:

[If you find that (claimant's or decedent's) **[care] [treatment] was not being rendered under emergency circumstances,] the [next] issue for you to decide is whether** (defendant) **was negligent in** (describe conduct in question)**; and, if so, whether that negligence was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.**

"Negligence" is the failure to use reasonable care. Reasonable care on the part of a [hospital] [physician] is that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably careful [hospitals] [physicians]. Negligence on the part of a [hospital] [physician] is doing something that a reasonably careful [hospital] [physician] would not do under like circumstances or failing to do something that a reasonably careful [hospital] [physician] would do under like

circumstances.

If the greater weight of the evidence does not support this claim, then your verdict [on this claim] should be for (defendant).

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then your verdict [on this claim] should be for** (claimant) **and against** (defendant).**]**

[However, if the greater weight of the evidence does support (claimant's) **claim, then you should consider the defense(s) raised by** (defendant).**]**

(3). Issues regarding reckless disregard:

[If you find that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances,] the [next] issue for you to decide is whether** (defendant) **acted with reckless disregard of the consequences in** (describe conduct in question)**; and, if so, whether that reckless disregard was a legal cause of the [loss] [injury] [or] [damage] to**(claimant, decedent or person for whose injury claim is made).**]**

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

If emergency circumstances have not been established by the greater weight of the evidence but the greater weight of the evidence supports (claimant's) **claim of negligence, then [your verdict [on this claim] should be for** (claimant) **and against** (defendant)**] [you should consider the defense(s) raised by** (defendant)**].**

(Proceed to instructions 402.14 and 402.15)

[However, if the greater weight of the evidence does not support (claimant's) **claim of negligence, then your verdict [on this claim] should be for** (defendant).**]**

On the other hand, if emergency circumstances have been established by the

greater weight of the evidence and the greater weight of the evidence also supports (claimant's) **claim of reckless disregard of the consequences, then [your verdict [on this claim] should be for** (claimant) **and against** (defendant)] **[you should consider the defense(s) raised by**(defendant)].

(Proceed to instructions 402.14 and 402.15)

[However, if the greater weight of the evidence does not support (claimant's) **claim of reckless disregard of the consequences, then your verdict [on this claim] should be for** (defendant) **and against** (claimant).]

402.16b EMERGENCY MEDICAL TREATMENT

(Describe conduct in question) **occurred in the course of [rendering] [or] [failing to render] emergency [care] [treatment] to** (claimant or decedent). **The issue for you to decide is whether** (defendant) **acted with reckless disregard of the consequences in** (describe conduct in question); **and, if so, whether that reckless disregard was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made).

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

If the greater weight of the evidence does not support (claimant's) **claim, then your verdict [on this claim] should be for**(defendant).

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then your verdict [on this claim] should be for** (claimant) **and against** (defendant).]

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then you should consider the defense(s) raised by** (defendant).]

(Proceed to instructions 402.14 and 402.15)

NOTES ON USE FOR 402.16

1. Instruction 402.16a should be given when there is a jury issue as to whether the care or treatment was being rendered under emergency circumstances. An appropriate special verdict will be necessary to distinguish between a finding that the care or treatment was not being rendered under emergency circumstances, in which case the standard of care is negligence, and a finding that the care or treatment was being rendered under emergency circumstances, in which case the standard of care is reckless disregard of the circumstances. The verdict should contain instructions to guide the jury depending on their finding as to whether the care and treatment was or was not rendered under emergency circumstances. The burden of proof provisions of instruction 402.16a should also be modified to incorporate the instructions in the special verdict. See Appendix A, Model Jury Instructions.

2. Instruction 402.16b should be given when the parties agree that the statute applies or when the court has ruled it applies as a matter of law.

3. Negligence of a patient, which contributes to or causes the medical condition for which treatment is sought, is not available as a defense (as comparative negligence) to subsequent medical negligence which causes a distinct injury. See, *e.g., Norman v. Mandarin Emergency Care Center, Inc.*, 490 So.2d 76 (Fla. 1st DCA 1986); *Matthews v. Williford*, 318 So.2d 480 (Fla. 2d DCA 1975); but see *Vandergrift v. Fort Pierce Memorial Hospital, Inc.*, 354 So.2d 398 (Fla. 4th DCA 1978). Rare circumstances may arise, involving a patient's negligence after emergency care or treatment has begun, in which comparative negligence is a legitimate issue. See generally *Whitehead v. Linkous*, 404 So.2d 377 (Fla. 1st DCA 1981).

4. Pending further developments in the law, the committee reserves the issue of whether comparative negligence is a defense when the reckless disregard standard is in effect. If the court decides that comparative negligence is a defense, then an instruction on simple negligence should be given.

5. "Reckless disregard," as defined and used in the context of *F.S.* 768.13(2)(b), does not appear to have the same meaning as reckless disregard when used in the context of standards for punitive damages. See Fla. Std. Jury Instr. (Civ.) 501.12 and 501.13.

APPENDIX C

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
Tampa, FL
Hillsborough County Courthouse

March, 4, 2010 (1:00 p.m. to 5:00 p.m.)
March 5, 2010 (8:30 a.m. to noon)

Emergency Medical Services

Edwards informed the Committee that since the 1980s, the legislature has been tinkering with the standards for medical malpractice emergency treatment. The subcommittee has changed the instructions in response. The subcommittee recommends keeping the old instructions in the book as the new book is published, since some cases still will be tried under the old standards.

The Committee reviewed the reckless disregard instruction, and noted the need for a standard verb tense throughout. The Committee further discussed whether to use the "failure to use reasonable care" language, and whether basic negligence or professional negligence is applicable. The Committee discussed what the instruction is attempting to define - - conduct or risk.

Based on all of the outstanding issues and questions, it was decided the subcommittee will put a notice in the book that the statute has been amended, and go back to continue working on these new instructions. Ingram, Roth, Boyer, Bagley, Kest, and Lytal joined the subcommittee. Edwards will Chair the subcommittee.

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
Orlando, FL
Orange County Courthouse

July 8, 2010 (1:00 p.m. to 5:00 p.m.)
July 9, 2010 (8:30 a.m. to noon)

EMERGENCY MEDICAL SERVICES

The Committee discussed this instruction and the best way to draw practitioners' attention to the fact that the instruction is for pre-2003 cases, and that until a new instruction comes out, the existing instruction will need to be modified for later cases.

Gunn and Jennings proposed a colored insert and a posting on the website. The subcommittee will circulate a new note on use and proposed notice (to alert practitioners to the issue) at the next meeting. Anything drafted by the subcommittee in advance should be circulated to the full Committee.

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
West Palm Beach, FL
Palm Beach County Courthouse
October 21, 2010 (1:00 p.m. to 5:00 p.m.)
October 22, 2010 (8:30 a.m. to noon)

EMERGENCY MEDICAL SERVICES:

Edwards reported that the subcommittee will soon begin to consider whether to amend instruction 402.16 on emergency medical treatment are needed in light of the 2003 amendments to the Medical Malpractice Act. At the last meeting, the Committee decided to add a note on use to instruction 402.16. The subcommittee suggests revising the wording of the note slightly to state: "This instruction is based on the pre-2003 version of the emergency medical treatment statute."

After the last meeting, the website subcommittee posted this note on the index to jury instructions on the supreme court website. The Clerk of the Court, Tom Hall, asked the Committee to remove the note because it had not been formally approved by the Court. The note was removed.

Barton is planning to meet with Clerk Hall in November to discuss administrative issues. **Barton will discuss with Clerk Hall whether there is another way that the Committee can use the supreme court website to alert the public when a new statute or case calls an instruction into question. Gunn directed the subcommittee to present a draft instruction in February.**

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

Tallahassee, FL
First District Court of Appeal
February 10, 2011 (1:00 p.m. to 5:00 p.m.)
February 11, 2011 (8:30 a.m. to 12:00 p.m)

EMERGENCY MEDICAL SERVICES

Edwards noted the instructions on emergency medical services (402.16) have not been updated since the 2003 amendments to the Medical Malpractice Act. The specific issue is the language in section 768.13, Florida Statutes, on "reckless disregard" and how the instructions will define negligence in this context. Edwards stated the statute uses the term "negligence," which is defined in the proposed instructions (p. 75 of the materials). The Committee generally agreed that negligence should be defined in this context.

Gertz stated the proposed instructions are too long. Artigliere noted they need to be that way per the statute, similar to the long reasonable doubt instruction in criminal cases. Russo suggested breaking up the sentence as follows ". . . life or health of another. An unreasonable risk is a risk that is . . ."

Farmer noted the existing body of Florida law concerning the term "reckless disregard" in the libel/slander context and suggested it may prove useful here.

Barton asked the Professional Malpractice subcommittee (Edwards as chair) to revise the proposed instructions and to then re-circulate it to the Committee. Barton noted that the Committee could approve the instruction before the next Committee meeting if the subcommittee thinks the instruction is good and does not need further discussion.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

Tampa, FL
George Edgecomb Courthouse
July 14, 2011 (1:00 p.m. to 5:00 p.m.)
July 15, 2011 (8:30 a.m. to 12:00 p.m.)

EMERGENCY MEDICAL SERVICES

Edwards explained that Instructions 402.16a(3) and 402.16b need to be revised based on the amendment to section 768.13(b)(3), Florida Statutes, and its definition of "reckless disregard." The problem encountered in revising the instruction is that the language of the amended statute differs from the language used in other standard instructions. Roth

noted that, per the amended statute, the applicable standard of care for emergency circumstances is greater than negligence but less than gross negligence. The problem is how to define this in an instruction. The Subcommittee had discussed two different proposals for revising the instruction (p. 239 of the materials).

Lytal stated the Committee should not interpret the statute and define it in an instruction before the courts construe it. No Committee member was aware of a trial or appellate opinion on the amended statute. Ingram stated the Committee should draft something to comply with the amended statute; the Committee cannot ignore the fact that the Legislature has provided a definition of "reckless disregard." Kest noted that the instruction will vary from case to case if the Committee does not prepare a standard one.

Rosenbloum, Ingram, Kest, and Costello suggested using the statutory language in the instruction. Barton suggested doing something similar to what was done with the punitive damages instructions, providing separate instructions for the old and amended statute, with the instruction for the amended statute using the statutory language. Costello stated that when she was on the criminal instructions committee, they had to address ambiguous statutes all the time and simply cited the statute. Roth disagreed with using statutory language as the standard jury instruction. Artigliere similarly stated that statutes are not jury instructions. Artigliere and Lytal believed the Committee should tell the Supreme Court it could not come up with an instruction and just cite the statute.

Roth stated that the "unreasonable risk of injury" language in the Subcommittee's two proposals was a definition of negligence, and the statute says more than negligence is needed to find a violation of the standard of care. Campo stated his belief that jurors will think they understand this situation and can make the appropriate findings.

Barton asked the Subcommittee to compare the old and amended statutes, to retool those parts of Instructions 402.16a and 402.16b that it can, and to just cite the statute for the definition of reckless disregard. Barton noted that the introductory comment of the current standard instruction needs to be changed, as well.

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

Coral Gables, FL
Office of DeMahy Labrador Drake Victor Payne & Cabeza
October 20, 2011 (1:00 p.m. to 5:00 p.m.)
October 21, 2011 (8:30 a.m. to 12:00 p.m.)

Instruction 402.16

Barton noted the receipt of an email from Barbara Green on Instruction 402.16 regarding emergency medical treatment. Green believed the burden of proof on the Good Samaritan defense should be on the defendant as an affirmative defense, citing a recent Third District Court of Appeal decision in *Public Health Trust of Miami-Dade County v. Rolle*, 2011 WL 4467382 (Fla. 3d DCA Sept. 28, 2011). Roth noted that the new case may help the Committee fashion an instruction in an area that has been difficult because of the pertinent statute. Roth noted that it is pled as an affirmative defense in practice. **Barton stated the issue raised by Green's email should be referred to the professional malpractice subcommittee. Barton will also forward on to the subcommittee another short email he just received from John Williams regarding the confusing statute and some suggestions.**

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

Orlando, FL
Orange County Courthouse
March 8, 2012 (1:00 p.m. to 5:00 p.m.)
March 9, 2012 (8:30 a.m. to 12:00 p.m.)

Emergency medical treatment

Roth described the issue with the definition of reckless disregard for emergency medical treatment in section 768.13(b)(3), Florida Statutes, and how its wording does not appear consistent with Florida tort law. The legislature's intent was to make the plaintiff show something more than simple negligence. Despite trying, the subcommittee cannot craft a plain English instruction without rewriting the statute. Artigliere agreed. Even though he is reluctant to tell the Supreme Court that the Committee cannot craft an instruction, this is one of those rare situations where the Committee should do so.

Ingram observed that the statutory language is what is being used in current trials – with the focus on "something greater than negligence." Hinkle stated that it is the "risk" that has to be greater than negligence, which is not right.

Vargas noted that this situation was addressed in 2003 when the statute came out, and the Committee came to the same conclusion then – that it could not make sense of the statute. Vargas and Roth both believed the Committee must tell the Supreme Court that the current instruction should be withdrawn with a new note directing the reader to the statute. Barton questioned whether the Committee should publish the withdrawal of the current instruction and request comments. Vargas and Lang believed that was a good idea. Roth believed the Committee should make clear that not only is the current instruction wrong, but that this is also a burden on the

defendant. Rosenbloum was not sure the instruction should be completely withdrawn and thereby eliminate its framework. Barnett believed removing it with a note on use is sufficient. Kest noted problems with new judges that are not experienced and want to follow the standards unless there is a note making it clear that it may not be appropriate in certain circumstances. Kest questioned whether the Committee could recommend withdrawal without a replacement; Barton believed the Committee could do so. Roth noted that total withdrawal may be problematic for pipeline cases, which should be made clear in the report and notes. Artigliere suggested two new notes: (1) this applies to pre-2003 cases, and post-2003 the law changed and see the statute; and (2) see the *Rolle* case. Ingram believed all of the notes on use for this standard need to be revisited. Artigliere believed the new note should be prominent since it is about a change in the law. Farmer believed the bench and Bar will want to know why no standard is provided on the new statute, so the Committee should say it is unable to state what the law is under this statute until further guidance is obtained from appellate decisions and, in the interim, point the reader the statute. **Barton asked Roth and the subcommittee to draft the appropriate notes on use, and he suggested something similar to how punitive damages are dealt with (pre-1999 and post-1999).** Burlington suggested saying the statute cannot be translated to plain English without doing injustice to the statute. Burlington noted that the statute is what he has used as the instruction in such cases. Farmer believed the statute is incoherent. Ingram noted that there is a current introduction to this section of the instructions (402.16) that discusses the issue of the definition of reckless disregard, and that is what should be updated now. Roth will attempt to carefully craft the note to make the problem clear in a diplomatic way.

Roth noted that Sales prepared a draft revision to the instruction but the subcommittee believed it was not enough to meet the statute. Roth believed the Supreme Court should be told that the Committee is unable to come up with a plain language instruction based on the new statute. He further believed an alert should be provided that the current instruction is wrong and that it should be made clear that it is an affirmative defense and that the burden is accordingly on the defendant, with the plaintiff having the ability to rebut it.

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

Tampa, FL
Hillsborough County Edgecomb Courthouse
July 12, 2012 (1:00 p.m. to 5:00 p.m.)
July 13, 2012 (8:30 a.m. to 12:00 p.m.)

Emergency Medical Services

Roth reported that the Committee had determined to tell the Florida Supreme Court that the Committee could not develop an instruction addressing section 768.13(b)(3), Florida Statutes. Roth stated the subcommittee developed two proposals (pp. 32-33 of the materials) for a Note on Use for 402.16:

a. This statute was amended in 2003 and the following instructions should be used only in cases which the statute, prior to the amendments, apply. The Standard Jury Instruction Committee has considered the statute as amended over a considerable length of time. The Committee has concluded that it cannot draft a plain English instruction pertaining to §768.13(2)(b)(3) without interpreting legislative intent and conflicting with recognize principles of tort laws adopted by Florida courts. The Committee will again consider an appropriate instruction for the statute once guidance is available from decisions of the Florida appellate courts.

b. Florida Statute §768.13(b)(3) was amended in 2003. The Committee has attempted to write a plain English instruction which would represent a correct statement of the law. It cannot do so without rendering an interpretation of legislative intent which is beyond the purview of the Committee.

Rosenbloum does not agree with saying the Committee cannot make sense of the statute. Rosenbloum suggested a Note that says the statute has been amended and that an instruction will be developed after appellate guidance. Roth rephrased Rosenbloum's thought as a Note that says this instruction does not apply after the effective date of the new statute (2003) and a new instruction for the amended statute will be provided when there is appellate guidance. Artigliere noted that the Committee has previously stated something like, "pending further development of the law, the Committee has not developed an instruction for cases under the new statute." Lytal believes the Committee should at least say in its report to the Florida Supreme Court that it cannot make sense of the statute; Rosenbloum agreed, but stated his belief that it should not be repeated in a Note on Use. Lang said the subcommittee's proposals could go in the report to the Court. Roth suggested using the second proposal above as the statement to include in the report to the Court, and use a revised version of the first proposal as the Note on Use using its first sentence. Hinkle believed readers should know why there is no standard instruction, in the form of an appropriate Note on Use, especially because there is an instruction for the pre-2003 version of the statute. Roth noted that the statute is currently being used as the instruction, which he believes is worthless given the language of the statute. Artigliere does not agree with the proposed language in the Notes about not discerning legislative intent, as that is not a proper use of a Note on Use; he said they are fine to report to the Florida Supreme Court. Jennings pointed out that there is an Introductory Comment to 402.16. Its last paragraph addresses the issues being discussed currently by the Committee, which have apparently been around for some time. Roth noted that something must be done to inform readers that the current

instruction does not apply for causes of action after the statute was amended in 2003. Dukes advocated a simple sentence so stating, such as the first sentence of the first proposal above. Ingram asked whether to make that statement in a Note on Use or in the Introductory Comment. Lytal believed that it should be a Note on Use. Jennings stated that there is a current Note on Use to the instruction that says the Committee reserves the issue of whether comparative negligence is a defense when the reckless disregard standard is in effect.

Roth noted there are two issues: (1) informing readers that the statute was amended; and (2) telling the Florida Supreme Court that the statute cannot be construed and an instruction fashioned. Roth then noted a third issue as to whether the burden of proof is on the defendant and asked if anything needed to be done about that. The *Public Health Trust of Miami-Dade County v. Rolle* case was the first to hold it was an affirmative defense. Rosenbloum asked if the current instruction wrongly places the burden on the plaintiff; Roth believed it does. Ingram observed that, unlike other affirmative defenses, this one concerns the standard of care, which is usually the plaintiff's burden. Artigliere believed the plaintiff still has the burden, but it raises the bar the plaintiff must prove if the defendant shows the requisite conditions exist. Dukes does not believe there is a need for a Note about the burden of proof issue relating to the old instruction.

Sales asked if reckless disregard is the real issue in cases where this statute applies. Ingram said that is usually not the issue, as it would admit negligence; they focus instead on whether it was emergent or the patient has been stabilized.

Barton noted the parallel to the punitive damages instructions, where the old instructions were put in an appendix, and asked if there was a need to do that here. Sales believes there is no need for the old instruction. Barton suggested a pre-2003 instruction in a separate place and a placeholder for the post-2003 instruction with no substantive instruction provided yet. Barton suggested an Introductory Comment explaining why there is no current instruction. Rosenbloum noted that Barton's proposal does not address the possible burden of proof problem if people use the pre-2003 version as a model for the post-2003 version where no standard instruction has been provided. Barton suggested a Note on Use to address that, citing the *Rolle* case.

Lytal suggested using the first sentence in Roth's first proposal as a Note on Use and using the second proposal as the Introductory Comment to the instruction. Barton believed it should all be viewed in context. **Roth will prepare a revised proposal, get subcommittee approval, and then circulate to the Committee for approval (maybe before the next meeting).** Roth will work the burden of proof issue into the proposed Introductory Comment. Ingram thinks there is no need to say "burden of proof" if it is already clear it is an affirmative defense and *Rolle* is cited. Ingram also agreed with Artigliere that once the defendant establishes it is an emergent situation, then the plaintiff has the burden of proving the higher reckless disregard standard.

MINUTES

Coral Gables, FL
Office of Kozyak Tropin & Throckmorton
(Hosted by Neal Roth)
March 7, 2013 (1:00 p.m. to 5:00 p.m.)
March 8, 2013 (8:30 a.m. to 12:00 p.m.)

PROFESSIONAL MALPRACTICE

Roth reported that the subcommittee is trying to develop what he referred to as a "placeholder" for the instruction on emergency medical services. Roth proposed alternatives, including referring to the fact that the statute was amended, that the old instruction is in an appendix, and that the Committee could not come up with a new instruction. Four versions (pp. 89-90 of the materials) are proposed:

Emergency Medical Services – No. 1

The Florida Legislature amended §768.13(b)(3), effective September 15, 2003. For instructions applicable to causes of action arising prior to that date, see Appendix ____ to this book.

The Committee has attempted to write a plain English instruction for the amended statute, but has been unable to do so. The Committee will consider an appropriate instruction once guidance is provided from decisions of the Florida appellate courts.

In regard to the application of §768.13(b)(3), see *Public Health Trust of Miami Dade County v. Rolle*, 88 So.3d 191 (Fla. 3d DCA 2011).

Emergency Medical Services – No. 2

The Florida Legislature amended §768.13(b)(3), effective September 15, 2003. For instructions applicable to causes of action arising prior to that date, see Appendix ____ to this book.

The Committee has attempted to write a plain English instruction for the amended statute, but has been unable to do so. The Committee will consider an appropriate instruction once guidance is provided from decisions of the Florida appellate courts.

In regard to the application of §768.13(b)(3), see *Public Health Trust of Miami Dade County v. Rolle*, 88 So.3d 191 (Fla. 3d DCA 2011) and *University of Florida Board of Trustees v. Stone*, 92 So.3d 264 (Fla. 1st DCA 2012).

Emergency Medical Services – No. 3

The Florida Legislature amended §768.13(b)(3), effective September 15, 2003. For instructions applicable to causes of action arising prior to that date, see Appendix ____ to this book.

The Committee has attempted to write a plain English instruction for the amended statute, but has been unable to do so without interpreting legislative intent. The Committee will consider an appropriate instruction once guidance is provided from decisions of the Florida appellate courts.

In regard to the application of §768.13(b)(3), see *Public Health Trust of Miami Dade County v. Rolle*, 88 So.3d 191 (Fla. 3d DCA 2011) and *University of Florida Board of Trustees v. Stone*, 92 So.3d 264 (Fla. 1st DCA 2012).

Emergency Medical Services – No. 4

The Florida Legislature amended §768.13(b)(3), effective September 15, 2003. For instructions applicable to causes of action arising prior to that date, see Appendix ____ to this book.

The Committee will consider an appropriate instruction once guidance is provided from decisions of the Florida appellate courts.

In regard to the application of §768.13(b)(3), see *Public Health Trust of Miami Dade County v. Rolle*, 88 So.3d 191 (Fla. 3d DCA 2011) and *University of Florida Board of Trustees v. Stone*, 92 So.3d 264 (Fla. 1st DCA 2012).

Proposal 2 adds a citation to the *University of Florida* case, which Roth thinks is an instructive case. Proposal 3 adds a phrase about inability to interpret legislative intent. Proposal 4 replaces the second paragraph with a sentence that the Committee would reconsider after guidance. Roth stated that the consensus was Proposal 3 makes the most sense, but Sales suggested a rewrite of the second paragraph (p. 91 of the materials):

> The Committee has attempted to write a plain English instruction for the amended statute, but has been unable to do so without attempting to discern the intent of the Legislature, which is not stated. The Committee will consider an appropriate instruction once guidance is provided from decisions of the Florida appellate courts.

Roth believes Proposal 3, as is or with the modified second paragraph, is the best option.

Lang asked if the statute and its history were silent on legislative intent, and Sales said the statute is silent on intent. Lytal voted for the original Proposal 3. Roth reiterated that the note would be a "placeholder" to go where the current instruction is located with "reserved" in place of the current instruction. Jennings asked about the Appendix to the instructions and whether to locate the old instruction there. Roth referenced the old punitive damage instruction in the Appendix and suggested something similar for this old instruction. Boyer asked why this needs to go in the book. Vargas said move it to the back and explain that is

because the statute has been amended and using plainer language like "unable to determine legislative intent." Burlington is worried about criticism of the legislature, even if justified. Lytal noted a concern about the Supreme Court possibly sending it back if the Committee does not say it cannot develop an instruction. Roth noted the need for something to be done here because there is an outdated instruction based on an old statute. Like how punitive damages appear in the book, there is a note to go to the old instruction in the back of the book and then explain that there is no current instruction because the Committee cannot interpret legislative intent in order to develop a standard instruction. Roth said Proposal 2 does not take a shot at the Legislature. Boyer voted for Proposal 4. Costello believed that Proposal 4 made it appear like the Committee did not try. DeMahy believes the Committee should note that it has tried to develop something but cannot without case law guidance. **Roth moved for Proposal 2, Russo seconded, unanimously approved:**

> **The Florida Legislature amended §768.13(b)(3), effective September 15, 2003. For instructions applicable to causes of action arising prior to that date, see Appendix ____ to this book.**
>
> **The Committee has attempted to write a plain English instruction for the amended statute, but has been unable to do so. The Committee will consider an appropriate instruction once guidance is provided from decisions of the Florida appellate courts.**
>
> **In regard to the application of §768.13(b)(3), see *Public Health Trust of Miami Dade County v. Rolle*, 88 So.3d 191 (Fla. 3d DCA 2011) and *University of Florida Board of Trustees v. Stone*, 92 So.3d 264 (Fla. 1st DCA 2012).**

Barton asked Committee members in organizations with legislative committees to urge action on this statute.

APPENDIX D

"Jeff Fulford"
<jeff@fulfordlaw.com>
02/19/2010 01:29 PM

To "'Jeff Fulford'" <jeff@fulfordlaw.com>, "Dick Caldwell" <dcaldwell@rumberger.com>, "James Barton" <bartonjm@fljud13.org>, "Jodi @ TFB "
cc
bcc
Subject RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

Jodi
You asked that I forward you the final version to include in materials. This seems to be the last version, since I have not seen any further comments. I have included all suggested language and format, and think this will be the version to submit to the full committee. Tom has agreed to present this since I won't be attending this mtg. Thanks to all for your input and help.
Jeff

From: Jeff Fulford [mailto:jeff@fulfordlaw.com]
Sent: Thursday, February 18, 2010 11:49 AM
To: Dick Caldwell; James Barton; Jodi @ TFB ; Joe Lang ; Larry Stewart; Ralph Artigliere; Sammy Cacciatore; Tom Edwards; Tracy Gunn; Tyrie Boyer
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

Following Larry's suggestions, I have included his suggestions within the Third Draft below. I hope we are getting close.
Jeff

From: Larry Stewart [mailto:lsstewart@stfblaw.com]
Sent: Wednesday, February 17, 2010 6:12 PM
To: Jeff Fulford; Ralph Artigliere; Tom Edwards; tgunn@gunnappeals.com
Cc: dcaldwell@rumberger.com; bartonjm@fljud13.org; jjenning@flabar.org; jlang@carltonfields.com; sammy@nancelaw.com; twboyer@coj.net
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

I think that the proposal:

> "and that risk is substantially greater than the risk created by negligent conduct or the failure to use reasonable care."

is redundant since negligent conduct is the failure to reasonable care. I would therefore suggest deleting the term "negligent conduct." A more precise way to phrase it would be to follow Tom's suggestion, without "merely", since it incorporates the definitional language. We also need to cover "acting", hence the brackets and additional language:

> "and that risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar

and reasonably careful [physicians] [hospitals] [health care providers]."

I think this gets the concept across that the conduct must be more than just negligence, which is the point of the law.

From: Jeff Fulford [mailto:jeff@fulfordlaw.com]
Sent: Wednesday, February 17, 2010 6:15 PM
To: Dick Caldwell; James Barton; Jodi @ TFB ; Joe Lang ; Larry Stewart; Ralph Artigliere; Sammy Cacciatore; Tom Edwards; Tracy Gunn; Tyrie Boyer
Subject: FW: Jury Instruction Error re: Emergency Medical Services FS 768.13

Following these suggestions, I come up with this latest proposed version: (Third draft)

1- add definition of professional negligence to 9.1d (existing book) (Tom's version below);
2- add definition of professional negligence to 16b (new book) (Tom's version below);
3- prof negligence definition not needed in 9.2i or 16a since the definition is included in preceding paragraphs therein;
4- the term "merely" was included in the additions to 9.1d and 16b, but some members question if needed??;
5- the 'reckless disregard' definition in 9.2i and 16a was changed to insert the plain language we discussed;
6- We should also address to whom we should identify in the instructions. The statute deals with '**any health care provider**' (FS 768.13(2)(b)1&3). However, the current instructions state "(defendant hospital, hospital employee, physician)". The new book instructions change the categories to "[hospital] [physician]". I think we should consider altering both versions (current and proposed books) to conform to the statute and include "[hospital] [physician] [health care provider]". This suggestion is now included in the Third Draft below.
7- Larry's comments (above) are incorporated within the instructions below.

Thoughts?

THIRD DRAFT
I. Proposed amended instruction for current book:
FSJI at Misc MI 9.1d & 9.2i

MI 9.1
EMERGENCY MEDICAL TREATMENT

NO JURY ISSUE AS TO
APPLICABILITY OF § 768.13(2)(b) (FS 2003)

d. "Reckless disregard" defined:

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the

life or health of another, and that risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers].

[add these 2 notes on use for MI 9.1]

4. The statutory definition of 'reckless disregard' was amended, effective 9-15-03. The legislative intent was stated as follows, to-wit: "It is the intent of the Legislature to apply the provisions of this act to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution, except that the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is mailed on or after the effective date of this act (Sept. 15, 2003)." There may be an issue regarding the 'retroactive application' of this amendment, but the Committee takes no position on this issue pending resolution by the Courts.

5. For causes of actions which accrued prior to the effective date of the amendment of the definition of 'reckless disregard' (9-15-03), the prior instruction read as follows, to-wit:

MI 9.1 ***d.*** ***"Reckless disregard" defined:***

A [hospital] [(identify hospital em ployee providing patient care)] **[physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].**

MI 9.2
EMERGENCY MEDICAL TREATMENT

JURY ISSUE AS TO APPLICABILITY OF § 768.13(2)(b) (FS 2003)

i. ***"Reckless disregard" defined:***

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk is substantially greater than the risk created by the failure to use reasonable care.

[add these 2 notes on use for MI 9.2]

6. The statutory definition of 'reckless disregard' was amended, effective 9-15-03. The legislative intent was stated as follows, to-wit: "It is the intent of the Legislature to apply the provisions of this act to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution, except that the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is

mailed on or after the effective date of this act (Sept. 15, 2003)." There may be an issue regarding the 'retroactive application' of this amendment, but the Committee takes no position on this issue pending resolution by the Courts.

7. For causes of actions which accrued prior to the effective date of the amendment of the definition of 'reckless disregard' (9-15-03), the prior instruction read as follows, to-wit:

MI 9.2 *i.* *"Reckless disregard" defined:*

A [hospital] [(identify hospital em ployee providing patient care)] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

I. Proposed amended instruction for 'new book':

FSJI at 402.16a (3) [Note - remove current 2nd paragraph and insert this new definition]

"A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk is substantially greater than the risk created by the failure to use reasonable care."

FSJI at 402.16b [Note - remove current 2nd paragraph and insert this new definition]

"A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers]. "

[add these 2 notes on use for 402.16]

6. The statutory definition of 'reckless disregard' was amended, effective 9-15-03. The legislative intent was stated as follows, to-wit: "It is the intent of the Legislature to apply the provisions of this act to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution, except that the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is mailed on or after the effective date of this act (Sept. 15, 2003)." There may be an issue regarding the 'retroactive application' of this amendment, but the Committee takes no position on this issue pending resolution by the Courts.

7. For causes of actions which accrued prior to the effective date of the amendment of the definition of 'reckless disregard' (9-15-03), the prior instruction read as follows, to-wit:

MI 9.2 *i.* *"Reckless disregard" defined:*

A [hospital] [(identify hospital em ployee providing patient care)] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have

known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

END

Jeff:

My suggestion is we do two versions, one for 16a (brief w/o definition) and one for 16b including the definition right in the sentence as Tom suggested. My theory is that if we include a separate definition in 16b, there can be a distracting disconnect for jurors mentally processiong the instruction if we define negligence as a standard that is not the ER standard. We may want to get Alan Campo involved early on this one.

Ralph Artigliere
skywayra@tds.net
706-632-6035
706-851-4121
----- Original Message -----
From: "Jeff Fulford" <jeff@fulfordlaw.com>
To: "'Ralph Artigliere'" <skywayra@tds.net>; "'Tom Edwards'" <tse@edwardsragatz.com>; <lsstewart@stfblaw.com>; <tgunn@gunnappeals.com>
Cc: <dcaldwell@rumberger.com>; <bartonjm@fljud13.org>; <jjenning@flabar.org>; <jlang@carltonfields.com>; <sammy@nancelaw.com>; <twboyer@coj.net>
Sent: Wednesday, February 17, 2010 1:52 PM
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

The definition of professional negligence is already included in the instruction of 402.16a (when there is an issue of whether emerg med care is involved); but is not included in the 402.16b version (dealing with a case where the parties agree or the court has ruled that emerg med services were definitely involved).

So, I am thinking we don't need to restate the definition of professional negligence in the 'reckless disregard'aendment in 16a. However, we probably do need to include a version in 16b.

-----Original Message-----

From: Ralph Artigliere [mailto:skywayra@tds.net]
Sent: Wednesday, February 17, 2010 1:29 PM
To: Tom Edwards; jeff@fulfordlaw.com; lsstewart@stfblaw.com; tgunn@gunnappeals.com
Cc: dcaldwell@rumberger.com; bartonjm@fljud13.org; jjenning@flabar.org; jlang@carltonfields.com; sammy@nancelaw.com; twboyer@coj.net
Subject: Re: Jury Instruction Error re: Emergency Medical Services FS 768.13

Tom,

I liked your inclusion of the definition, which is why I brought it up again.

Ralph Artigliere
skywayra@tds.net
706-632-6035
706-851-4121
----- Original Message -----
From: "Tom Edwards" <tse@edwardsragatz.com>
To: <skywayra@tds.net>; <jeff@fulfordlaw.com>; <lsstewart@stfblaw.com>; <tgunn@gunnappeals.com>
Cc: <dcaldwell@rumberger.com>; <bartonjm@fljud13.org>; <jjenning@flabar.org>; <jlang@carltonfields.com>; <sammy@nancelaw.com>; <twboyer@coj.net>
Sent: Wednesday, February 17, 2010 1:03 PM
Subject: Re: Jury Instruction Error re: Emergency Medical Services FS 768.13

> That was my 2nd proposal - I drew the definitions from existing
> professional negligence inst
>
> Thomas S. Edwards, Jr.
> Edwards & Ragatz, P.A.
> Personal Injury and Commercial Trials
> 501 Riverside Ave., Suite 601, Jacksonville, Florida 32202
> Phone 904.399.1609/800.366.1609/Fax 904.399.1615
> Email: tse@edwardsragatz.comWeb Site: edwardsragatz.com
>
> ----- Original Message -----
> From: Ralph Artigliere <skywayra@tds.net>
> To: Jeff Fulford <jeff@fulfordlaw.com>; Tom Edwards; 'Larry Stewart'
> <lsstewart@stfblaw.com>; 'Tracy Gunn' <tgunn@gunnappeals.com>
> Cc: 'Dick Caldwell' <dcaldwell@rumberger.com>; 'James Barton'
> <bartonjm@fljud13.org>; 'Jodi @ TFB ' <jjenning@flabar.org>; 'Joe Lang '
> <jlang@carltonfields.com>; 'Sammy Cacciatore' <sammy@nancelaw.com>; Tyrie
> Boyer <twboyer@coj.net>
> Sent: Wed Feb 17 12:54:25 2010
> Subject: Re: Jury Instruction Error re: Emergency Medical Services FS
> 768.13
>
> If not otherwise defined, we will need to define physician reasonable
> care.

>
> Ralph Artigliere
> skywayra@tds.net
> 706-632-6035
> 706-851-4121
> ----- Original Message -----
> From: "Jeff Fulford" <jeff@fulfordlaw.com>
> To: "'Ralph Artigliere'" <skywayra@tds.net>; "'Tom Edwards'"
> <tse@edwardsragatz.com>; "'Larry Stewart'" <lsstewart@stfblaw.com>;
> "'Tracy
> Gunn'" <tgunn@gunnappeals.com>
> Cc: "'Dick Caldwell'" <dcaldwell@rumberger.com>; "'James Barton'"
> <bartonjm@fljud13.org>; "'Jodi @ TFB '" <jjenning@flabar.org>; "'Joe Lang
> '"
> <jlang@carltonfields.com>; "'Sammy Cacciatore'" <sammy@nancelaw.com>;
> "Tyrie
> Boyer " <twboyer@coj.net>
> Sent: Wednesday, February 17, 2010 12:48 PM
> Subject: RE: Jury Instruction Error re: Emergency Medical Services FS
> 768.13
>
>
> First, I agree with Ralph, that I am also conflicted on changing the
> statutory language. I do not like the statutory language at all, and
> think
> there is no way for an average juror to understand the phrase. Although
> I
> generally think that we should follow the statutory language, so that we
> are
> not creating new law, I am now questioning that logic here. If it is
> applied
> as written, it essentially will not be understandable and, thus, useless.
>
> I also think there may be an inherent flaw (or confusion) in the statute's
> language in the use of 'risk'. Risk is used twice in the statutory
> definition. First, to refer to the 'injury'. The second usage refers to
> conduct, since it relates to 'substantially greater... negligent
> conduct.'
> I think that is confusing. However, I do agree with Larry that it was
> probably the legislative intent to state some form of 'gross negligence.'
> Why they didn't use that term is a mystery since they have used it in
> other
> statutes (and the legislature is presumed to understand the meaning of its
> terms; especially where they have used those terms in different statutes.)
>
> I propose we do use plain English even if we may be inadvertently changing
> the subtle meaning or intent. In that regard, I do like Tom's first
> proposal as being more easily understood, but think that the term "merely"
> is superfluous (similar to Ralph's comment). What about this modified
> version:

> "and that risk is substantially greater than the risk created by
> negligent conduct or the failure to use reasonable care."
>
> **ps I am including Tyrie on this issue since he recently asked to be
> added
> to insurance (and professional?) subcommittees.
>
> Jeff
>
> JEFFREY C. FULFORD, P.A.
> 32 Southeast Osceola Street
> Suite A
> Stuart, FL 34994
> 772-288-5123 Tel
> 772-288-5143 Fax
> jeff@fulfordlaw.com
>
> CONFIDENTIALITY NOTICE: This e-mail transmission (and the attachments
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> are not the intended recipient, please contact the sender by reply e-mail,
> and destroy all copies of the original message.
>
>
>
> ----------
> -----Original Message-----
> From: Ralph Artigliere [mailto:skywayra@tds.net]
> Sent: Tuesday, February 16, 2010 11:40 PM
> To: Tom Edwards; Larry Stewart; Jeff Fulford; Tracy Gunn
> Cc: Dick Caldwell; James Barton; Jodi @ TFB ; Joe Lang ; Sammy Cacciatore
> Subject: Re: Jury Instruction Error re: Emergency Medical Services FS
> 768.13
>
> I think Tom is on the right track; i.e., we would need to define what we
> mean by "reasonable care" as was done here. I don't care for using the
> word
>
> "merely".
>
> We may need to stick with the statutory language in order to get the exact
> legal result intended by the legislature because there is no equivalent to
> this protected level of conduct.
>
> I am not adamant... just conflicted.
>
> Ralph

>
>
> Ralph Artigliere
> skywayra@tds.net
> 706-632-6035
> 706-851-4121
> ----------
> ----- Original Message -----
> From: "Tom Edwards" <tse@edwardsragatz.com>
> To: "Larry Stewart" <lsstewart@stfblaw.com>; "Jeff Fulford"
> <jeff@fulfordlaw.com>; "Tracy Gunn" <tgunn@gunnappeals.com>
> Cc: "Dick Caldwell" <dcaldwell@rumberger.com>; "James Barton"
> <bartonjm@fljud13.org>; "Jodi @ TFB " <jjenning@flabar.org>; "Joe Lang "
> <jlang@carltonfields.com>; "Sammy Cacciatore" <sammy@nancelaw.com>; "Ralph
> Artigliere" <skywayra@tds.net>
> Sent: Tuesday, February 16, 2010 9:26 PM
> Subject: RE: Jury Instruction Error re: Emergency Medical Services FS
> 768.13
>
>
> Or alternatively:
>
>
>
> "and that risk is substantially greater than the risk created by merely
> failing to act in a way considered acceptable and appropriate by similar
> and
>
> reasonably careful [physicians] [hospitals] [health care providers].
>
>
>
> Thomas S. Edwards, Jr.
>
>
> Edwards & Ragatz, P.A.
>
>
> ----------
> From: Tom Edwards [mailto:tse@edwardsragatz.com]
> Sent: Tuesday, February 16, 2010 9:16 PM
> To: Larry Stewart; Jeff Fulford; Tracy Gunn
> Cc: Dick Caldwell; James Barton; Jodi @ TFB ; Joe Lang ; Sammy Cacciatore;
> Ralph Artigliere
> Subject: RE: Jury Instruction Error re: Emergency Medical Services FS
> 768.13
>
>
> May I suggest instead:
>

> "and that risk is substantially greater than the risk created by merely
> failing to use reasonable care"
>
> that language is drawn from the negligence instruction
>
>
> Thomas S. Edwards, Jr.
>
>
> Edwards & Ragatz, P.A.
>
>
> _____
>
> From: Larry Stewart [mailto:lsstewart@stfblaw.com]
> Sent: Tue 2/16/2010 8:09 PM
> To: Jeff Fulford; Tracy Gunn
> Cc: Dick Caldwell; James Barton; Jodi @ TFB ; Tom Edwards; Joe Lang ;
> Sammy
> Cacciatore; Ralph Artigliere
> Subject: RE: Jury Instruction Error re: Emergency Medical Services FS
> 768.13
>
>
>
> I have been trying to come up with a "plain English" substitution for the
> last phrase of the definition, because I do not think that any jury will
> understand what that means. The problem is that the last phrase mixes
> "risk" with "conduct" and that makes it difficult to come up with a
> substitute. I think what the legislature intended was something in the
> nature of gross negligence but we cannot assume that. What do you think
> of
> this: "and that risk is substantially greater than the risk created by
> merely failing to act or acting inappropriately under similar
> circumstances"???
>

From: Jeff Fulford [mailto:jeff@fulfordlaw.com]
Sent: Tuesday, February 16, 2010 2:05 PM
To: 'Tracy Gunn'
Cc: 'Dick Caldwell'; 'James Barton'; 'Jodi @ TFB '; 'Larry Stewart'; 'Tom Edwards'; 'Joe Lang '; 'Sammy Cacciatore'; Ralph Artigliere
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

SECOND DRAFT:

Following some sage advice, I have drafted a second version. It attempts to incorporate the comments thus far. It does the following:

1- It incorporates Larry's plain English version (slightly different from statutory language);
2- It is formatted to be submitted in the current book, as well as the new book pending before the court (we would submit both for publication);
3- There is a 'note on use' for application of the older version of the statute (pre 2003). The current statutory version is included as the main instruction (Larry's suggestion); and
4- There is a 'note on use' that the statute attempted to apply the post 2003 version retroactively, but that the committee takes no position on this retroactive application, pending resolution of this issue by the courts. (Sammy's suggestion)

Please advise if there are additional suggestions or language changes. The highlighted yellow are the actual proposed charges and notes on use. Thanks
Jeff

I. Proposed amended instruction for current book:
FSJI at Misc MI 9.1d & 9.2i

MI 9.1
EMERGENCY MEDICAL TREATMENT

NO JURY ISSUE AS TO
APPLICABILITY OF § 768.13(2)(b) (FS 2003)

d. ***"Reckless disregard" defined:***

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk was substantially greater than that which is necessary to make the conduct negligent.

[add these 2 notes on use for MI 9.1]

4. The statutory definition of 'reckless disregard' was amended, effective 9-15-03. The legislative intent was stated as follows, to-wit: "It is the intent of the Legislature to apply the provisions of this act to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution, except that the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is mailed on or after the effective date of this act (Sept. 15, 2003)." There may be an issue regarding the 'retroactive application' of this amendment, but the Committee takes no position on this issue pending resolution by the Courts.

5. For causes of actions which accrued prior to the effective date of the amendment of the definition of 'reckless disregard' (9-15-03), the prior instruction read as follows, to-wit:

MI 9.1 ***d.*** ***"Reckless disregard" defined:***

A [hospital] [(identify hospital em ployee providing patient care)] **[physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care]**

[treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

MI 9.2
EMERGENCY MEDICAL TREATMENT

JURY ISSUE AS TO APPLICABILITY OF § 768.13(2)(b) (FS 2003)

i. "Reckless disregard" defined:

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk was substantially greater than that which is necessary to make the conduct negligent.

[add these 2 notes on use for MI 9.2]

6. The statutory definition of 'reckless disregard' was amended, effective 9-15-03. The legislative intent was stated as follows, to-wit: "It is the intent of the Legislature to apply the provisions of this act to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution, except that the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is mailed on or after the effective date of this act (Sept. 15, 2003)." There may be an issue regarding the 'retroactive application' of this amendment, but the Committee takes no position on this issue pending resolution by the Courts.

7. For causes of actions which accrued prior to the effective date of the amendment of the definition of 'reckless disregard' (9-15-03), the prior instruction read as follows, to-wit:

MI 9.2 *i. "Reckless disregard" defined:*

A [hospital] [(identify hospital em ployee providing patient care)] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

I. Proposed amended instruction for 'new book':

FSJI at 402.16a (3) [Note - remove current 2nd paragraph and insert this new definition]

"A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk was substantially greater than that which is necessary to make the conduct negligent."

FSJI at 402.16b [Note - remove current 2nd paragraph and insert this new definition]

"A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk was substantially greater than that which is necessary to make the conduct negligent."

[add these 2 notes on use for 402.16]

6. The statutory definition of 'reckless disregard' was amended, effective 9-15-03. The legislative intent was stated as follows, to-wit: "It is the intent of the Legislature to apply the provisions of this act to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution, except that the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is mailed on or after the effective date of this act (Sept. 15, 2003)." There may be an issue regarding the 'retroactive application' of this amendment, but the Committee takes no position on this issue pending resolution by the Courts.

7. For causes of actions which accrued prior to the effective date of the amendment of the definition of 'reckless disregard' (9-15-03), the prior instruction read as follows, to-wit:

MI 9.2 *i.* *"Reckless disregard" defined:

A [hospital] [(identify hospital em ployee providing patient care)] **[physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].**

END

From: Ralph Artigliere [mailto:skywayra@tds.net]
Sent: Monday, February 15, 2010 4:27 PM
To: Sammy Cacciatore; Jeff Fulford; Tracy Gunn
Cc: Dick Caldwell; James Barton; Jodi @ TFB ; Larry Stewart; Tom Edwards; Joe Lang ; Sammy Cacciatore
Subject: Re: Jury Instruction Error re: Emergency Medical Services FS 768.13

I agree with Larry, Sammy, and your second email, Jeff. You might take a stab at incorporating what you have heard and agree with so far and we can go from there.

Ralph Artigliere
skywayra@tds.net
706-632-6035
706-851-4121
----- Original Message -----
From: Sammy Cacciatore
To: Jeff Fulford ; Tracy Gunn
Cc: Dick Caldwell ; James Barton ; Jodi @ TFB ; Larry Stewart ; Tom Edwards ; Joe Lang ; Ralph

Artigliere ; Sammy Cacciatore
Sent: Friday, February 12, 2010 11:29 AM
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

Jeff,

Here are my thoughts as a former member:

I think that we need to keep both versions. The format that we used in the past setting the two versions apart by the dates as you suggest in parra. 3 is fine.

Notwithstanding the statutory language, it seems to me that the change is substantive and cannot be applied retroactively. We should suggest in the note there is a question regarding retroactive application and advise that the Committee takes no position pending resolution of the question.

I think Larry's comments and thoughts are good. I would concur on trying his language and submitting both versions.

Sammy Cacciatore
Sammy@NanceLaw.com

From: Jeff Fulford [mailto:jeff@fulfordlaw.com]
Sent: Friday, February 12, 2010 11:31 AM
To: 'Tracy Gunn'
Cc: 'Dick Caldwell'; 'James Barton'; 'Jodi @ TFB '; 'Larry Stewart'; 'Tom Edwards'; Sammy Cacciatore; Joe Lang ; Ralph Artigliere
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

Thanks Larry. You may not be a 'current member', but you will forever be a member in our hearts... Your thoughts are well taken.

I forgot the punitive damages charge was edited in the new book. I also like your idea of using only the current statutory version (with revisions if everyone agrees) as the main instruction; with a note on use identifying the date of the statutory change and older instruction. As to the editing, I do prefer plain English versions, but hesitate since we are dealing with a statutory provision. Modifying both (current instruction and new book version) would cover all bases. Other thoughts from the committee?
Jeff

-----Original Message-----
From: Larry Stewart [mailto:lsstewart@stfblaw.com]
Sent: Friday, February 12, 2010 11:09 AM
To: Jeff Fulford; Tracy Gunn
Cc: Dick Caldwell; James Barton; Jodi @ TFB ; Tom Edwards; Sammy Cacciatore; Joe Lang ; Ralph Artigliere

Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

Jeff: A couple of thoughts from a "former" member. First, I would consider putting the pre-'03 language in a Note On Use. We concluded that the old punitive damage instructions which had the pre and post '99 language in the instructions were very confusing. It was for that reason that we moved the pre-'99 language to an Appendix. I don't think this is long enough to warrant an Appendix and that it could be handled in a Note On Use.

Second, while the statutory language is pretty good (for statutory language), it could be improved a little by some slight changes, as follows:

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [her] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that will affect the life or health of another, and that risk was substantially greater than that which is necessary to make the conduct negligent.

I tried to red-line the changes but that exceeded my computer skills. Nonetheless, you can see the changes by comparison -- they are in the third line. I tried to think of a substitute for the last phrase (because I doubt that a jury will understand what that means) but couldn't come up with anything simple.

Lastly, with respect to which version (current or proposed) of the instruction to modify, I would do both. As I recall, we kept these instructions pretty much intact (if not verbatim). Since the Court has not raised any questions about any of the med mal instructions, they may be prepared to approved them "as is" maybe before this proposal can even get there (since it first has to be published for comments, which means the earliest you can get this up there is the end of the summer). If you do both versions, you will be set to go no matter what the Court does.

From: Jeff Fulford [mailto:jeff@fulfordlaw.com]
Sent: Friday, February 12, 2010 10:25 AM
To: 'Tracy Gunn'
Cc: 'Dick Caldwell'; 'James Barton'; 'Jodi @ TFB '; 'Larry Stewart'; 'Tom Edwards'; Sammy Cacciatore; Joe Lang ; Ralph Artigliere
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13
To subcommittee members:
Upon reflection last night after sending this, I thought I should try to list the issues that I see, as it makes for an easier review by the subcommittee:

1- We need to agree on the language, first.
(Since statutory, I think it should follow the statute, instead of inserting plain English

translation, but that is just my thought.)

2- We need to determine if we keep old version **and** new version.
(I think both are still needed, since there are probably still a few pre 2003 cases out there.)

3- If keeping both versions, then the format should probably mirror what we have done in the past with the use of dates (eg- pre 9-15-03 causes of action use older version, cases which accrued after 9-15-03 use newer version.... The Punitive Damage section is a good example as to how we did this in other situations.)

4- Finally, I think we should include a note on use that the statute attempts to apply it retroactively, but that the committee thinks they are substantive changes and it cannot be applied retroactively (if that is our collective thought); and simply cite the statute language regarding application, following our note on use, as follows:

"It is the intent of the Legislature to apply the provisions of this act to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution, except that the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is mailed on or after the effective date of this act [Sept. 15, 2003]."

Those are the issues that I see. Thoughts?
Jeff

From: Jeff Fulford [mailto:jeff@fulfordlaw.com]
Sent: Thursday, February 11, 2010 5:58 PM
To: 'Ralph Artigliere'; 'Tracy Gunn'
Cc: 'Dick Caldwell'; 'James Barton'; 'Jodi @ TFB '; 'Joe Lang'; 'Larry Stewart'; 'Tom Edwards'; Sammy Cacciatore
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

To the Professional Negligence Subcommittee members:

This is my first stab at correcting our instructions on the "reckless disregard" definition under Emergency Medical Services. I think it is fairly straight forward since we are dealing with a statutory change (which I think we all agree is a substantive change and cannot be applied retroactively). I have included the older version, the newer proposed version, and a note on use suggesting it is likely a substantive statutory change, etc. The specific statutory language (old and new) is in this email thread below. Please let me know thoughts and proposed changes.

An additional thought is whether we are attempting to amend the current version (as written below), or if we want to propose changing the new 'book' version currently before the court. My suggestion is we offer this now, based on the current version, since it is years overdue.

Thanks
Jeff

Current versions in FSJI at Misc MI 9.1d & 9.2 (based on older version of statute):

MI 9.1

EMERGENCY MEDICAL TREATMENT

NO JURY ISSUE AS TO
APPLICABILITY OF § 768.13(2)(b)

d. "Reckless disregard" defined:

A [hospital] [(identify hospital em ployee providing patient care)] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

MI 9.2
EMERGENCY MEDICAL TREATMENT

JURY ISSUE AS TO APPLICABILITY OF § 768.13(2)(b)

i. "Reckless disregard" defined:

A [hospital] [(identify hospital em ployee providing patient care)] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

Proposed new version and notes on use, should be applied to both sections below (based on current statutory version):

MI 9.1 d. and
MI 9.2 i.

"Reckless disregard" defined:

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [her] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury so as to affect the life or health of another, and such risk was substantially greater than that which is necessary to make the conduct negligent.

NOTES ON USE

[Add as #4 to 9.1; and as #6 to 9.2]

Florida Statutes 768.12 (2)(b)3 was amended in 2003, and appears to be a substantive statutory amendment. The committee recommends using the pre 2003 statutory definition of "reckless disregard" for those cases whose cause of action accrued prior to the effective date of the amended statute on September 15, 2003; and using the current statutory version for all cases which accrued thereafter.

From: Ralph Artigliere [mailto:skywayra@tds.net]
Sent: Friday, December 11, 2009 1:16 PM
To: Jeff Fulford; 'Tracy Gunn'
Cc: Dick Caldwell; James Barton; Jodi @ TFB ; Joe Lang; Larry Stewart; Tom Edwards
Subject: Re: Jury Instruction Error re: Emergency Medical Services FS 768.13

I am on board with this approach.

I for one hope Sammy and Larry stay engaged at least until we resolve the new book and this needed adjustment.

Ralph
----- Original Message -----
From: Jeff Fulford
To: 'Tracy Gunn'
Cc: Dick Caldwell ; James Barton ; Jodi @ TFB ; Joe Lang ; Larry Stewart ; Ralph Artigliere ; Tom Edwards
Sent: Friday, December 11, 2009 10:50 AM
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

Tracy
I'll be happy to do so. I will start on a new version. I will send to the med mal subcommittee; but since we are losing Sammy and Larry (and they will be missed), then we probably need some new members. Jeff

From: Tracy Gunn [mailto:tgunn@gunnappeals.com]
Sent: Friday, December 11, 2009 6:17 AM
To: Jeff Fulford
Subject: Re: Jury Instruction Error re: Emergency Medical Services FS 768.13

Thanks so much Jeff. This is very helpful. Yes please do reply to him. We need to get some new people on the med mal subcommittee. Can you take charge of this issue and I'll make sure you have subcommittee help?

Tracy Gunn
Sent from my iPhone

On Dec 10, 2009, at 7:00 PM, "Jeff Fulford" <jeff@fulfordlaw.com> wrote:

Tracy

Attorney Malove makes a good point. The statute was amended in 2003 (FS sec. 768.13 (2)(b)), and altered the definition somewhat from its prior version. The current instructions are found at MI 9.1 d & MI 9.2 I, and still use the older statutory language. It appears we also used the older language of the statute in the new instructions currently pending before the Court, and I think it should be changed to reflect the current statutory definition.

Pre 2003 version: 768.13 (2)(b) 3:

For purposes of this paragraph, 'reckless disregard' as it applies to a given health care provider rending
emergency medical services shall be such conduct which a health care provider knew or should have known, at the time such services were
rendered, would be likely to result in injury so as to affect the life or health of another, taking into account the following to the extent they may be present;

a. The extent or serious nature of the circumstances prevailing.
b. The lack of time or ability to obtain appropriate consultation.
c. The lack of a prior patient-physician relationship.
d. The inability to obtain an appropriate medical history of the patient.
e. The time constraints imposed by coexisting emergencies.

Current version since 2003:

For purposes of this paragraph, "reckless disregard" as it applies to a given health care provider rendering emergency medical services shall be
such conduct that a health care provider knew or should have known, at the time such services were rendered, created an unreasonable risk of injury so as to affect the life or health of another, and such risk was substantially greater than that which is necessary to make the conduct negligent.

However, the statute specifically states that the 2003 amendments should be retroactively applied "to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution...." If this were only considered a procedural change, then I don't think there would be any prohibition to the retro-application of the language to all cases pending. However, if considered substantive, then we may need to show both statutory definitions with a note on use as to when to use each version (I believe this may be the correct method to use for this instruction). If so, then I think it probably should be considered a substantive change in the statute, but would like to hear more thoughts from others.

I don't specifically recall any discussion on the use of this language during the meetings, but could be wrong. If you would like, I could email Malove and advise we

are looking into his comment and that we consider them meritorious. Let me know. Jeff

From: Jodi B Jennings [mailto:jjenning@flabar.org]
Sent: Thursday, December 10, 2009 4:07 PM
To: Amos, Joseph; apratt@fisherlawfirm.com; Artigliere, Ralph; reajr@robertaustinlaw.com; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; lcbrown@co.palm-beach.fl.us; mellis@co.palm-beach.fl.us; sammy@nancelaw.com; vanessa@nancelaw.com; dcaldwell@rumberger.com; Edwards, Thomas; Farmer, Gary; simmonsk@flcourts.org; Fulford, Jeffrey; Gertz, Sally; wgraham@jud11.flcourts.org; griffinj@flcourts.org; kahnc@1dca.org; marstoncj@1dca.org; jlang@carltonfields.com; LaRose, Edward; fmiller@jud11.flcourts.org; poseyg@flcourts.org; wlumish@carltonfields.com; Whitmore, Laura; Richards, John; Tracy Wasserman; lsstewart@stfblaw.com; Mary Masferrer; rmercier@jkwpa.com; Wagner, Alan; Gunn, Tracy; Campo, Allan; Bagley, Jerald; Barnett, Karen; Burlington, Philip; costellod@jud14.flcourts.org; DeMahy, Pedro (Pete); Francis, Gregorio; Hinkle, Donald; Ingram, J.; Kest, John ; Lytal, Lake; McCloy, Dixon; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Sass, Cynthia; Iacone, Diane; Stringfield, Courtney
Subject: Fw: Jury Instruction Error

See the below comment on MI 9.2.

----- Forwarded by Jodi B Jennings/The Florida Bar on 12/10/2009 04:04 PM -----

Tracy Gunn <tgunn@gunnappeals.com>

12/10/2009 03:54 PM

To Jjenning <jjenning@flabar.org>
cc
Subject Fwd: Jury Instruction Error

Jodi, Can you please distribute this to the committee. Thanks.

Tracy Gunn
Sent from my iPhone

Begin forwarded message:

From: malove2@aol.com
Date: December 10, 2009 3:46:33 PM EST
To: tgunn@gunnappeals.com
Subject: Jury Instruction Error

Hello:

I was recently preparing jury instructions in a med mal case and came upon the legal definition of "reckless disregard." The definition in 9.2 was in effect in the past. There is a new definition. I thought you might want to investigate this.

Sincerely,

Stephen L. Malove, Esq.
Law Offices of Stephen L. Malove & Associates, P.A.
14 Rose Drive
Ft. Lauderdale, FL 33316
Phone: 954-767-1000
Fax: 954-767-1001
Email: Malove2@aol.com
Website: www.malovelawfirm.com

"Jeff Fulford"
<jeff@fulfordlaw.com>
06/08/2010 03:42 PM

To "Alan Wagner" <alanwagner@wagnerlaw.com>, "Dedee Costello " <costellod@jud14.flcourts.org>, "Elizabeth Russo " <ekr@russoappeals.com>, "Jodi @ TFB "
cc
bcc
Subject FSJIC - Bad faith instruction

To Insurance subcommittee:

I have reviewed the notes from the last meeting and think these are the items on the table. If anyone has any additional issues or comments, then lets discuss them. Items 1 and 2 merely restate the committee's action on these issues. Items 3 and 4 require our follow-up.

1) Location of new/reworked version of BF instruction, on duty to advise:

I saw no objections by the full committee, to the subcommittee's recommended language or suggestion to place as part of 404.4. It would then be placed as the beginning paragraph of 404.4, with amended notes on use. The whole instruction and notes on use, would then read as follows, to-wit:

404.4 Insurer's Duties and Bad Faith (Failure to Settle)

"An insurance company has a duty [to advise its insured of all settlement opportunities] [to advise its insured as to the probable outcome of litigation] [to warn its insured of the possibility of a judgment that is not covered by the policy and to advise its insured of any steps [he] [she] [it] might take to avoid such a judgment] [to warn its insured of the possibility of a judgment that is greater than the available insurance and to advise its insured of any steps [he] [she] [it] might take to avoid such a judgment] [to warn or to advise its insured of (describe other harm) and to advise its insured of any steps [he] [she] [it] might take to avoid (describe other harm)]."

"Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward [its policyholder] [its insured] [an excess carrier] and with due regard for [his] [her] [its] [their] interests."

NOTES ON USE FOR 404.4

1. 404.4 does not distinguish statutory claims from common law claims or first party claims from third party claims. *See State Farm Mut. Auto. Ins. Co. v. LaForet,* 658 So. 2d 55 (Fla. 1995).

2. 404.4 is applicable when the particular matter in issue is the insurance company's failure to settle a claim. This instruction does not exhaust the subject. The bracketed portions of the first paragraph should be used if applicable. Other instructions may be necessary if liability is asserted for the insurance company's violation of some other duty. *See, e.g., Boston Old Colony Ins. Co. v. Gutierrez,* 386 So.2d 783, 785 (Fla. 1980) (duty "to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same").

3. In cases brought under section 624.155, Florida Statutes, issues of notice and cure generally will be determined by the court. *See Talat Enters., Ins. v. Aetna Cas. And Sur. Co.* , 753 So.2d 1278 (Fla. 2000). Therefore, no standard jury instruction is provided on those issues.

The only changes I made since the meeting discussion are the title (to include 'Duties'); and the 3rd sentence is added to Notes on Use #2.

2) Additional proposed instructions that were considered, but rejected by the subcommittee and committee:

a) 'Duty to defend' – since it most likely would be handled by a dec action as a matter of law.

b) 'Adequacy of defense'

c) 'Duty of carrier to institute settlement regardless of whether a plaintiff's demand has been made.' – The SC believed more case was needed.

---

3) The issue was raised (Lytal) why there weren't any instructions on 'insurer's fiduciary duty'. Roth pointed out that in most cases it may be resolved as a legal issue and handled through a preemptive instruction. The committee was going to explore this.

a) Should there be a separate instruction on the insurer's 'fiduciary duty' to its insured?

Comment: If the subcommittee thinks it should be included, I would suggest that it may appropriately be set out as a separate instruction. Also, if we use that language/theory, then we should probably consider providing a case approved definition. I found *Wachovia Ins. Services, Inc. v. Toomey*, 994 So.2d 980 (Fla. 2008), which held that breach of a fiduciary duty is a separate cause of action, from breach of common law duties owed by an insurer. Although the case dealt with the duty of an insurer to obtain coverage and assignment issues, it held that both c/a's can be brought in one case. It also specifically stated that a 'breach of fiduciary duty' is akin to a bad faith case. I would invite more comments and thoughts on Lake's and Neal's observations made at the meeting....

I agree with Lake's concern that we haven't addressed 'specific fiduciary duties or claims'; and at a minimum would suggest that we should at least have a 'note on use' that advises the lawyers/judges that additional instructions may be indicated if a separate claim is brought for breach of a fiduciary duty. I am doing some additional research on this issue, and would invite comments from those of you with more experience in these claims. thx

---

4) Finally, I see that the meeting minutes state that "**The subcommittee will add notes on use explaining other harm cases (to instruction 404.1).**" I apologize for not being present at the last meeting, and am unsure of the subcommittee action that we were delegated to perform. If anyone has thoughts or suggestions on our duty here, then please advise. Thanks

Best regards
Jeff

JEFFREY C. FULFORD, P.A.
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"Rebecca Mercier-Vargas" <rmercier@jkwpa.com>
09/23/2010 12:46 PM

To "Meeks, Thomas J." <tmeeks@carltonfields.com>, <tgunn@gunnappeals.com>, "Barton, James " <BARTONJM@fljud13.org>
cc "Jodi B Jennings" <jjenning@flabar.org>
bcc
Subject FW: SJI civil website: note on emergency medical treatment and changes to ch. 400

History: This message has been forwarded.

I hope all is well with you all. Tom, could you please take a look to the note on use that we added before the emergency medical treatment instruction (402.16) and make sure this is what the committee had in mind? http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml#402

Please take a look at the placement of the note. I put it right after instruction 402.16 (and before 402.16a & b). In context on the website, I think people would also find it if we put it at the beginning of 402, where we already have 2 notes on use.

On the language, I used the language Tom emailed me at the last meeting, except I deleted the # 1 since we don't have a note # 2. In context on the website, I'm not sure if the reference to "this statute" is clear on whether we are referring to the 2003 amendments to the entire Medical Malpractice Act, or just this section. Maybe we should change the first sentence to read: "This instruction is based on the pre-2003 version of the statute of the emergency medical treatment statute ".

Also, I checked some of the old minutes because I had the recollection that the committee had looked at these issues closer in time to the 2003 amendments. I'm separately emailing you a copy of the committee minutes from July 2004, which state on page 2 that:
***

Dan Mitchell reported that he has studied new legislation and does not believe that any revisions to the civil jury instructions are required. While the Good Samaritan Act adds additional defendants that are eligible for immunity from medical malpractice suits, but does not change the substantive law. No other committee members were aware of any new legislation requiring revisions to the jury instructions. Altenbernd will report to the Supreme Court that no revisions are needed in response to new legislation.

***

The minutes are not perfectly clear (and I have to admit drafting them myself) on what amendments the committee reviewed. My recollection is that Dan Mitchell had looked at the entire 2003 Med Mal Act Amendments and recommended against revising it, which the committee accepted. Tracy or Jim may have a clearer recollection on that than me. Of course, that doesn't mean that we can't consider the issue again.

Rebecca

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From: Tricia Knox [mailto:knoxt@flcourts.org]
Sent: Thursday, September 23, 2010 9:59 AM
To: Rebecca Mercier-Vargas
Subject: RE: SJI civil website: note on emergency medical treatment and changes to ch. 400

Hi Rebecca,

I've made the changes. Please check to make sure they are what you want.

Tricia

From: Rebecca Mercier-Vargas [mailto:rmercier@jkwpa.com]
Sent: Tuesday, September 21, 2010 5:13 PM
To: Tricia Knox
Subject: SJI civil website: note on emergency medical treatment and changes to ch. 400

Tricia:

I hope that you are had a good end of your summer. We have three requests for you:

(1) On the civil jury instructions website, the committee would like to insert a note on use on page listing instructions, just after instruction 402.16 (and before 402.16a & b).

Note on use
This instruction is based on the pre-2003 version of the statute. For cases after the 2003 effective date (9/15/03) of the statute, revisions must be made based upon statutory changes, pending approval of a new instruction.

(2) We would also like to add a hyperlinked index with all the sections in chapter 400. So, when you scroll down to

SECTION 400 - SUBSTANTIVE INSTRUCTIONS

We would add a short index with a hyperlink to each section:

401 General Negligence
402 Professional Negligence
403 Products Liability
404 Insurer's Bad Faith
405 Defamation
406 Malicious Prosecution
407 False Imprisonment
408 Tortious Interference with Business Relationships
409 Misrepresentation
410 Outrageous Conduct Causing Severe Emotional Distress
411 Civil Theft
412 Contribution Among Tortfeasors
413 Claim for Personal Injury Protection (PIP) Benefits (Medical Benefits only)
414 Intentional Tort As an Exception to Exclusive Remedy of Workers' Compensation
415 Unlawful Retaliation

(3) Also in Chapter 400, could we make it so that if you have opened an instruction, and you are using the back button to navigate back to the index of instructions, it takes you back to the same place you had just been reading on the index. Most of the time, it seems to navigate back to the beginning of chapter 400–section 401. For example, if I click open an instruction in section 404, it will navigate back to the beginning of chapter 400–section 401. Some of the instructions near the end of chapter 400 seem to navigate back to the end of the instructions (around instruction 600-800). Since chapter 400 is so long, I think it would really help if we could direct users back so they don't lose track of where they had been reading on the index.

Thanks very much, as always, for your help. Please feel free to give me a call if you have any questions about this.

Rebecca Mercier Vargas, Esq.
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"Tom Edwards" <tse@edwardsragatz.com>
01/31/2011 12:29 PM

To "Jodi B Jennings" <jjenning@flabar.org>, "Amos, Joseph" <jamos@fisherlawfirm.com>, "Artigliere, Ralph" <skywayra@tds.net>, <jbailey@jud11.flcourts.org>,
cc
bcc
Subject Jury Instructions -- Emergency Medical Services --

Professional Negligence Committee

We need to address the new (relatively) statute on Emergency Medical Services. I have the Professional Negligence Committee as follows:
Edwards
Artigliere
Bagley
Roth
Lytle
Ingram
Boyer
Kest
Kahn (leaving the committee)
Russo
Either – Joe Lang or Joe Amos (I think it was Joe Amos)

If I missed anyone or you don't care to be on this committee please let me know.

The minutes from the last meeting where we discussed this are attached with an email string addressing a proposed instruction. Notes from the last meeting are below. Below that is the CURRENT instruction based on the OLD statute.
Below that is the CURRENT statute. Attached is a set of emails re this from over a year ago.

AT THE BOTTEM IN YELLOW IS THE LAST VERSION WE WERE WORKING FROM – BELOW THAT IS LARRY STEWART'S LAST COMMENT RE THIS – AT THE MEETING THERE WAS DEBATE OVER CONFUSING LANGUAGE – WE NEED TO PICK UP THE DEBATE RE THIS INSTRUCTION – EVERYONE PLEASE COMMENT RE THE YELLOW HIGHLIGHTED INTRUCTION AND THE NEW STATUTE ----

MINUTES

6. EMERGENCY MEDICAL SERVICES:
Edwards reported that the subcommittee will soon begin to consider whether to amend instruction 402.16 on emergency medical treatment are needed in light of the 2003 amendments to the Medical Malpractice Act. At the last meeting, the Committee decided to add a note on use to instruction 402.16. The subcommittee suggests revising the wording of the note slightly to state: "This instruction is based on the pre-2003 version of the

emergency medical treatment statute."

After the last meeting, the website subcommittee posted this note on the index to jury instructions on the supreme court website. The Clerk of the Court, Tom Hall, asked the Committee to remove the note because it had not been formally approved by the Court. The note was removed.

Barton is planning to meet with Clerk Hall in November to discuss administrative issues. **Barton will discuss with Clerk Hall whether there is another way that the Committee can use the supreme court website to alert the public when a new statute or case calls an instruction into question. Gunn directed the subcommittee to present a draft instruction in February.**

INSTUCTION BASED ON OLD STATUTE

402.16 EMERGENCY MEDICAL TREATMENT CLAIMS

INTRODUCTORY COMMENT

Instruction 402.16 addresses the provisions of *F.S.* 768.13(2)(b). It applies only to cases described in that statute or to cases in which there is a jury issue as to the applibility of the statute. Instruction 402.16 does not apply to cases involving patients capable of receiving treatment as non-emergency patients, even if treated in an emergency room.

Instruction 402.16a applies to cases in which there is a jury issue as to whether the statute applies. Instruction 402.16b applies to cases in which either the parties agree that the statute applies or the court has ruled that the statute applies as a matter of law.

The applicable part of instruction 402.16 should be preceded by instructions 402.1, 402.2, 402.3, and 403.6. Instruction 402.4 should not be given in the ordinary sequence as it is, to the extent applicable, incorporated in instruction 402.16. If there are any preliminary vicarious liability issues, instructions 402.9 and 402.10 should also be given.

No reported decision construes the legislative intent behind this section. Based upon the definition of "reckless disregard" in *F.S.* 768.13(2)(b)3, the committee has concluded that the intent was to limit liability in civil actions for damages arising out of fact situations to which the statute applies to cases where something more than "simple" negligence is established. Therefore, the standard instructions dealing with "simple" negligence are not appropriate for civil damage actions to which the statute applies.

402.16a EMERGENCY MEDICAL TREATMENT — Jury Issue as to Application of *F.S.* 768.13(2)(b)

(1). Preliminary issue on application of statute:

The first issue for you to decide on (claimant's) **claim against** (defendant) **is whether** (claimant) **was being [cared for] [treated] under emergency circumstances.**

[Care] [treatment] is rendered under emergency circumstances when a [hospital] [physician] renders medical [care] [treatment] required by a sudden, unexpected situation or event that resulted in a serious medical condition demanding immediate medical attention, for which (claimant or decedent) **initially entered the hospital through its [emergency room] [trauma center], before** (claimant or decedent) **was medically stabilized and capable of receiving [care] [treatment] as a nonemergency patient.**

If the greater weight of the evidence does not support that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances then you shall proceed to decide whether** (defendant) **was negligent in [his] [her] [its] [care] [treatment] of** (claimant or decedent).

However, if the greater weight of the evidence supports that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances, then you shall proceed to decide whether** (defendant) **acted in reckless disregard of the consequences in [his] [her] [its] [care] [treatment] of** (claimant or decedent).

(2). Issues regarding negligence:

[If you find that (claimant's or decedent's) **[care] [treatment] was not being rendered under emergency circumstances,] the [next] issue for you to decide is whether** (defendant) **was negligent in** (describe conduct in question); **and, if so, whether that negligence was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made).

"Negligence" is the failure to use reasonable care. Reasonable care on the part of a [hospital] [physician] is that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably careful [hospitals] [physicians]. Negligence on the part of a [hospital] [physician] is doing something that a reasonably careful [hospital] [physician] would not do under like circumstances or failing to do something that a reasonably careful [hospital] [physician] would do under like circumstances.

If the greater weight of the evidence does not support this claim, then your verdict [on this claim] should be for (defendant).

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then your verdict [on this claim] should be for** (claimant) **and against** (defendant).**]**

[However, if the greater weight of the evidence does support (claim-ant's) **claim, then you should consider the defense(s) raised by** (defendant).**]**

(3). Issues regarding reckless disregard:

[If you find that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances,] the [next] issue for you to decide is whether** (defendant) **acted with reckless disregard of the consequences in** (describe conduct in question); **and, if so, whether that reckless disregard was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made).**]**

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

If emergency circumstances have not been established by the greater weight of the evidence but the

greater weight of the evidence supports (claimant's) **claim of negligence, then [your verdict [on this claim] should be for** (claimant) **and against** (defendant)] **[you should consider the defense(s) raised by** (defendant)**].**

(Proceed to instructions 402.14 and 402.15)

[However, if the greater weight of the evidence does not support (claimant's) **claim of negligence, then your verdict [on this claim] should be for** (defendant).**]**

On the other hand, if emergency circumstances have been established by the greater weight of the evidence and the greater weight of the evidence also supports (claimant's) **claim of reckless disregard of the consequences, then [your verdict [on this claim] should be for** (claimant) **and against** (defendant)] **[you should consider the defense(s) raised by** (defendant)**].**

(Proceed to instructions 402.14 and 402.15)

[However, if the greater weight of the evidence does not support (claimant's) **claim of reckless disregard of the consequences, then your verdict [on this claim] should be for** (defendant) **and against** (claimant).**]**

402.16b EMERGENCY MEDICAL TREATMENT

(Describe conduct in question) **occurred in the course of [rendering] [or] [failing to render] emergency [care] [treatment] to** (claimant or decedent). **The issue for you to decide is whether** (defendant) **acted with reckless disregard of the consequences in** (describe conduct in question); **and, if so, whether that reckless disregard was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made).

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

If the greater weight of the evidence does not support (claimant's) **claim, then your verdict [on this claim] should be for** (defendant).

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then your verdict [on this claim] should be for** (claimant) **and against** (defendant).**]**

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then you should consider the defense(s) raised by** (defendant).**]**

(Proceed to instructions 402.14 and 402.15)

NOTES ON USE FOR 402.16

1. Instruction 402.16a should be given when there is a jury issue as to whether the care or treatment was being

rendered under emergency circumstances. An appropriate special verdict will be necessary to distinguish between a finding that the care or treatment was not being rendered under emergency circumstances, in which case the standard of care is negligence, and a finding that the care or treatment was being rendered under emergency circumstances, in which case the standard of care is reckless disregard of the circumstances. The verdict should contain instructions to guide the jury depending on their finding as to whether the care and treatment was or was not rendered under emergency circumstances. The burden of proof provisions of instruction 402.16a should also be modified to incorporate the instructions in the special verdict. See Appendix A, Model Jury Instructions.

2. Instruction 402.16b should be given when the parties agree that the statute applies or when the court has ruled it applies as a matter of law.

3. Negligence of a patient, which contributes to or causes the medical condition for which treatment is sought, is not available as a defense (as comparative negligence) to subsequent medical negligence which causes a distinct injury. See, *e.g.* , *Norman v. Mandarin Emergency Care Center, Inc* ., 490 So.2d 76 (Fla. 1st DCA 1986); *Matthews v. Williford* , 318 So.2d 480 (Fla. 2d DCA 1975); but see *Vandergrift v. Fort Pierce Memorial Hospital, Inc* ., 354 So.2d 398 (Fla. 4th DCA 1978). Rare circumstances may arise, involving a patient's negligence after emergency care or treatment has begun, in which comparative negligence is a legitimate issue. See generally *Whitehead v. Linkous* , 404 So.2d 377 (Fla. 1st DCA 1981).

4. Pending further developments in the law, the committee reserves the issue of whether comparative negligence is a defense when the reckless disregard standard is in effect. If the court decides that comparative negligence is a defense, then an instruction on simple negligence should be given.

5. "Reckless disregard," as defined and used in the context of *F.S.* 768.13(2)(b), does not appear to have the same meaning as reckless disregard when used in the context of standards for punitive damages. See Fla. Std. Jury Instr. (Civ.) 501.12 and 501.13.

NEW STATUTE

768.13
Good Samaritan Act; immunity from civil liability.

— (NOTE -- THERE ARE SEPARATE PROVISIONS FOR "VOLUNTEERS")

— (b)1.

— Any health care provider, including a hospital licensed under chapter 395, providing emergency services pursuant to obligations imposed by 42 U.S.C. s. 1395dd, s. 395.1041, s. 395.401, or s. 401.45 shall not be held liable for any civil damages as a result of such medical care or treatment unless such damages result from providing, or failing to provide, medical care or treatment under circumstances demonstrating a reckless disregard for the consequences so as to affect the life or health of another.

— 2.

— The immunity provided by this paragraph applies to damages as a result of any act or omission of providing medical care or treatment, including diagnosis:

— a.

— Which occurs prior to the time the patient is stabilized and is capable of receiving

medical treatment as a nonemergency patient, unless surgery is required as a result of the emergency within a reasonable time after the patient is stabilized, in which case the immunity provided by this paragraph applies to any act or omission of providing medical care or treatment which occurs prior to the stabilization of the patient following the surgery.

— b.

— Which is related to the original medical emergency.

— 3.

— For purposes of this paragraph, "reckless disregard" as it applies to a given health care provider rendering emergency medical services shall be such conduct that a health care provider knew or should have known, at the time such services were rendered, created an unreasonable risk of injury so as to affect the life or health of another, and such risk was substantially greater than that which is necessary to make the conduct negligent.

— 4.

— Every emergency care facility granted immunity under this paragraph shall accept and treat all emergency care patients within the operational capacity of such facility without regard to ability to pay, including patients transferred from another emergency care facility or other health care provider pursuant to Pub. L. No. 99-272, s. 9121. The failure of an emergency care facility to comply with this subparagraph constitutes grounds for the department to initiate disciplinary action against the facility pursuant to chapter 395.

BELOW IS THE LAST VERSION WE WERE DEBATING

I. Proposed amended instruction for 'new book':

FSJI at 402.16a (3) [Note - remove current 2nd paragraph and insert this new definition]

"A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk is substantially greater than the risk created by the failure to use reasonable care."

FSJI at 402.16b [Note - remove current 2nd paragraph and insert this new definition]

"A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers]. "

[add these 2 notes on use for 402.16]

6. **The statutory definition of 'reckless disregard' was amended, effective 9-15-03. The legislative intent was stated as follows, to-wit: "It is the intent of the Legislature to apply the provisions of this act to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution, except that the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is mailed on or after the effective date of this act (Sept. 15, 2003)." There may be an issue regarding the 'retroactive application' of this amendment, but the Committee takes no position on this issue pending resolution by the Courts.**

7. **For causes of actions which accrued prior to the effective date of the amendment of the definition of 'reckless disregard' (9-15-03), the prior instruction read as follows, to-wit:**

MI 9.2 ***i.*** ***"Reckless disregard" defined:***

A [hospital] [(identify hospital employee providing patient care)] **[physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].**

END

Larry's last comments

I think that the proposal:

> "and that risk is substantially greater than the risk created by negligent conduct or the failure to use reasonable care."

is redundant since negligent conduct is the failure to reasonable care. I would therefore suggest deleting the term "negligent conduct." A more precise way to phrase it would be to follow Tom's suggestion, without "merely", since it incorporates the definitional language. We also need to cover "acting", hence the brackets and additional language:

> "and that risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers]."

I think this gets the concept across that the conduct must be more than just negligence, which is the point of the law.

Thomas S. Edwards, Jr.

Edwards & Ragatz, P.A.

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transaction or matter addressed herein. Emergency Med Materials 7.6.10.pdf

INISURANCE CONTINUED:

Emergency Medical Services

Edwards informed the Committee that since the 1980s, the legislature has been tinkering with the standards for medical malpractice emergency treatment. The subcommittee has changed the instructions in response. The subcommittee recommends keeping the old instructions in the book as the new book is published, since some cases still will be tried under the old standards.

The Committee reviewed the reckless disregard instruction, and noted the need for a standard verb tense throughout. The Committee further discussed whether to use the "failure to use reasonable care" language, and whether basic negligence or professional negligence is applicable. The Committee discussed what the instruction is attempting to define - - conduct or risk.

Based on all of the outstanding issues and questions, it was decided the subcommittee will put a notice in the book that the statute has been amended, and go back to continue working on these new instructions. Ingram, Roth, Boyer, Bagley, Kest, and Lytal joined the subcommittee. Edwards will Chair the subcommittee.

Bad Faith

The Committee needs to decide where this instruction should go. The subcommittee recommends putting it adjacent to instruction 404.4 (failure to settle).

Edwards posed the question of whether an additional instruction on duty to defend is needed. Edwards explained that most of the subcommittee felt that issue would be resolved as a legal question in an action for declaratory judgment. Another question is whether an instruction is needed for a case involving "adequacy of defense." The subcommittee does not recommend such an instruction at this time. The other potential instruction is an instruction regarding the duty of a carrier to institute settlement regardless of whether there has been an offer to settle by the plaintiff. This arises from *Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12 (Fla. 3d DCA 1991). The subcommittee believes more case law on this issue is needed before an instruction is proper.

Lytal questioned why an insurer's fiduciary duty is not addressed. The Committee discussed this.

"Jeff Fulford"
<jeff@fulfordlaw.com>
02/19/2010 01:29 PM

To "'Jeff Fulford'" <jeff@fulfordlaw.com>, "Dick Caldwell" <dcaldwell@rumberger.com>, "James Barton" <bartonjm@fljud13.org>, "Jodi @ TFB "
cc
bcc
Subject RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

Jodi
You asked that I forward you the final version to include in materials. This seems to be the last version, since I have not seen any further comments. I have included all suggested language and format, and think this will be the version to submit to the full committee. Tom has agreed to present this since I won't be attending this mtg. Thanks to all for your input and help.
Jeff

From: Jeff Fulford [mailto:jeff@fulfordlaw.com]
Sent: Thursday, February 18, 2010 11:49 AM
To: Dick Caldwell; James Barton; Jodi @ TFB ; Joe Lang ; Larry Stewart; Ralph Artigliere; Sammy Cacciatore; Tom Edwards; Tracy Gunn; Tyrie Boyer
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

Following Larry's suggestions, I have included his suggestions within the Third Draft below. I hope we are getting close.
Jeff

From: Larry Stewart [mailto:lsstewart@stfblaw.com]
Sent: Wednesday, February 17, 2010 6:12 PM
To: Jeff Fulford; Ralph Artigliere; Tom Edwards; tgunn@gunnappeals.com
Cc: dcaldwell@rumberger.com; bartonjm@fljud13.org; jjenning@flabar.org; jlang@carltonfields.com; sammy@nancelaw.com; twboyer@coj.net
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

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> "and that risk is substantially greater than the risk created by negligent conduct or the failure to use reasonable care."

is redundant since negligent conduct is the failure to reasonable care. I would therefore suggest deleting the term "negligent conduct." A more precise way to phrase it would be to follow Tom's suggestion, without "merely", since it incorporates the definitional language. We also need to cover "acting", hence the brackets and additional language:

> "and that risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar

and reasonably careful [physicians] [hospitals] [health care providers]."

I think this gets the concept across that the conduct must be more than just negligence, which is the point of the law.

From: Jeff Fulford [mailto:jeff@fulfordlaw.com]
Sent: Wednesday, February 17, 2010 6:15 PM
To: Dick Caldwell; James Barton; Jodi @ TFB ; Joe Lang ; Larry Stewart; Ralph Artigliere; Sammy Cacciatore; Tom Edwards; Tracy Gunn; Tyrie Boyer
Subject: FW: Jury Instruction Error re: Emergency Medical Services FS 768.13

Following these suggestions, I come up with this latest proposed version: (Third draft)

1- add definition of professional negligence to 9.1d (existing book) (Tom's version below);
2- add definition of professional negligence to 16b (new book) (Tom's version below);
3- prof negligence definition not needed in 9.2i or 16a since the definition is included in preceding paragraphs therein;
4- the term "merely" was included in the additions to 9.1d and 16b, but some members question if needed??;
5- the 'reckless disregard' definition in 9.2i and 16a was changed to insert the plain language we discussed;
6- We should also address to whom we should identify in the instructions. The statute deals with **'any health care provider'** (FS 768.13(2)(b)1&3). However, the current instructions state "(defendant hospital, hospital employee, physician)". The new book instructions change the categories to "[hospital] [physician]". I think we should consider altering both versions (current and proposed books) to conform to the statute and include "[hospital] [physician] [health care provider]". This suggestion is now included in the Third Draft below.
7- Larry's comments (above) are incorporated within the instructions below.

Thoughts?

THIRD DRAFT
I. Proposed amended instruction for current book:
FSJI at Misc MI 9.1d & 9.2i

MI 9.1
EMERGENCY MEDICAL TREATMENT

NO JURY ISSUE AS TO
APPLICABILITY OF § 768.13(2)(b) (FS 2003)

d. "Reckless disregard" defined:

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the

life or health of another, and that risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers].

[add these 2 notes on use for MI 9.1]

4. The statutory definition of 'reckless disregard' was amended, effective 9-15-03. The legislative intent was stated as follows, to-wit: "It is the intent of the Legislature to apply the provisions of this act to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution, except that the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is mailed on or after the effective date of this act (Sept. 15, 2003)." There may be an issue regarding the 'retroactive application' of this amendment, but the Committee takes no position on this issue pending resolution by the Courts.

5. For causes of actions which accrued prior to the effective date of the amendment of the definition of 'reckless disregard' (9-15-03), the prior instruction read as follows, to-wit:

MI 9.1 *d.* *"Reckless disregard" defined:*

A [hospital] [(identify hospital em ployee providing patient care)] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

MI 9.2
EMERGENCY MEDICAL TREATMENT

JURY ISSUE AS TO APPLICABILITY OF § 768.13(2)(b) (FS 2003)

i. *"Reckless disregard" defined:*

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk is substantially greater than the risk created by the failure to use reasonable care.

[add these 2 notes on use for MI 9.2]

6. The statutory definition of 'reckless disregard' was amended, effective 9-15-03. The legislative intent was stated as follows, to-wit: "It is the intent of the Legislature to apply the provisions of this act to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution, except that the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is

mailed on or after the effective date of this act (Sept. 15, 2003)." There may be an issue regarding the 'retroactive application' of this amendment, but the Committee takes no position on this issue pending resolution by the Courts.

7. For causes of actions which accrued prior to the effective date of the amendment of the definition of 'reckless disregard' (9-15-03), the prior instruction read as follows, to-wit:

MI 9.2 *i.* *"Reckless disregard" defined:*

A [hospital] [(identify hospital em ployee providing patient care)] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

I. Proposed amended instruction for 'new book':

FSJI at 402.16a (3) [Note - remove current 2nd paragraph and insert this new definition]

"A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk is substantially greater than the risk created by the failure to use reasonable care."

FSJI at 402.16b [Note - remove current 2nd paragraph and insert this new definition]

"A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers]."

[add these 2 notes on use for 402.16]

6. The statutory definition of 'reckless disregard' was amended, effective 9-15-03. The legislative intent was stated as follows, to-wit: "It is the intent of the Legislature to apply the provisions of this act to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution, except that the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is mailed on or after the effective date of this act (Sept. 15, 2003)." There may be an issue regarding the 'retroactive application' of this amendment, but the Committee takes no position on this issue pending resolution by the Courts.

7. For causes of actions which accrued prior to the effective date of the amendment of the definition of 'reckless disregard' (9-15-03), the prior instruction read as follows, to-wit:

MI 9.2 *i.* *"Reckless disregard" defined:*

A [hospital] [(identify hospital em ployee providing patient care)] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have

known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

END

Jeff:

My suggestion is we do two versions, one for 16a (brief w/o definition) and one for 16b including the definition right in the sentence as Tom suggested. My theory is that if we include a separate definition in 16b, there can be a distracting disconnect for jurors mentally processiong the instruction if we define negligence as a standard that is not the ER standard. We may want to get Alan Campo involved early on this one.

Ralph Artigliere
skywayra@tds.net
706-632-6035
706-851-4121
----- Original Message -----
From: "Jeff Fulford" <jeff@fulfordlaw.com>
To: "'Ralph Artigliere'" <skywayra@tds.net>; "'Tom Edwards'" <tse@edwardsragatz.com>; <lsstewart@stfblaw.com>; <tgunn@gunnappeals.com>
Cc: <dcaldwell@rumberger.com>; <bartonjm@fljud13.org>; <jjenning@flabar.org>; <jlang@carltonfields.com>; <sammy@nancelaw.com>; <twboyer@coj.net>
Sent: Wednesday, February 17, 2010 1:52 PM
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

The definition of professional negligence is already included in the instruction of 402.16a (when there is an issue of whether emerg med care is involved); but is not included in the 402.16b version (dealing with a case where the parties agree or the court has ruled that emerg med services were definitely involved).

So, I am thinking we don't need to restate the definition of professional negligence in the 'reckless disregard'aendment in 16a. However, we probably do need to include a version in 16b.

-----Original Message-----

From: Ralph Artigliere [mailto:skywayra@tds.net]
Sent: Wednesday, February 17, 2010 1:29 PM
To: Tom Edwards; jeff@fulfordlaw.com; lsstewart@stfblaw.com; tgunn@gunnappeals.com
Cc: dcaldwell@rumberger.com; bartonjm@fljud13.org; jjenning@flabar.org; jlang@carltonfields.com; sammy@nancelaw.com; twboyer@coj.net
Subject: Re: Jury Instruction Error re: Emergency Medical Services FS 768.13

Tom,

I liked your inclusion of the definition, which is why I brought it up again.

Ralph Artigliere
skywayra@tds.net
706-632-6035
706-851-4121
----- Original Message -----
From: "Tom Edwards" <tse@edwardsragatz.com>
To: <skywayra@tds.net>; <jeff@fulfordlaw.com>; <lsstewart@stfblaw.com>; <tgunn@gunnappeals.com>
Cc: <dcaldwell@rumberger.com>; <bartonjm@fljud13.org>; <jjenning@flabar.org>; <jlang@carltonfields.com>; <sammy@nancelaw.com>; <twboyer@coj.net>
Sent: Wednesday, February 17, 2010 1:03 PM
Subject: Re: Jury Instruction Error re: Emergency Medical Services FS 768.13

> That was my 2nd proposal - I drew the definitions from existing
> professional negligence inst .
>
> Thomas S. Edwards, Jr.
> Edwards & Ragatz, P.A.
> Personal Injury and Commercial Trials
> 501 Riverside Ave., Suite 601, Jacksonville, Florida 32202
> Phone 904.399.1609/800.366.1609/Fax 904.399.1615
> Email: tse@edwardsragatz.comWeb Site: edwardsragatz.com
>
> ----- Original Message -----
> From: Ralph Artigliere <skywayra@tds.net>
> To: Jeff Fulford <jeff@fulfordlaw.com>; Tom Edwards; 'Larry Stewart'
> <lsstewart@stfblaw.com>; 'Tracy Gunn' <tgunn@gunnappeals.com>
> Cc: 'Dick Caldwell' <dcaldwell@rumberger.com>; 'James Barton'
> <bartonjm@fljud13.org>; 'Jodi @ TFB ' <jjenning@flabar.org>; 'Joe Lang '
> <jlang@carltonfields.com>; 'Sammy Cacciatore' <sammy@nancelaw.com>; Tyrie
> Boyer <twboyer@coj.net>
> Sent: Wed Feb 17 12:54:25 2010
> Subject: Re: Jury Instruction Error re: Emergency Medical Services FS
> 768.13
>
> If not otherwise defined, we will need to define physician reasonable
> care.

> Ralph Artigliere
> skywayra@tds.net
> 706-632-6035
> 706-851-4121
> ----- Original Message -----
> From: "Jeff Fulford" <jeff@fulfordlaw.com>
> To: "'Ralph Artigliere'" <skywayra@tds.net>; "'Tom Edwards'"
> <tse@edwardsragatz.com>; "'Larry Stewart'" <lsstewart@stfblaw.com>;
> "'Tracy
> Gunn'" <tgunn@gunnappeals.com>
> Cc: "'Dick Caldwell'" <dcaldwell@rumberger.com>; "'James Barton'"
> <bartonjm@fljud13.org>; "'Jodi @ TFB '" <jjenning@flabar.org>; "'Joe Lang
> '"
> <jlang@carltonfields.com>; "'Sammy Cacciatore'" <sammy@nancelaw.com>;
> "Tyrie
> Boyer " <twboyer@coj.net>
> Sent: Wednesday, February 17, 2010 12:48 PM
> Subject: RE: Jury Instruction Error re: Emergency Medical Services FS
> 768.13
>
>
> First, I agree with Ralph, that I am also conflicted on changing the
> statutory language. I do not like the statutory language at all, and
> think
> there is no way for an average juror to understand the phrase. Although
> I
> generally think that we should follow the statutory language, so that we
> are
> not creating new law, I am now questioning that logic here. If it is
> applied
> as written, it essentially will not be understandable and, thus, useless.
>
> I also think there may be an inherent flaw (or confusion) in the statute's
> language in the use of 'risk'. Risk is used twice in the statutory
> definition. First, to refer to the 'injury'. The second usage refers to
> conduct, since it relates to 'substantially greater... negligent
> conduct.'
> I think that is confusing. However, I do agree with Larry that it was
> probably the legislative intent to state some form of 'gross negligence.'
> Why they didn't use that term is a mystery since they have used it in
> other
> statutes (and the legislature is presumed to understand the meaning of its
> terms; especially where they have used those terms in different statutes.)
>
> I propose we do use plain English even if we may be inadvertently changing
> the subtle meaning or intent. In that regard, I do like Tom's first
> proposal as being more easily understood, but think that the term "merely"
> is superfluous (similar to Ralph's comment). What about this modified
> version:

> "and that risk is substantially greater than the risk created by
> negligent conduct or the failure to use reasonable care."
>
> **ps I am including Tyrie on this issue since he recently asked to be
> added
> to insurance (and professional?) subcommittees.
>
> Jeff
>
> JEFFREY C. FULFORD, P.A.
> 32 Southeast Osceola Street
> Suite A
> Stuart, FL 34994
> 772-288-5123 Tel
> 772-288-5143 Fax
> jeff@fulfordlaw.com
>
> CONFIDENTIALITY NOTICE: This e-mail transmission (and the attachments
> accompanying it) contains confidential information belonging to the sender
> which is protected by the Electronic Communications Privacy Act, 18 U.S.C
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> are not the intended recipient, please contact the sender by reply e-mail,
> and destroy all copies of the original message.
>
>
>
> ----------
> -----Original Message-----
> From: Ralph Artigliere [mailto:skywayra@tds.net]
> Sent: Tuesday, February 16, 2010 11:40 PM
> To: Tom Edwards; Larry Stewart; Jeff Fulford; Tracy Gunn
> Cc: Dick Caldwell; James Barton; Jodi @ TFB ; Joe Lang ; Sammy Cacciatore
> Subject: Re: Jury Instruction Error re: Emergency Medical Services FS
> 768.13
>
> I think Tom is on the right track; i.e., we would need to define what we
> mean by "reasonable care" as was done here. I don't care for using the
> word
>
> "merely".
>
> We may need to stick with the statutory language in order to get the exact
> legal result intended by the legislature because there is no equivalent to
> this protected level of conduct.
>
> I am not adamant... just conflicted.
>
> Ralph

> Ralph Artigliere
> skywayra@tds.net
> 706-632-6035
> 706-851-4121
> ----------
> ----- Original Message -----
> From: "Tom Edwards" <tse@edwardsragatz.com>
> To: "Larry Stewart" <lsstewart@stfblaw.com>; "Jeff Fulford"
> <jeff@fulfordlaw.com>; "Tracy Gunn" <tgunn@gunnappeals.com>
> Cc: "Dick Caldwell" <dcaldwell@rumberger.com>; "James Barton"
> <bartonjm@fljud13.org>; "Jodi @ TFB " <jjenning@flabar.org>; "Joe Lang "
> <jlang@carltonfields.com>; "Sammy Cacciatore" <sammy@nancelaw.com>; "Ralph
> Artigliere" <skywayra@tds.net>
> Sent: Tuesday, February 16, 2010 9:26 PM
> Subject: RE: Jury Instruction Error re: Emergency Medical Services FS
> 768.13
>
>
> Or alternatively:
>
>
>
> "and that risk is substantially greater than the risk created by merely
> failing to act in a way considered acceptable and appropriate by similar
> and
>
> reasonably careful [physicians] [hospitals] [health care providers].
>
>
>
> Thomas S. Edwards, Jr.
>
>
> Edwards & Ragatz, P.A.
>
>
> ----------
> From: Tom Edwards [mailto:tse@edwardsragatz.com]
> Sent: Tuesday, February 16, 2010 9:16 PM
> To: Larry Stewart; Jeff Fulford; Tracy Gunn
> Cc: Dick Caldwell; James Barton; Jodi @ TFB ; Joe Lang ; Sammy Cacciatore;
> Ralph Artigliere
> Subject: RE: Jury Instruction Error re: Emergency Medical Services FS
> 768.13
>
>
> May I suggest instead:
>

> "and that risk is substantially greater than the risk created by merely
> failing to use reasonable care"
>
> that language is drawn from the negligence instruction
>
>
> Thomas S. Edwards, Jr.
>
>
> Edwards & Ragatz, P.A.
>
>
> _____
>
> From: Larry Stewart [mailto:lsstewart@stfblaw.com]
> Sent: Tue 2/16/2010 8:09 PM
> To: Jeff Fulford; Tracy Gunn
> Cc: Dick Caldwell; James Barton; Jodi @ TFB ; Tom Edwards; Joe Lang ;
> Sammy
> Cacciatore; Ralph Artigliere
> Subject: RE: Jury Instruction Error re: Emergency Medical Services FS
> 768.13
>
>
>
> I have been trying to come up with a "plain English" substitution for the
> last phrase of the definition, because I do not think that any jury will
> understand what that means. The problem is that the last phrase mixes
> "risk" with "conduct" and that makes it difficult to come up with a
> substitute. I think what the legislature intended was something in the
> nature of gross negligence but we cannot assume that. What do you think
> of
> this: "and that risk is substantially greater than the risk created by
> merely failing to act or acting inappropriately under similar
> circumstances"???
>

From: Jeff Fulford [mailto:jeff@fulfordlaw.com]
Sent: Tuesday, February 16, 2010 2:05 PM
To: 'Tracy Gunn'
Cc: 'Dick Caldwell'; 'James Barton'; 'Jodl @ TFB '; 'Larry Stewart'; 'Tom Edwards'; 'Joe Lang '; 'Sammy Cacciatore'; Ralph Artigliere
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

SECOND DRAFT:

Following some sage advice, I have drafted a second version. It attempts to incorporate the comments thus far. It does the following:

1- It incorporates Larry's plain English version (slightly different from statutory language);
2- It is formatted to be submitted in the current book, as well as the new book pending before the court (we would submit both for publication);
3- There is a 'note on use' for application of the older version of the statute (pre 2003). The current statutory version is included as the main instruction (Larry's suggestion); and
4- There is a 'note on use' that the statute attempted to apply the post 2003 version retroactively, but that the committee takes no position on this retroactive application, pending resolution of this issue by the courts. (Sammy's suggestion)

Please advise if there are additional suggestions or language changes. The highlighted yellow are the actual proposed charges and notes on use. Thanks
Jeff

I. Proposed amended instruction for current book:
FSJI at Misc MI 9.1d & 9.2i

MI 9.1
EMERGENCY MEDICAL TREATMENT

NO JURY ISSUE AS TO
APPLICABILITY OF § 768.13(2)(b) (FS 2003)

d. "Reckless disregard" defined:

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk was substantially greater than that which is necessary to make the conduct negligent.

[add these 2 notes on use for MI 9.1]

4. The statutory definition of 'reckless disregard' was amended, effective 9-15-03. The legislative intent was stated as follows, to-wit: "It is the intent of the Legislature to apply the provisions of this act to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution, except that the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is mailed on or after the effective date of this act (Sept. 15, 2003)." There may be an issue regarding the 'retroactive application' of this amendment, but the Committee takes no position on this issue pending resolution by the Courts.

5. For causes of actions which accrued prior to the effective date of the amendment of the definition of 'reckless disregard' (9-15-03), the prior instruction read as follows, to-wit:

MI 9.1 *d.* *"Reckless disregard" defined:*

A [hospital] [(identify hospital em ployee providing patient care)] **[physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care]**

[treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

MI 9.2
EMERGENCY MEDICAL TREATMENT

JURY ISSUE AS TO APPLICABILITY OF § 768.13(2)(b) (FS 2003)

i. "Reckless disregard" defined:

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk was substantially greater than that which is necessary to make the conduct negligent.

[add these 2 notes on use for MI 9.2]

6. The statutory definition of 'reckless disregard' was amended, effective 9-15-03. The legislative intent was stated as follows, to-wit: "It is the intent of the Legislature to apply the provisions of this act to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution, except that the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is mailed on or after the effective date of this act (Sept. 15, 2003)." There may be an issue regarding the 'retroactive application' of this amendment, but the Committee takes no position on this issue pending resolution by the Courts.

7. For causes of actions which accrued prior to the effective date of the amendment of the definition of 'reckless disregard' (9-15-03), the prior instruction read as follows, to-wit:

MI 9.2 *i. "Reckless disregard" defined:*

A [hospital] [(identify hospital em ployee providing patient care)] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

I. Proposed amended instruction for 'new book':

FSJI at 402.16a (3) [Note - remove current 2nd paragraph and insert this new definition]

"A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk was substantially greater than that which is necessary to make the conduct negligent."

FSJI at 402.16b [Note - remove current 2nd paragraph and insert this new definition]

"A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk was substantially greater than that which is necessary to make the conduct negligent."

[add these 2 notes on use for 402.16]

6. **The statutory definition of 'reckless disregard' was amended, effective 9-15-03. The legislative intent was stated as follows, to-wit: "It is the intent of the Legislature to apply the provisions of this act to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution, except that the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is mailed on or after the effective date of this act (Sept. 15, 2003)." There may be an issue regarding the 'retroactive application' of this amendment, but the Committee takes no position on this issue pending resolution by the Courts.**

7. **For causes of actions which accrued prior to the effective date of the amendment of the definition of 'reckless disregard' (9-15-03), the prior instruction read as follows, to-wit:**

MI 9.2 *i.* ***"Reckless disregard" defined:***

A [hospital] [(identify hospital em ployee providing patient care)] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

END

From: Ralph Artigliere [mailto:skywayra@tds.net]
Sent: Monday, February 15, 2010 4:27 PM
To: Sammy Cacciatore; Jeff Fulford; Tracy Gunn
Cc: Dick Caldwell; James Barton; Jodi @ TFB ; Larry Stewart; Tom Edwards; Joe Lang ; Sammy Cacciatore
Subject: Re: Jury Instruction Error re: Emergency Medical Services FS 768.13

I agree with Larry, Sammy, and your second email, Jeff. You might take a stab at incorporating what you have heard and agree with so far and we can go from there.

Ralph Artigliere
skywayra@tds.net
706-632-6035
706-851-4121
----- Original Message -----
From: Sammy Cacciatore
To: Jeff Fulford ; Tracy Gunn
Cc: Dick Caldwell ; James Barton ; Jodi @ TFB ; Larry Stewart ; Tom Edwards ; Joe Lang ; Ralph

Artigliere ; Sammy Cacciatore
Sent: Friday, February 12, 2010 11:29 AM
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

Jeff,

Here are my thoughts as a former member:

I think that we need to keep both versions. The format that we used in the past setting the two versions apart by the dates as you suggest in parra. 3 is fine.

Notwithstanding the statutory language, it seems to me that the change is substantive and cannot be applied retroactively. We should suggest in the note there is a question regarding retroactive application and advise that the Committee takes no position pending resolution of the question.

I think Larry's comments and thoughts are good. I would concur on trying his language and submitting both versions.

Sammy Cacciatore
Sammy@NanceLaw.com

From: Jeff Fulford [mailto:jeff@fulfordlaw.com]
Sent: Friday, February 12, 2010 11:31 AM
To: 'Tracy Gunn'
Cc: 'Dick Caldwell'; 'James Barton'; 'Jodi @ TFB '; 'Larry Stewart'; 'Tom Edwards'; Sammy Cacciatore; Joe Lang ; Ralph Artigliere
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

Thanks Larry. You may not be a 'current member', but you will forever be a member in our hearts... Your thoughts are well taken.

I forgot the punitive damages charge was edited in the new book. I also like your idea of using only the current statutory version (with revisions if everyone agrees) as the main instruction; with a note on use identifying the date of the statutory change and older instruction. As to the editing, I do prefer plain English versions, but hesitate since we are dealing with a statutory provision. Modifying both (current instruction and new book version) would cover all bases. Other thoughts from the committee?
Jeff

-----Original Message-----
From: Larry Stewart [mailto:lsstewart@stfblaw.com]
Sent: Friday, February 12, 2010 11:09 AM
To: Jeff Fulford; Tracy Gunn
Cc: Dick Caldwell; James Barton; Jodi @ TFB ; Tom Edwards; Sammy Cacciatore; Joe Lang ; Ralph Artigliere

Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

Jeff: A couple of thoughts from a "former" member. First, I would consider putting the pre-'03 language in a Note On Use. We concluded that the old punitive damage instructions which had the pre and post '99 language in the instructions were very confusing. It was for that reason that we moved the pre-'99 language to an Appendix. I don't think this is long enough to warrant an Appendix and that it could be handled in a Note On Use.

Second, while the statutory language is pretty good (for statutory language), it could be improved a little by some slight changes, as follows:

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [her] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that will affect the life or health of another, and that risk was substantially greater than that which is necessary to make the conduct negligent.

I tried to red-line the changes but that exceeded my computer skills. Nonetheless, you can see the changes by comparison -- they are in the third line. I tried to think of a substitute for the last phrase (because I doubt that a jury will understand what that means) but couldn't come up with anything simple.

Lastly, with respect to which version (current or proposed) of the instruction to modify, I would do both. As I recall, we kept these instructions pretty much intact (if not verbatim). Since the Court has not raised any questions about any of the med mal instructions, they may be prepared to approved them "as is" maybe before this proposal can even get there (since it first has to be published for comments, which means the earliest you can get this up there is the end of the summer). If you do both versions, you will be set to go no matter what the Court does.

From: Jeff Fulford [mailto:jeff@fulfordlaw.com]
Sent: Friday, February 12, 2010 10:25 AM
To: 'Tracy Gunn'
Cc: 'Dick Caldwell'; 'James Barton'; 'Jodi @ TFB '; 'Larry Stewart'; 'Tom Edwards'; Sammy Cacciatore; Joe Lang ; Ralph Artigliere
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13
To subcommittee members:
Upon reflection last night after sending this, I thought I should try to list the issues that I see, as it makes for an easier review by the subcommittee:

1- We need to agree on the language, first.
(Since statutory, I think it should follow the statute, instead of inserting plain English

translation, but that is just my thought.)

2- We need to determine if we keep old version **and** new version.
(I think both are still needed, since there are probably still a few pre 2003 cases out there.)

3- If keeping both versions, then the format should probably mirror what we have done in the past with the use of dates (eg- pre 9-15-03 causes of action use older version, cases which accrued after 9-15-03 use newer version.... The Punitive Damage section is a good example as to how we did this in other situations.)

4- Finally, I think we should include a note on use that the statute attempts to apply it retroactively, but that the committee thinks they are substantive changes and it cannot be applied retroactively (if that is our collective thought); and simply cite the statute language regarding application, following our note on use, as follows:

"It is the intent of the Legislature to apply the provisions of this act to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution, except that the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is mailed on or after the effective date of this act [Sept. 15, 2003]."

Those are the issues that I see. Thoughts?
Jeff

From: Jeff Fulford [mailto:jeff@fulfordlaw.com]
Sent: Thursday, February 11, 2010 5:58 PM
To: 'Ralph Artigliere'; 'Tracy Gunn'
Cc: 'Dick Caldwell'; 'James Barton'; 'Jodi @ TFB '; 'Joe Lang'; 'Larry Stewart'; 'Tom Edwards'; Sammy Cacciatore
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

To the Professional Negligence Subcommittee members:

This is my first stab at correcting our instructions on the "reckless disregard" definition under Emergency Medical Services. I think it is fairly straight forward since we are dealing with a statutory change (which I think we all agree is a substantive change and cannot be applied retroactively). I have included the older version, the newer proposed version, and a note on use suggesting it is likely a substantive statutory change, etc. The specific statutory language (old and new) is in this email thread below. Please let me know thoughts and proposed changes.

An additional thought is whether we are attempting to amend the current version (as written below), or if we want to propose changing the new 'book' version currently before the court. My suggestion is we offer this now, based on the current version, since it is years overdue.
Thanks
Jeff

Current versions in FSJI at Misc MI 9.1d & 9.2 (based on older version of statute):

MI 9.1

EMERGENCY MEDICAL TREATMENT

NO JURY ISSUE AS TO
APPLICABILITY OF § 768.13(2)(b)

d. "Reckless disregard" defined:

A [hospital] [(identify hospital em ployee providing patient care)] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

MI 9.2
EMERGENCY MEDICAL TREATMENT

JURY ISSUE AS TO APPLICABILITY OF § 768.13(2)(b)

i. "Reckless disregard" defined:

A [hospital] [(identify hospital em ployee providing patient care)] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

Proposed new version and notes on use, should be applied to both sections below (based on current statutory version):

MI 9.1 d. and
MI 9.2 i.

"Reckless disregard" defined:

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [her] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury so as to affect the life or health of another, and such risk was substantially greater than that which is necessary to make the conduct negligent.

NOTES ON USE

[Add as #4 to 9.1; and as #6 to 9.2]

Florida Statutes 768.12 (2)(b)3 was amended in 2003, and appears to be a substantive statutory amendment. The committee recommends using the pre 2003 statutory definition of "reckless disregard" for those cases whose cause of action accrued prior to the effective date of the amended statute on September 15, 2003; and using the current statutory version for all cases which accrued thereafter.

From: Ralph Artigliere [mailto:skywayra@tds.net]
Sent: Friday, December 11, 2009 1:16 PM
To: Jeff Fulford; 'Tracy Gunn'
Cc: Dick Caldwell; James Barton; Jodi @ TFB ; Joe Lang; Larry Stewart; Tom Edwards
Subject: Re: Jury Instruction Error re: Emergency Medical Services FS 768.13

I am on board with this approach.

I for one hope Sammy and Larry stay engaged at least until we resolve the new book and this needed adjustment.

Ralph
----- Original Message -----
From: Jeff Fulford
To: 'Tracy Gunn'
Cc: Dick Caldwell ; James Barton ; Jodi @ TFB ; Joe Lang ; Larry Stewart ; Ralph Artigliere ; Tom Edwards
Sent: Friday, December 11, 2009 10:50 AM
Subject: RE: Jury Instruction Error re: Emergency Medical Services FS 768.13

Tracy
I'll be happy to do so. I will start on a new version. I will send to the med mal subcommittee; but since we are losing Sammy and Larry (and they will be missed), then we probably need some new members. Jeff

From: Tracy Gunn [mailto:tgunn@gunnappeals.com]
Sent: Friday, December 11, 2009 6:17 AM
To: Jeff Fulford
Subject: Re: Jury Instruction Error re: Emergency Medical Services FS 768.13

Thanks so much Jeff. This is very helpful. Yes please do reply to him. We need to get some new people on the med mal subcommittee. Can you take charge of this issue and I'll make sure you have subcommittee help?

Tracy Gunn
Sent from my iPhone

On Dec 10, 2009, at 7:00 PM, "Jeff Fulford" <jeff@fulfordlaw.com> wrote:

Tracy

Attorney Malove makes a good point. The statute was amended in 2003 (FS sec. 768.13 (2)(b)), and altered the definition somewhat from its prior version. The current instructions are found at MI 9.1 d & MI 9.2 I, and still use the older statutory language. It appears we also used the older language of the statute in the new instructions currently pending before the Court, and I think it should be changed to reflect the current statutory definition.

Pre 2003 version: 768.13 (2)(b) 3:

For purposes of this paragraph, 'reckless disregard' as it applies to a given health care provider rending
emergency medical services shall be such conduct which a health care provider knew or should have known, at the time such services were
rendered, would be likely to result in injury so as to affect the life or health of another, taking into account the following to the extent they may be present;

a. The extent or serious nature of the circumstances prevailing.
b. The lack of time or ability to obtain appropriate consultation.
c. The lack of a prior patient-physician relationship.
d. The inability to obtain an appropriate medical history of the patient.
e. The time constraints imposed by coexisting emergencies.

Current version since 2003:

For purposes of this paragraph, "reckless disregard" as it applies to a given health care provider rendering emergency medical services shall be
such conduct that a health care provider knew or should have known, at the time such services were rendered, created an unreasonable risk of injury so as to affect the life or health of another, and such risk was substantially greater than that which is necessary to make the conduct negligent

However, the statute specifically states that the 2003 amendments should be retroactively applied "to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution...." If this were only considered a procedural change, then I don't think there would be any prohibition to the retro-application of the language to all cases pending. However, if considered substantive, then we may need to show both statutory definitions with a note on use as to when to use each version (I believe this may be the correct method to use for this instruction). If so, then I think it probably should be considered a substantive change in the statute, but would like to hear more thoughts from others.

I don't specifically recall any discussion on the use of this language during the meetings, but could be wrong. If you would like, I could email Malove and advise we

are looking into his comment and that we consider them meritorious. Let me know. Jeff

From: Jodi B Jennings [mailto:jjenning@flabar.org]
Sent: Thursday, December 10, 2009 4:07 PM
To: Amos, Joseph; apratt@fisherlawfirm.com; Artigliere, Ralph; reajr@robertaustinlaw.com; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; lcbrown@co.palm-beach.fl.us; mellis@co.palm-beach.fl.us; sammy@nancelaw.com; vanessa@nancelaw.com; dcaldwell@rumberger.com; Edwards, Thomas; Farmer, Gary; simmonsk@flcourts.org; Fulford, Jeffrey; Gertz, Sally; wgraham@jud11.flcourts.org; griffinj@flcourts.org; kahnc@1dca.org; marstonci@1dca.org; jlang@carltonfields.com; LaRose, Edward; fmiller@jud11.flcourts.org; poseyg@flcourts.org; wlumish@carltonfields.com; Whitmore, Laura; Richards, John; Tracy Wasserman; lsstewart@stfblaw.com; Mary Masferrer; rmercier@jkwpa.com; Wagner, Alan; Gunn, Tracy; Campo, Allan; Bagley, Jerald; Barnett, Karen; Burlington, Philip; costellod@jud14.flcourts.org; DeMahy, Pedro (Pete); Francis, Gregorio; Hinkle, Donald; Ingram, J.; Kest, John ; Lytal, Lake; McCloy, Dixon; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Sass, Cynthia; Iacone, Diane; Stringfield, Courtney
Subject: Fw: Jury Instruction Error

See the below comment on MI 9.2.

----- Forwarded by Jodi B Jennings/The Florida Bar on 12/10/2009 04:04 PM -----

Tracy Gunn <tgunn@gunnappeals.com>

12/10/2009 03:54 PM

To Jjenning <jjenning@flabar.org>
cc
Subject Fwd: Jury Instruction Error

Jodi, Can you please distribute this to the committee. Thanks.

Tracy Gunn
Sent from my iPhone

Begin forwarded message:

From: malove2@aol.com
Date: December 10, 2009 3:46:33 PM EST
To: tgunn@gunnappeals.com
Subject: Jury Instruction Error

Hello:

I was recently preparing jury instructions in a med mal case and came upon the legal definition of "reckless disregard." The definition in 9.2 was in effect in the past. There is a new definition. I thought you might want to investigate this.

Sincerely,

Stephen L. Malove, Esq.
Law Offices of Stephen L. Malove & Associates, P.A.
14 Rose Drive
Ft. Lauderdale, FL 33316
Phone: 954-767-1000
Fax: 954-767-1001
Email: Malove2@aol.com
Website: www.malovelawfirm.com

"Jeff Fulford"
<jeff@fulfordlaw.com>
03/01/2011 12:58 PM

To "'Ralph Artigliere'" <skywayra@tds.net>, "'Kest, John'" <ctjujk1@ocnjcc.org>, "'Tom Edwards'" <tse@edwardsragatz.com>, "'Jodi B Jennings'"
cc
bcc
Subject RE: Jury Instructions --Emergency Medical Services

We talked about some of these issues when the statutory change was originally brought to our attention and Larry Stewart and Sammy Cacciatore were still on the committee. Ralph is correct that the statute is somewhat ambiguous, and we originally discussed the difficulty in applying the statutory language verbatim, or close to it. The comments by the subcommittee in its earlier sessions (via email string) are attached to this email.

That said, I do like the 2 sentence version offered by Ralph. It 'seems' simpler but still conveys the statutory language. However, I could live with either version.

It may be helpful for the members of the subcommittee to review the lengthy email string (attached) for all the issues we need to address for this instruction. Because the new jury book has been accepted by the Court, then the versions we were amending in the old book are now moot (and I removed them from the email string to uncomplicated an already complicated matter). We need only consider the amendments needed for the new book. Also, it makes sense (as Tom has proposed) to address the language in the main instruction first, and then concentrate on the notes on use regarding the retroapplication of the statute (as the legislature has attempted but is probably impermissible).

As for Ralph's comment regarding legislative intent..., I think the legislature intended this to be akin to 'gross negligence', which would apply to the behavior, and not the outcome. Even though the statute does specifically read **'created an unreasonable risk of injury'**, which seemingly applies to the outcome, it does reference 'reckless disregard' in defining the conduct of the hcp. It doesn't appear to really matter in the formation of our instruction though, since we are using the specific statutory language. (almost sounds like an Andrews/Cordoza argument in *Palsgraf* .)
Jeff

From: Ralph Artigliere [mailto:skywayra@tds.net]
Sent: Monday, February 28, 2011 4:50 PM
To: Jeff Fulford; 'Kest, John'; 'Tom Edwards'; 'Jodi B Jennings'; 'Amos, Joseph'; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; 'Boyer, Tyrie'; 'Bagley, Jerald'; 'Lytal, Lake'; 'Rosenbloum, Louis'; 'Roth, Neal'; 'Russo, Elizabeth'; 'Bagley, Judge'; jlang@carltonfields.com; 'Ingram, J.'
Subject: Re: Jury Instructions --Emergency Medical Services

I am still having difficulty understanding what the legislature intended. As we discussed at the meeting, are we talking about unreasonably risky behavior or behavior that risks an unreasonable outcome e.g., death or serious injury that was not reasonably anticipated if the treatment was not negligent?

I would suggest we stick closer to the statute, and I like suggestions by Gertz and Russo that we break up the instruction into two sentences.

Reckless disregard is conduct that a [hospital][physician] knew or should have known at the time the services were rendered created an unreasonable risk of injury affecting the life or health of another. An unreasonable risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers].

Sorry about the yellow highlighting. Don't know how to turn it off!

Ralph Artigliere
skywayra@tds.net
----- Original Message -----
From: Jeff Fulford
To: 'Kest, John' ; 'Tom Edwards' ; 'Jodi B Jennings' ; 'Amos, Joseph' ; 'Artigliere, Ralph' ; jbailey@jud11.flcourts.org ; bartonjm@fljud13.org ; 'Boyer, Tyrie' ; 'Bagley, Jerald' ; 'Lytal, Lake' ; 'Rosenbloum, Louis' ; 'Roth, Neal' ; 'Russo, Elizabeth' ; 'Bagley, Judge' ; jlang@carltonfields.com ; 'Ingram, J.'
Sent: Monday, February 28, 2011 3:06 PM
Subject: RE: Jury Instructions --Emergency Medical Services

I also like the language and think it fits the statutory changes. Jeff

From: Kest, John [mailto:ctjujk1@ocnjcc.org]
Sent: Monday, February 28, 2011 12:41 PM
To: Tom Edwards; Jeff Fulford; Jodi B Jennings; Amos, Joseph; Artigliere, Ralph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Lytal, Lake; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: RE: Jury Instructions --Emergency Medical Services

Tom,

It looks like a good "starting point."

John

John Marshall Kest
Circuit Judge, Ninth Judicial Circuit

From: Tom Edwards [mailto:tse@edwardsragatz.com]
Sent: Monday, February 28, 2011 11:52 AM
To: Jeff Fulford; Jodi B Jennings; Amos, Joseph; Artigliere, Ralph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Kest, John; Lytal, Lake; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: Jury Instructions --Emergency Medical Services

This follow up on the Professional Negligence Sub-Committee – Emergency Medicine Instruction. I have the following members:

Edwards
Fulford

Lang
Amos
Lytal
Artigliere
Bailey
Barton
Boyer
Bagley
Kest
Rosenbloum
Roth
Russo
Ingram

If I missed anyone please let me know.

Minutes from the last meeting are below--- Instructions are in RED

6. EMERGENCY MEDICAL SERVICES

Edwards noted the instructions on emergency medical services (402.16) have not been updated since the 2003 amendments to the Medical Malpractice Act. The specific issue is the language in section 768.13, Florida Statutes, on "reckless disregard" and how the instructions will define negligence in this context. Edwards stated the statute uses the term "negligence," which is defined in the proposed instructions (p. 75 of the materials). The Committee generally agreed that negligence should be defined in this context.

Gertz stated the proposed instructions are too long. Artigliere noted they need to be that way per the statute, similar to the long reasonable doubt instruction in criminal cases. Russo suggested breaking up the sentence as follows ". . . life or health of another. An unreasonable risk is a risk that is . . ."

Farmer noted the existing body of Florida law concerning the term "reckless disregard" in the libel/slander context and suggested it may prove useful here.

Barton asked the Professional Malpractice subcommittee (Edwards as chair) to revise the proposed instructions and to then re-circulate it to the Committee. Barton noted that the Committee could approve the instruction before the next Committee meeting if the subcommittee thinks the instruction is good and does not need further discussion.

The key language we must resolve in the context of the new statute is the definition of "reckless disregard" – because the instruction relies on comparing the "negligent" conduct to the "reckless" standard we agreed at the meeting we should address it by giving the full definition of healthcare negligence – once we resolve this language I will re-draft the instruction – PLEASE COMMENT ON THE BELOW AS THE STARTING POINT FOR RE-DRAFTING THE INSTRUCTION

"A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers]."

BY THE WAY – this is all based upon 768.13(2)(b)(3)

Thomas S. Edwards, Jr.
Edwards & Ragatz, P.A.
Personal Injury and Commercial Trials
501 Riverside Ave., Suite 601
Jacksonville, Florida 32202
Phone 904-399-1609/Fax 904-399-1615
tse@edwardsragatz.com

"Lake Lytal, Jr." <llytal@palmbeachlaw.com>
03/03/2011 07:39 PM

To "Ralph Artigliere" <skywayra@tds.net>
cc "Jeff Fulford" <jeff@fulfordlaw.com>, "Kest, John" <ctjujk1@ocnjcc.org>, "Tom Edwards" <tse@edwardsragatz.com>, "Jodi B Jennings"
bcc
Subject Re: Jury Instructions --Emergency Medical Services

I defer to those who have been on the committee longer than I have

Sent from my iPhone

On Mar 3, 2011, at 5:20 PM, "Ralph Artigliere" <skywayra@tds.net> wrote:

> I see the problem here, but I, for one, do not feel we are interpreting the law by including the statutory language. Our instruction will simply be as ambiguous as the statute it is based on... no more, no less. That's a sad commentary, I know, especially from a guy who has preached clarity in jury instructions for as long as I have. But I think that's what we are left with...
>
> The only alternative I see is to propose a warning note that cites the (not so) new statute and indicates that the existing instruction is not valid for cases after [effective date of statute]. We can then say that the new statutory language is ambiguous and, pending further development of the law, we do not at this time propose a standard instruction. Parties will then need to draft case specific instructions where 766.13(2)(b)(3) applies with no guidance from us. The problem with this approach is that it does not give the guidance that Judge Kest says is needed. Even if we take this approach just to bring the ambiguity to the attention of the Supreme Court, I feel we may be rebuked, as they never pass on the correctness of any instructions we send them and will not give us direction on language in the absence of a case or controversy.
>
> We are between a rock and a hard place. I am personally left with the fact we need to mimic stautory language as best we can and let the court deal with it if they actually get an actual case before them addressing this issue. If they give us guidance at that point, we can propose a better instruction.
>
> Ralph Artigliere
> skywayra@tds.net
> 706-632-6035
> 706-851-4121
> ----- Original Message -----
> **From:** Lake Lytal, Jr.
> **To:** Jeff Fulford
> **Cc:** Kest, John ; Tom Edwards ; Jodi B Jennings ; Amos, Joseph ; Artigliere, Ralph ; jbailey@jud11.flcourts.org ; bartonjm@fljud13.org ; Boyer, Tyrie ; Bagley, Jerald ; Rosenbloum, Louis ; Roth, Neal ; Russo, Elizabeth ; Bagley, Judge ; jlang@carltonfields.com ; Ingram, J.
> **Sent:** Thursday, March 03, 2011 1:32 PM
> **Subject:** Re: Jury Instructions --Emergency Medical Services
> I understand and agree that Ralph's proposed instruction probably reflects what the legislature intended. I just have a problem with standard instructions on an unclear statute being created by a committee with no judicial opinions to back up the

committee's interpretation. It seems that the courts rather than the committee should have the first bite of the apple.

Sent from my iPhone

On Mar 3, 2011, at 11:45 AM, "Jeff Fulford" <jeff@fulfordlaw.com> wrote:

> Lake
>
> John is right that we need to have an instruction for the trial judges to use around the state. I am sure that everyone on the committee agrees with you that the statute is ambiguous. However, there does need to be uniformity with the instructions used statewide on this statute. We have to just do the best we can given the language of the statute. That is why Ralph states we need to create an instruction that closely resembles the statute, so that we don't put our own erroneous interpretation on the instruction.
>
> Also, bear in mind that we are 'fixing' an instruction that has been around for years (formulated from the statute), based upon a statutory change. We have to correct it since the 'current' instruction is based on a statute inapplicable to newer causes of action.
>
> Jeff
>
> **From:** Lake Lytal, Jr. [mailto:llytal@palmbeachlaw.com]
> **Sent:** Wednesday, March 02, 2011 10:00 PM
> **To:** Kest, John
> **Cc:** Tom Edwards; Jeff Fulford; Jodi B Jennings; Amos, Joseph; Artigliere, Ralph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
> **Subject:** Re: Jury Instructions --Emergency Medical Services
>
> As I recall cases state the Court can look at the legislative history to try to determine what the legislature meant to do. We have not done that nor do I think we should. I am concerned about our committee coming up with a "standard" instruction on an ambiguous statute that has never been interpreted by an appellate Court.
>
> Sent from my iPhone
>
> On Mar 2, 2011, at 9:23 AM, "Kest, John" <ctjujk1@ocnjcc.org> wrote:
>
> > Lake,
> >
> > Unfortunately, that is what we, as trial judges, are faced with everyday. Even though the statute, as written, is ambiguous at best, we have to instruct the jury

to the best of our ability. Therefore, I do think we need to devise something -- within the limitations of the present statute -- to be used for those cases that are to go to the jury. Failing that we will end up with a "hodge podge" of different instructions around the state -- going in all different directions -- with no continuity.

Parenthetically, if we can come up with a consensus draft and maybe point out in the notes on use the issues that the statute creates -- it will at least help focus to the Supreme Court the problem that arises from the statute as written.

I am not sure we can take a "we can't do anything" approach, although I certainly agree with your frustration.

John

John Marshall Kest

Circuit Judge, Ninth Judicial Circuit

From: Lake Lytal, Jr. [mailto:llytal@palmbeachlaw.com]
Sent: Tuesday, March 01, 2011 1:49 PM
To: Tom Edwards; Jeff Fulford; Jodi B Jennings; Amos, Joseph; Artigliere, Ralph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Kest, John; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: RE: Jury Instructions --Emergency Medical Services

Can we agree that the statute,as written, makes no sense? Does the Court need to enforce a statute that doesn't make sense? I do not see how we can come up with an instruction based on this statute without rewriting the statute or trying to guess what the legislature intended it to say.

From: Tom Edwards [mailto:tse@edwardsragatz.com]
Sent: Monday, February 28, 2011 11:52 AM
To: Jeff Fulford; Jodi B Jennings; Amos, Joseph; Artigliere, Ralph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Kest, John ; Lake Lytal, Jr.; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: Jury Instructions --Emergency Medical Services

This follow up on the Professional Negligence Sub-Committee – Emergency Medicine Instruction.

I have the following members:

Edwards

Fulford

Lang

Amos

Lytal

Artigliere

Bailey

Barton

Boyer

Bagley

Kest

Rosenbloum

Roth

Russo

Ingram

If I missed anyone please let me know.

Minutes from the last meeting are below--- Instructions are in RED

6. EMERGENCY MEDICAL SERVICES

Edwards noted the instructions on emergency medical services (402.16) have not been updated since the 2003 amendments to the Medical Malpractice Act. The specific issue is the language in section 768.13, Florida Statutes, on "reckless disregard" and how the instructions will define negligence in this context. Edwards stated the statute uses the term "negligence," which is defined in the proposed instructions (p. 75 of the materials). The Committee generally agreed that negligence should be defined in this context.

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An unreasonable risk is a risk that is . . ."

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"A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers]. "

BY THE WAY – this is all based upon 768.13(2)(b)(3)

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promoting, marketing or recommending to another party any transaction or matter addressed herein.

"Boyer, Tyrie"
<TWBoyer@coj.net>
03/04/2011 01:50 PM

To "Ralph Artigliere" <skywayra@tds.net>, "Lake Lytal, Jr." <llytal@palmbeachlaw.com>, "Jeff Fulford" <jeff@fulfordlaw.com>
cc "Kest, John" <ctjujk1@ocnjcc.org>, "Tom Edwards" <tse@edwardsragatz.com>, "Jodi B Jennings" <jjenning@flabar.org>, "Amos, Joseph"
bcc
Subject RE: Jury Instructions --Emergency Medical Services

I believe that we should suggest adoption of the first 3 sentences of the second paragraph of Ralph's most recent email. Tyrie

From: Ralph Artigliere [mailto:skywayra@tds.net]
Sent: Thursday, March 03, 2011 5:22 PM
To: Lake Lytal, Jr.; Jeff Fulford
Cc: Kest, John; Tom Edwards; Jodi B Jennings; Amos, Joseph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
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I see the problem here, but I, for one, do not feel we are interpreting the law by including the statutory language. Our instruction will simply be as ambiguous as the statute it is based on... no more, no less. That's a sad commentary, I know, especially from a guy who has preached clarity in jury instructions for as long as I have. But I think that's what we are left with...

The only alternative I see is to propose a warning note that cites the (not so) new statute and indicates that the existing instruction is not valid for cases after [effective date of statute]. We can then say that the new statutory language is ambiguous and, pending further development of the law, we do not at this time propose a standard instruction. Parties will then need to draft case specific instructions where 766.13(2)(b)(3) applies with no guidance from us. The problem with this approach is that it does not give the guidance that Judge Kest says is needed. Even if we take this approach just to bring the ambiguity to the attention of the Supreme Court, I feel we may be rebuked, as they never pass on the correctness of any instructions we send them and will not give us direction on language in the absence of a case or controversy.

We are between a rock and a hard place. I am personally left with the fact we need to mimic stautory language as best we can and let the court deal with it if they actually get an actual case before them addressing this issue. If they give us guidance at that point, we can propose a better instruction.

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skywayra@tds.net
706-632-6035
706-851-4121
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Sent: Thursday, March 03, 2011 1:32 PM

Subject: Re: Jury Instructions --Emergency Medical Services

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Sent from my iPhone

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> Jeff
>
> **From:** Lake Lytal, Jr. [mailto:llytal@palmbeachlaw.com]
> **Sent:** Wednesday, March 02, 2011 10:00 PM
> **To:** Kest, John
> **Cc:** Tom Edwards; Jeff Fulford; Jodi B Jennings; Amos, Joseph; Artigliere, Ralph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
> **Subject:** Re: Jury Instructions --Emergency Medical Services
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John

John Marshall Kest

Circuit Judge, Ninth Judicial Circuit

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Subject: RE: Jury Instructions --Emergency Medical Services

Can we agree that the statute,as written, makes no sense? Does the Court need to enforce a statute that doesn't make sense? I do not see how we can come up with an instruction based on this statute without rewriting the statute or trying to guess what the legislature intended it to say.

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used by any taxpayer, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

promoting, marketing or recommending to another party any transaction or matter addressed herein.

"Lake Lytal, Jr." <llytal@palmbeachlaw.com>
03/10/2011 09:10 PM

To "Lang, Joseph H." <jlang@carltonfields.com>
cc "J. Charles Ingram" <jci@eifg-law.com>, "Tom Edwards" <tse@edwardsragatz.com>, "Ralph Artigliere" <skywayra@tds.net>, "Jeff Fulford" <jeff@fulfordlaw.com>,
bcc
Subject Re: Jury Instructions --Emergency Medical Services

I do as well

Sent from my iPhone

On Mar 10, 2011, at 3:03 PM, "Lang, Joseph H." <jlang@carltonfields.com> wrote:

> I agree we should go with the two-sentence version.
>
> Best,
>
> Joe.
>
> <image001.gif>
>
> **Joseph H. Lang, Jr.**
> Board Certified by The Florida Bar in Appellate Practice
>
> 4221 W. Boy Scout Boulevard, Suite 1000
> Tampa, Florida 33607-5780
>
> direct 813.229.4253
> fax 813.229.4133
> jlang@carltonfields.com
> www.carltonfields.com
> bio
> vcard

From: J. Charles Ingram [mailto:jci@eifg-law.com]
Sent: Wednesday, March 09, 2011 5:05 PM
To: Tom Edwards; Ralph Artigliere; Jeff Fulford; Boyer, Tyrie; Lake Lytal, Jr.
Cc: Kest, John; Jodi B Jennings; Amos, Joseph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; Lang, Joseph H.
Subject: RE: Jury Instructions --Emergency Medical Services

Chuck Ingram feels that the (2) sentence instruction is better in its wording.

In the (1) sentence version, the connecting phrase "and that risk" seems awkward—particularly when read out loud.

From: Tom Edwards [mailto:tse@edwardsragatz.com]
Sent: Wednesday, March 09, 2011 5:03 PM
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Subject: RE: Jury Instructions --Emergency Medical Services

Unless there is an objection – I will draft the whole instruction with this to distribute for discussion and consideration –

Probably tomorrow or Friday --

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tse@edwardsragatz.com

From: Ralph Artigliere [mailto:skywayra@tds.net]
Sent: Wednesday, March 09, 2011 4:56 PM
To: Tom Edwards; Jeff Fulford; Boyer, Tyrie; Lake Lytal, Jr.
Cc: Kest, John; Jodi B Jennings; Amos, Joseph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: Re: Jury Instructions --Emergency Medical Services

I expect you know I like the two sentence version. The meaning is identical. Try reading it like a judge would. As a judge, I would prefer reading the two sentence version. Plus... if the jurors refer back to the written instructions, the two sentence version is written more like a pair of definitions. That would seem to be easier to comprehend than an instruction saying that "a hospital or doctor acts with reckless disregard if..." That is not how we talk.

Ralph Artigliere
skywayra@tds.net
706-632-6035
706-851-4121
----- Original Message -----

From: Tom Edwards

To: Jeff Fulford ; Boyer, Tyrie ; Ralph Artigliere ; Lake Lytal, Jr.

Cc: Kest, John ; Jodi B Jennings ; Amos, Joseph ; jbailey@jud11.flcourts.org ; bartonjm@fljud13.org ; Bagley, Jerald ; Rosenbloum, Louis ; Roth, Neal ; Russo, Elizabeth ; Bagley, Judge ; jlang@carltonfields.com ; Ingram, J.

Sent: Wednesday, March 09, 2011 11:09 AM

Subject: RE: Jury Instructions --Emergency Medical Services

The two instructions under consideration are Ralph's and mine – one breaks the language down into different sentences but defines negligence based on the FSJI definition (see the first below)

– the other one is statutory language with the same definitional language used – we should see if there is consensus on one or the other and I can then use that to draft a complete instruction –

PLEASE RESPOND AS TO WHICH WORKS BETTER AS AN INSTRUCTION ON THIS STATUTE --

Reckless disregard is conduct that a [hospital][physician] knew or should have known at the time the services were rendered created an unreasonable risk of injury affecting the life or health of another. An unreasonable risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers].

OR

"A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers]. "

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tse@edwardsragatz.com

From: Jeff Fulford [mailto:jeff@fulfordlaw.com]
Sent: Wednesday, March 09, 2011 10:52 AM
To: 'Boyer, Tyrie'; 'Ralph Artigliere'; 'Lake Lytal, Jr.'
Cc: 'Kest, John'; Tom Edwards; 'Jodi B Jennings'; 'Amos, Joseph'; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; 'Bagley, Jerald'; 'Rosenbloum, Louis'; 'Roth, Neal'; 'Russo, Elizabeth'; 'Bagley, Judge'; jlang@carltonfields.com; 'Ingram, J.'
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These seem to be the current prevailing thoughts, to-wit;

1) attempt an instruction based on the statute; or

2) refuse to draft a uniform instruction but prepare a note on use explaining our reasoning and note the statutory change.

I think we need to formulate the best instruction we can given the language of the statute. I don't think it is fair to the trial judges and lawyers if we don't take a stab at coming up with a statutory instruction. (and if we don't, it will probably result in multiple cases going up on appeal with different resulting instructions). .If I am reading Tom, John and Ralph correctly, it appears they think we should come up with something (and as directed at the meeting to do).

But on the other hand, Tyrie and Lake may be right, and the failure to draft a uniform instruction will be the quickest way to get appellate review of the statute for court guidance to us in the preparation of a uniform instruction.

So, if we are at the voting stage, I vote to prepare an instruction on the current statute (as Tom

has done at the bottom of this email string). I can live with the language used, unless someone wants to offer any other changes. I agree it should be based on statutory language.

Jeff

From: Boyer, Tyrie [mailto:TWBoyer@coj.net]
Sent: Friday, March 04, 2011 1:50 PM
To: Ralph Artigliere; Lake Lytal, Jr.; Jeff Fulford
Cc: Kest, John; Tom Edwards; Jodi B Jennings; Amos, Joseph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
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I think we need to do as tasked and address a proposal for the committee –

HOWEVER – at its core I am in agreement with Lake – at the first meeting we discussed this issue I raised a concern that as someone litigating these issues currently there are different arguable interpretations of the wording of this statute – there are ambiguities – someone else (Chuck Ingram???) weighed in and agreed because they were on the other side of the issue --

My concern with breaking this into the new sentences created by Judge Artigliere is that we are now modifying statutory language – for better or worse – if we propose an instruction we are supposed to ONLY RECOMMEND WHAT IS SETTLED LAW – when we start interpreting we are making law and this committee is not supposed to do that –

If the statute is so unclear that we believe the jury cannot be effectively instructed with it then I think we should not propose an instruction until the courts interpret this issue.

If we are going to propose an instruction then I believe we must stick strictly to the statutory language and only debate inserting an accepted defined term for a term that may otherwise make this confusing – that is what we did with the word negligence in my earlier proposed instruction – it should be strictly statutory language with a definition substituted for a statutory

term –

Thoughts or responses?

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To: Tom Edwards; Jeff Fulford; Jodi B Jennings; Amos, Joseph; Artigliere, Ralph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Kest, John; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: RE: Jury Instructions --Emergency Medical Services

Can we agree that the statute,as written, makes no sense? Does the Court need to enforce a statute that doesn't make sense? I do not see how we can come up with an instruction based on this statute without rewriting the statute or trying to guess what the legislature intended it to say.

From: Tom Edwards [mailto:tse@edwardsragatz.com]
Sent: Monday, February 28, 2011 11:52 AM
To: Jeff Fulford; Jodi B Jennings; Amos, Joseph; Artigliere, Ralph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Kest, John ; Lake Lytal, Jr.; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: Jury Instructions --Emergency Medical Services

This follow up on the Professional Negligence Sub-Committee – Emergency Medicine Instruction.

I have the following members:

Edwards

Fulford

Lang

Amos

Lytal

Artigliere

Bailey

Barton

Boyer

Bagley

Kest

Rosenbloum

Roth

Russo

Ingram

If I missed anyone please let me know.

Minutes from the last meeting are below--- Instructions are in RED

6. EMERGENCY MEDICAL SERVICES

Edwards noted the instructions on emergency medical services (402.16) have not been updated since the 2003 amendments to the Medical Malpractice Act. The specific issue is the language in section 768.13, Florida Statutes, on "reckless disregard" and how the instructions will define negligence in this context. Edwards stated the statute uses the term "negligence," which is defined in the proposed instructions (p. 75 of the materials). The Committee generally agreed that negligence should be defined in this context.

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Barton asked the Professional Malpractice subcommittee (Edwards as chair) to revise the proposed instructions and to then re-circulate it to the Committee. Barton noted that the Committee could approve the instruction before the next Committee meeting if the subcommittee thinks the instruction is good and does not need further discussion.

The key language we must resolve in the context of the new statute is the definition of "reckless disregard" – because the instruction relies on comparing the "negligent" conduct to the "reckless" standard we agreed at the meeting we should address it by giving the full definition of healthcare negligence – once we resolve this language I will re-draft the instruction – PLEASE COMMENT ON THE BELOW AS THE STARTING POINT FOR RE-DRAFTING THE INSTRUCTION

"A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers]. "

BY THE WAY – this is all based upon 768.13(2)(b)(3)

Thomas S. Edwards, Jr.

Edwards & Ragatz, P.A.

Personal Injury and Commercial Trials

501 Riverside Ave., Suite 601

Jacksonville, Florida 32202

Phone 904-399-1609/Fax 904-399-1615

tse@edwardsragatz.com

of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

promoting, marketing or recommending to another party any transaction or matter addressed herein.

"Bailey, Jennifer"
<JBailey@jud11.flcourts.org>
03/10/2011 10:39 AM

To "Neal Roth" <NAR@grossmanroth.com>, "Jeff Fulford" <jeff@fulfordlaw.com>, "Tom Edwards" <tse@edwardsragatz.com>, "Boyer, Tyrie"
cc "Kest, John" <ctjujk1@ocnjcc.org>, "Jodi B Jennings" <jjenning@flabar.org>, "Amos, Joseph" <jamos@fisherlawfirm.com>, <bartonjm@fljud13.org>,
bcc

Subject RE: Jury Instructions --Emergency Medical Services

No matter which way this gets written, it will require significant explanation in closing argument. I think the first version is simpler and clearer, word-smithing wise.

Judge Jennifer D. Bailey
Administrative Judge, Circuit Civil Division
11th Judicial Circuit
Miami-Dade County Courthouse
73 W. Flagler St., Room 1307
Miami, FL 33130
(305)349-7152

From: Neal Roth [mailto:NAR@grossmanroth.com]
Sent: Thursday, March 10, 2011 6:42 AM
To: Jeff Fulford; Tom Edwards; Boyer, Tyrie; Ralph Artigliere; Lake Lytal, Jr.
Cc: Kest, John; Jodi B Jennings; Amos, Joseph; Bailey, Jennifer; bartonjm@fljud13.org; Bagley, Jerald; Rosenbloum, Louis; Russo, Elizabeth; Perez, Ileana; jlang@carltonfields.com; Ingram, J.
Subject: RE: Jury Instructions --Emergency Medical Services

I generally do not like to be cynical, but this law is incapable of being understood and reflects the worst of what happens when special interests write laws. I truly believe that jurors will both hear and see this instruction and then do what they believe is best in the case to support their view of the overall case. So it does not really matter what we do. Having said that simpler is generally better and I defer to our judges who deal with this far more frequently.

Neal A. Roth
2525 Ponce de Leon Blvd
Coral Gables, Florida 33134
305-442-8666(O)
305-285-1668(fax)
nar@grossmanroth.com

From: Jeff Fulford [mailto:jeff@fulfordlaw.com]
Sent: Wednesday, March 09, 2011 11:16 AM
To: 'Tom Edwards'; 'Boyer, Tyrie'; 'Ralph Artigliere'; 'Lake Lytal, Jr.'
Cc: 'Kest, John'; 'Jodi B Jennings'; 'Amos, Joseph'; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; 'Bagley, Jerald'; 'Rosenbloum, Louis'; Neal Roth; 'Russo, Elizabeth'; 'Bagley, Judge'; jlang@carltonfields.com; 'Ingram, J.'
Subject: RE: Jury Instructions --Emergency Medical Services

I vote for the 2 sentence version. It seems slightly easier to 'digest' than the one full sentence version.
Jeff

From: Tom Edwards [mailto:tse@edwardsragatz.com]
Sent: Wednesday, March 09, 2011 11:10 AM
To: Jeff Fulford; Boyer, Tyrie; Ralph Artigliere; Lake Lytal, Jr.
Cc: Kest, John; Jodi B Jennings; Amos, Joseph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: RE: Jury Instructions --Emergency Medical Services

The two instructions under consideration are Ralph's and mine – one breaks the language down into different sentences but defines negligence based on the FSJI definition (see the first below) – the other one is statutory language with the same definitional language used – we should see if there is consensus on one or the other and I can then use that to draft a complete instruction –

PLEASE RESPOND AS TO WHICH WORKS BETTER AS AN INSTRUCTION ON THIS STATUTE --

Reckless disregard is conduct that a [hospital][physician] knew or should have known at the time the services were rendered created an unreasonable risk of injury affecting the life or health of another. An unreasonable risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers].

OR

"A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers]. "

Thomas S. Edwards, Jr.
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Jacksonville, Florida 32202
Phone 904-399-1609/Fax 904-399-1615
tse@edwardsragatz.com

From: Jeff Fulford [mailto:jeff@fulfordlaw.com]
Sent: Wednesday, March 09, 2011 10:52 AM
To: 'Boyer, Tyrie'; 'Ralph Artigliere'; 'Lake Lytal, Jr.'
Cc: 'Kest, John'; Tom Edwards; 'Jodi B Jennings'; 'Amos, Joseph'; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; 'Bagley, Jerald'; 'Rosenbloum, Louis'; 'Roth, Neal'; 'Russo, Elizabeth'; 'Bagley, Judge'; jlang@carltonfields.com; 'Ingram, J.'
Subject: RE: Jury Instructions --Emergency Medical Services

These seem to be the current prevailing thoughts, to-wit;
1) attempt an instruction based on the statute; or
2) refuse to draft a uniform instruction but prepare a note on use explaining our reasoning and note the statutory change.

I think we need to formulate the best instruction we can given the language of the statute. I don't think it is fair to the trial judges and lawyers if we don't take a stab at coming up with a statutory instruction. (and if we don't, it will probably result in multiple cases going up on appeal with different resulting instructions). If I am reading Tom, John and Ralph correctly, it appears they think we should come up with something (and as directed at the meeting to do).

But on the other hand, Tyrie and Lake may be right, and the failure to draft a uniform instruction will be the quickest way to get appellate review of the statute for court guidance to us in the preparation of a uniform instruction.

So, if we are at the voting stage, I vote to prepare an instruction on the current statute (as Tom has done at the bottom of this email string). I can live with the language used, unless someone wants to offer any other changes. I agree it should be based on statutory language.
Jeff

From: Boyer, Tyrie [mailto:TWBoyer@coj.net]
Sent: Friday, March 04, 2011 1:50 PM
To: Ralph Artigliere; Lake Lytal, Jr.; Jeff Fulford
Cc: Kest, John; Tom Edwards; Jodi B Jennings; Amos, Joseph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: RE: Jury Instructions --Emergency Medical Services

I believe that we should suggest adoption of the first 3 sentences of the second paragraph of Ralph's most recent email. Tyrie

From: Ralph Artigliere [mailto:skywayra@tds.net]
Sent: Thursday, March 03, 2011 5:22 PM
To: Lake Lytal, Jr.; Jeff Fulford
Cc: Kest, John; Tom Edwards; Jodi B Jennings; Amos, Joseph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: Re: Jury Instructions --Emergency Medical Services
I see the problem here, but I, for one, do not feel we are interpreting the law by including the statutory language. Our instruction will simply be as ambiguous as the statute it is based on... no more, no less. That's a sad

commentary, I know, especially from a guy who has preached clarity in jury instructions for as long as I have. But I think that's what we are left with...

The only alternative I see is to propose a warning note that cites the (not so) new statute and indicates that the existing instruction is not valid for cases after [effective date of statute]. We can then say that the new statutory language is ambiguous and, pending further development of the law, we do not at this time propose a standard instruction. Parties will then need to draft case specific instructions where 766.13(2)(b)(3) applies with no guidance from us. The problem with this approach is that it does not give the guidance that Judge Kest says is needed. Even if we take this approach just to bring the ambiguity to the attention of the Supreme Court, I feel we may be rebuked, as they never pass on the correctness of any instructions we send them and will not give us direction on language in the absence of a case or controversy.

We are between a rock and a hard place. I am personally left with the fact we need to mimic stautory language as best we can and let the court deal with it if they actually get an actual case before them addressing this issue. If they give us guidance at that point, we can propose a better instruction.

Ralph Artigliere
skywayra@tds.net
706-632-6035
706-851-4121

From: Tom Edwards [mailto:tse@edwardsragatz.com]
Sent: Thursday, March 03, 2011 1:05 PM
To: Jeff Fulford; Lake Lytal, Jr.; Kest, John
Cc: Jodi B Jennings; Amos, Joseph; Artigliere, Ralph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: RE: Jury Instructions --Emergency Medical Services

I think we need to do as tasked and address a proposal for the committee –

HOWEVER – at its core I am in agreement with Lake – at the first meeting we discussed this issue I raised a concern that as someone litigating these issues currently there are different arguable interpretations of the wording of this statute – there are ambiguities – someone else (Chuck Ingram???) weighed in and agreed because they were on the other side of the issue --

My concern with breaking this into the new sentences created by Judge Artigliere is that we are now modifying statutory language – for better or worse – if we propose an instruction we are supposed to ONLY RECOMMEND WHAT IS SETTLED LAW – when we start interpreting we are making law and this committee is not supposed to do that –

If the statute is so unclear that we believe the jury cannot be effectively instructed with it then I think we should not propose an instruction until the courts interpret this issue.

If we are going to propose an instruction then I believe we must stick strictly to the statutory language and only debate inserting an accepted defined term for a term that may otherwise make this confusing – that is what we did with the word negligence in my earlier proposed instruction – it should be strictly statutory language with a definition substituted for a statutory term –

Thoughts or responses?

Thomas S. Edwards, Jr.
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Personal Injury and Commercial Trials
501 Riverside Ave., Suite 601
Jacksonville, Florida 32202
Phone 904-399-1609/Fax 904-399-1615
tse@edwardsragatz.com

----- Original Message -----
From: Lake Lytal, Jr.
To: Jeff Fulford
Cc: Kest, John ; Tom Edwards ; Jodi B Jennings ; Amos, Joseph ; Artigliere, Ralph ; jbailey@jud11.flcourts.org ; bartonjm@fljud13.org ; Boyer, Tyrie ; Bagley, Jerald ; Rosenbloum, Louis ; Roth, Neal ; Russo, Elizabeth ; Bagley, Judge ; jlang@carltonfields.com ; Ingram, J.
Sent: Thursday, March 03, 2011 1:32 PM
Subject: Re: Jury Instructions --Emergency Medical Services

I understand and agree that Ralph's proposed instruction probably reflects what the legislature intended. I just have a problem with standard instructions on an unclear statute being created by a committee with no judicial opinions to back up the committee's interpretation. It seems that the courts rather than the committee should have the first bite of the apple.

Sent from my iPhone

On Mar 3, 2011, at 11:45 AM, "Jeff Fulford" <jeff@fulfordlaw.com> wrote:

> Lake
> John is right that we need to have an instruction for the trial judges to use around the state. I am sure that everyone on the committee agrees with you that the statute is ambiguous. However, there does need to be uniformity with the instructions used statewide on this statute. We have to just do the best we can given the language of the statute. That is why Ralph states we need to create an instruction that closely resembles the statute, so that we don't put our own erroneous interpretation on the instruction.
> Also, bear in mind that we are 'fixing' an instruction that has been around for years (formulated from the statute), based upon a statutory change. We have to correct it since the 'current' instruction is based on a statute inapplicable to newer causes of action.
> Jeff
> **From:** Lake Lytal, Jr. [mailto:llytal@palmbeachlaw.com]
> **Sent:** Wednesday, March 02, 2011 10:00 PM
> **To:** Kest, John
> **Cc:** Tom Edwards; Jeff Fulford; Jodi B Jennings; Amos, Joseph; Artigliere, Ralph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
> **Subject:** Re: Jury Instructions --Emergency Medical Services
> As I recall cases state the Court can look at the legislative history to try to determine what the legislature meant to do. We have not done that nor do I think we should. I am concerned about our committee coming up with a "standard" instruction on an ambiguous statute that has never been interpreted by an appellate Court.

Sent from my iPhone

On Mar 2, 2011, at 9:23 AM, "Kest, John" <ctjujk1@ocnjcc.org> wrote:

Lake,
Unfortunately, that is what we, as trial judges, are faced with everyday. Even though the statute, as written, is ambiguous at best, we have to instruct the jury to the best of our ability. Therefore, I do think we need to devise something -- within the limitations of the present statute -- to be used for those cases that are to go to the jury. Failing that we will end up with a "hodge podge" of different instructions around the state -- going in all different directions -- with no continuity.
Parenthetically, if we can come up with a consensus draft and maybe point out in the notes on use the issues that the statute creates -- it will at least help focus to the Supreme Court the problem that arises from the statute as written.
I am not sure we can take a "we can't do anything" approach, although I certainly agree with your frustration.
John

John Marshall Kest
Circuit Judge, Ninth Judicial Circuit

From: Lake Lytal, Jr. [mailto:llytal@palmbeachlaw.com]
Sent: Tuesday, March 01, 2011 1:49 PM
To: Tom Edwards; Jeff Fulford; Jodi B Jennings; Amos, Joseph; Artigliere, Ralph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Kest, John; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
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Sent: Monday, February 28, 2011 11:52 AM
To: Jeff Fulford; Jodi B Jennings; Amos, Joseph; Artigliere, Ralph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Kest, John ; Lake Lytal, Jr.; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: Jury Instructions --Emergency Medical Services
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I have the following members:
Edwards
Fulford
Lang
Amos
Lytal
Artigliere
Bailey
Barton
Boyer
Bagley

Kest
Rosenbloum
Roth
Russo
Ingram
If I missed anyone please let me know.
Minutes from the last meeting are below--- Instructions are in RED

6. EMERGENCY MEDICAL SERVICES

Edwards noted the instructions on emergency medical services (402.16) have not been updated since the 2003 amendments to the Medical Malpractice Act. The specific issue is the language in section 768.13, Florida Statutes, on "reckless disregard" and how the instructions will define negligence in this context. Edwards stated the statute uses the term "negligence," which is defined in the proposed instructions (p. 75 of the materials). The Committee generally agreed that negligence should be defined in this context.

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"A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers]. "

BY THE WAY – this is all based upon 768.13(2)(b)(3)

Thomas S. Edwards, Jr.

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tse@edwardsragatz.com

promoting, marketing or recommending to another party any transaction or matter addressed herein.

"Boyer, Tyrie"
<TWBoyer@coj.net>
03/10/2011 09:59 AM

To "Kest, John" <ctjujk1@ocnjcc.org>, "Tom Edwards" <tse@edwardsragatz.com>, "Ralph Artigliere" <skywayra@tds.net>, "Jeff Fulford" <jeff@fulfordlaw.com>,
cc "Jodi B Jennings" <jjenning@flabar.org>, "Amos, Joseph" <jamos@fisherlawfirm.com>, <jbailey@jud11.flcourts.org>, <bartonjm@fljud13.org>, "Bagley, Jerald"
bcc

Subject RE: Jury Instructions --Emergency Medical Services

ditto

From: Kest, John [mailto:ctjujk1@ocnjcc.org]
Sent: Wednesday, March 09, 2011 5:15 PM
To: Tom Edwards; Ralph Artigliere; Jeff Fulford; Boyer, Tyrie; Lake Lytal, Jr.
Cc: Jodi B Jennings; Amos, Joseph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: RE: Jury Instructions --Emergency Medical Services

Tom,

I like the two sentence proposal. It is clearer – to the extent this instruction can be – and I believe would be easier for the jurors to understand. As noted by Ralph, it is certainly easier to give from the judicial standpoint.

All that being said, there are still big problems with the language that we are not going to be able to cure no matter how we draft it. That is going to have to be for the Court or the legislature in redrafting the statute.

John

John Marshall Kest
Circuit Judge, Ninth Judicial Circuit

From: Tom Edwards [mailto:tse@edwardsragatz.com]
Sent: Wednesday, March 09, 2011 5:03 PM
To: Ralph Artigliere; Jeff Fulford; Boyer, Tyrie; Lake Lytal, Jr.
Cc: Kest, John; Jodi B Jennings; Amos, Joseph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: RE: Jury Instructions --Emergency Medical Services

Unless there is an objection – I will draft the whole instruction with this to distribute for discussion and consideration –

Probably tomorrow or Friday --

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Personal Injury and Commercial Trials
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Jacksonville, Florida 32202

Phone 904-399-1609/Fax 904-399-1615
tse@edwardsragatz.com

From: Ralph Artigliere [mailto:skywayra@tds.net]
Sent: Wednesday, March 09, 2011 4:56 PM
To: Tom Edwards; Jeff Fulford; Boyer, Tyrie; Lake Lytal, Jr.
Cc: Kest, John; Jodi B Jennings; Amos, Joseph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: Re: Jury Instructions --Emergency Medical Services

I expect you know I like the two sentence version. The meaning is identical. Try reading it like a judge would. As a judge, I would prefer reading the two sentence version. Plus... if the jurors refer back to the written instructions, the two sentence version is written more like a pair of definitions. That would seem to be easier to comprehend than an instruction saying that "a hospital or doctor acts with reckless disregard if..." That is not how we talk.

Ralph Artigliere
skywayra@tds.net
706-632-6035
706-851-4121

----- Original Message -----
From: Tom Edwards
To: Jeff Fulford ; Boyer, Tyrie ; Ralph Artigliere ; Lake Lytal, Jr.
Cc: Kest, John ; Jodi B Jennings ; Amos, Joseph ; jbailey@jud11.flcourts.org ; bartonjm@fljud13.org ; Bagley, Jerald ; Rosenbloum, Louis ; Roth, Neal ; Russo, Elizabeth ; Bagley, Judge ; jlang@carltonfields.com ; Ingram, J.
Sent: Wednesday, March 09, 2011 11:09 AM
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tse@edwardsragatz.com

From: Jeff Fulford [mailto:jeff@fulfordlaw.com]
Sent: Wednesday, March 09, 2011 10:52 AM
To: 'Boyer, Tyrie'; 'Ralph Artigliere'; 'Lake Lytal, Jr.'
Cc: 'Kest, John'; Tom Edwards; 'Jodi B Jennings'; 'Amos, Joseph'; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; 'Bagley, Jerald'; 'Rosenbloum, Louis'; 'Roth, Neal'; 'Russo, Elizabeth'; 'Bagley, Judge'; jlang@carltonfields.com; 'Ingram, J.'
Subject: RE: Jury Instructions --Emergency Medical Services

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2) refuse to draft a uniform instruction but prepare a note on use explaining our reasoning and note the statutory change.

I think we need to formulate the best instruction we can given the language of the statute. I don't think it is fair to the trial judges and lawyers if we don't take a stab at coming up with a statutory instruction. (and if we don't, it will probably result in multiple cases going up on appeal with different resulting instructions). If I am reading Tom, John and Ralph correctly, it appears they think we should come up with something (and as directed at the meeting to do).

But on the other hand, Tyrie and Lake may be right, and the failure to draft a uniform instruction will be the quickest way to get appellate review of the statute for court guidance to us in the preparation of a uniform instruction.

So, if we are at the voting stage, I vote to prepare an instruction on the current statute (as Tom has done at the bottom of this email string). I can live with the language used, unless someone wants to offer any other changes. I agree it should be based on statutory language.
Jeff

From: Boyer, Tyrie [mailto:TWBoyer@coj.net]
Sent: Friday, March 04, 2011 1:50 PM
To: Ralph Artigliere; Lake Lytal, Jr.; Jeff Fulford
Cc: Kest, John; Tom Edwards; Jodi B Jennings; Amos, Joseph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: RE: Jury Instructions --Emergency Medical Services

I believe that we should suggest adoption of the first 3 sentences of the second paragraph of Ralph's most recent email. Tyrie

From: Ralph Artigliere [mailto:skywayra@tds.net]
Sent: Thursday, March 03, 2011 5:22 PM
To: Lake Lytal, Jr.; Jeff Fulford
Cc: Kest, John; Tom Edwards; Jodi B Jennings; Amos, Joseph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: Re: Jury Instructions --Emergency Medical Services
I see the problem here, but I, for one, do not feel we are interpreting the law by including the statutory language. Our instruction will simply be as ambiguous as the statute it is based on... no more, no less. That's a sad commentary, I know, especially from a guy who has preached clarity in jury instructions for as long as I have. But I think that's what we are left with...

The only alternative I see is to propose a warning note that cites the (not so) new statute and indicates that the existing instruction is not valid for cases after [effective date of statute]. We can then say that the new statutory language is ambiguous and, pending further development of the law, we do not at this time propose a standard instruction. Parties will then need to draft case specific instructions where 766.13(2)(b)(3) applies with no guidance from us. The problem with this approach is that it does not give the guidance that Judge Kest says is needed. Even if we take this approach just to bring the ambiguity to the attention of the Supreme Court, I feel we may be rebuked, as they never pass on the correctness of any instructions we send them and will not give us direction on language in the absence of a case or controversy.

We are between a rock and a hard place. I am personally left with the fact we need to mimic stautory language as best we can and let the court deal with it if they actually get an actual case before them addressing this issue. If they give us guidance at that point, we can propose a better instruction.

Ralph Artigliere
skywayra@tds.net
706-632-6035
706-851-4121

From: Tom Edwards [mailto:tse@edwardsragatz.com]
Sent: Thursday, March 03, 2011 1:05 PM
To: Jeff Fulford; Lake Lytal, Jr.; Kest, John

Cc: Jodi B Jennings; Amos, Joseph; Artigliere, Ralph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: RE: Jury Instructions --Emergency Medical Services

I think we need to do as tasked and address a proposal for the committee –

HOWEVER – at its core I am in agreement with Lake – at the first meeting we discussed this issue I raised a concern that as someone litigating these issues currently there are different arguable interpretations of the wording of this statute – there are ambiguities – someone else (Chuck Ingram???) weighed in and agreed because they were on the other side of the issue --

My concern with breaking this into the new sentences created by Judge Artigliere is that we are now modifying statutory language – for better or worse – if we propose an instruction we are supposed to ONLY RECOMMEND WHAT IS SETTLED LAW – when we start interpreting we are making law and this committee is not supposed to do that –

If the statute is so unclear that we believe the jury cannot be effectively instructed with it then I think we should not propose an instruction until the courts interpret this issue.

If we are going to propose an instruction then I believe we must stick strictly to the statutory language and only debate inserting an accepted defined term for a term that may otherwise make this confusing – that is what we did with the word negligence in my earlier proposed instruction – it should be strictly statutory language with a definition substituted for a statutory term –

Thoughts or responses?

Thomas S. Edwards, Jr.
Edwards & Ragatz, P.A.
Personal Injury and Commercial Trials
501 Riverside Ave., Suite 601
Jacksonville, Florida 32202
Phone 904-399-1609/Fax 904-399-1615
tse@edwardsragatz.com

----- Original Message -----
From: Lake Lytal, Jr.
To: Jeff Fulford
Cc: Kest, John ; Tom Edwards ; Jodi B Jennings ; Amos, Joseph ; Artigliere, Ralph ; jbailey@jud11.flcourts.org ; bartonjm@fljud13.org ; Boyer, Tyrie ; Bagley, Jerald ; Rosenbloum, Louis ; Roth, Neal ; Russo, Elizabeth ; Bagley, Judge ; jlang@carltonfields.com ; Ingram, J.
Sent: Thursday, March 03, 2011 1:32 PM
Subject: Re: Jury Instructions --Emergency Medical Services

I understand and agree that Ralph's proposed instruction probably reflects what the legislature intended. I just have a problem with standard instructions on an unclear statute being created by a committee with no judicial opinions to back up the committee's interpretation. It seems that the courts rather than the committee should have the first bite of the apple.

Sent from my iPhone

On Mar 3, 2011, at 11:45 AM, "Jeff Fulford" <jeff@fulfordlaw.com> wrote:

Lake
John is right that we need to have an instruction for the trial judges to use around the state. I am sure that everyone on the committee agrees with you that the statute is ambiguous. However, there does need to be uniformity with the instructions used statewide on this statute. We have to just do the best we can given the language of the statute. That is why Ralph states we need to create an instruction that closely resembles the statute, so that we don't put our own erroneous interpretation on the instruction.
Also, bear in mind that we are 'fixing' an instruction that has been around for years (formulated from the statute), based upon a statutory change. We have to correct it since the 'current' instruction is based on a statute inapplicable to newer causes of action.
Jeff
From: Lake Lytal, Jr. [mailto:llytal@palmbeachlaw.com]
Sent: Wednesday, March 02, 2011 10:00 PM
To: Kest, John
Cc: Tom Edwards; Jeff Fulford; Jodi B Jennings; Amos, Joseph; Artigliere, Ralph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: Re: Jury Instructions --Emergency Medical Services
As I recall cases state the Court can look at the legislative history to try to determine what the legislature meant to do. We have not done that nor do I think we should. I am concerned about our committee coming up with a "standard" instruction on an ambiguous statute that has never been interpreted by an appellate Court.

Sent from my iPhone

On Mar 2, 2011, at 9:23 AM, "Kest, John" <ctjujk1@ocnjcc.org> wrote:

Lake,
Unfortunately, that is what we, as trial judges, are faced with everyday. Even though the statute, as written, is ambiguous at best, we have to instruct the jury to the best of our ability. Therefore, I do think we need to devise something -- within the limitations of the present statute -- to be used for those cases that are to go to the jury. Failing that we will end up with a "hodge podge" of different instructions around the state -- going in all different directions -- with no continuity.
Parenthetically, if we can come up with a consensus draft and maybe point out in the notes on use the issues that the statute creates -- it will at least help focus to the Supreme Court the problem that arises from the statute as written.
I am not sure we can take a "we can't do anything" approach, although I certainly agree with your frustration.
John
John Marshall Kest
Circuit Judge, Ninth Judicial Circuit

From: Lake Lytal, Jr. [mailto:llytal@palmbeachlaw.com]
Sent: Tuesday, March 01, 2011 1:49 PM
To: Tom Edwards; Jeff Fulford; Jodi B Jennings; Amos, Joseph; Artigliere, Ralph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Kest, John; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge;

jlang@carltonfields.com; Ingram, J.
Subject: RE: Jury Instructions --Emergency Medical Services
Can we agree that the statute,as written, makes no sense? Does the Court need to enforce a statute that doesn't make sense? I do not see how we can come up with an instruction based on this statute without rewriting the statute or trying to guess what the legislature intended it to say.

From: Tom Edwards [mailto:tse@edwardsragatz.com]
Sent: Monday, February 28, 2011 11:52 AM
To: Jeff Fulford; Jodi B Jennings; Amos, Joseph; Artigliere, Ralph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Boyer, Tyrie; Bagley, Jerald; Kest, John ; Lake Lytal, Jr.; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge; jlang@carltonfields.com; Ingram, J.
Subject: Jury Instructions --Emergency Medical Services
This follow up on the Professional Negligence Sub-Committee – Emergency Medicine Instruction.
I have the following members:
Edwards
Fulford
Lang
Amos
Lytal
Artigliere
Bailey
Barton
Boyer
Bagley
Kest
Rosenbloum
Roth
Russo
Ingram
If I missed anyone please let me know.
Minutes from the last meeting are below--- Instructions are in RED

6. EMERGENCY MEDICAL SERVICES

Edwards noted the instructions on emergency medical services (402.16) have not been updated since the 2003 amendments to the Medical Malpractice Act. The specific issue is the language in section 768.13, Florida Statutes, on "reckless disregard" and how the instructions will define negligence in this context. Edwards stated the statute uses the term "negligence," which is defined in the proposed instructions (p. 75 of the materials). The Committee generally agreed that negligence should be defined in this context.

Gertz stated the proposed instructions are too long. Artigliere noted they need to be that way per the statute, similar to the long reasonable doubt instruction in criminal cases. Russo suggested breaking up the sentence as follows ". . . life or health of another. An unreasonable risk is a risk that is . . ."

Farmer noted the existing body of Florida law concerning the term "reckless disregard" in the libel/slander context and suggested it may prove useful here.

Barton asked the Professional Malpractice subcommittee (Edwards as chair) to revise the proposed instructions and to then re-circulate it to the Committee. Barton noted that the Committee could approve the instruction before the next Committee meeting if the subcommittee thinks the instruction is good and does not need further discussion.

The key language we must resolve in the context of the new statute is the definition of "reckless disregard" – because the instruction relies on comparing the "negligent" conduct to the "reckless" standard we agreed at the meeting we should address it by giving the full definition of healthcare negligence – once we resolve this language I will re-draft the instruction – PLEASE COMMENT ON THE BELOW AS THE STARTING POINT FOR RE-DRAFTING THE INSTRUCTION

"A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known, at the time [it] [he] [she] rendered emergency services, that [its] [his] [her] conduct created an unreasonable risk of injury that would affect the life or health of another, and that risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers]. "

BY THE WAY – this is all based upon 768.13(2)(b)(3)

Thomas S. Edwards, Jr.

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Phone 904-399-1609/Fax 904-399-1615
tse@edwardsragatz.com

promoting, marketing or recommending to another party any transaction or matter addressed herein.

"Tom Edwards" <tse@edwardsragatz.com>
03/18/2011 01:37 PM

To "Lake Lytal, Jr." <llytal@palmbeachlaw.com>, "Lang, Joseph H." <jlang@carltonfields.com>
cc "J. Charles Ingram" <jci@eifg-law.com>, "Ralph Artigliere" <skywayra@tds.net>, "Jeff Fulford" <jeff@fulfordlaw.com>, "Boyer, Tyrie" <TWBoyer@coj.net>, "Kest, John"
bcc
Subject RE: Jury Instructions --Emergency Medical Services

Based on the consensus that we use the 2 sentence version proposed by Ralph I have inserted that into the old Emergency Medicine instruction the new "Reckless Disregard" definition we agreed upon. I have not yet adjusted the notes – I have only read through this once so I need to make sure there are no other statutory changes or inconsistencies ---

BUT – reading this I think the instruction at the end of 402.16(a) is confusing – that is from the prior standard but seems difficult –

Below are all of the Emergency Medicine instructions from the current book with the new definition inserted – the new definition is in yellow – the section that I think can get confusing is in green:

402.16 EMERGENCY MEDICAL TREATMENT CLAIMS

INTRODUCTORY COMMENT

Instruction 402.16 addresses the provisions of *F.S.* 768.13(2)(b). It applies only to cases described in that statute or to cases in which there is a jury issue as to the applibility of the statute. Instruction 402.16 does not apply to cases involving patients capable of receiving treatment as non-emergency patients, even if treated in an emergency room.

Instruction 402.16a applies to cases in which there is a jury issue as to whether the statute applies. Instruction 402.16b applies to cases in which either the parties agree that the statute applies or the court has ruled that the statute applies as a matter of law.

The applicable part of instruction 402.16 should be preceded by instructions 402.1, 402.2, 402.3, and 403.6. Instruction 402.4 should not be given in the ordinary sequence as it is, to the extent applicable, incorporated in instruction 402.16. If there are any preliminary vicarious liability issues, instructions 402.9 and 402.10 should also be given.

No reported decision construes the legislative intent behind this section. Based upon the definition of "reckless disregard" in *F.S.* 768.13(2)(b)3, the committee has concluded that the intent was to limit liability in civil actions for damages arising out of fact situations to which the statute applies to cases where something more than "simple" negligence is established. Therefore, the standard instructions dealing with "simple" negligence are not appropriate for civil damage actions to which the statute applies.

402.16a EMERGENCY MEDICAL TREATMENT — Jury Issue as to Application of *F.S.* 768.13(2)(b)

(1). Preliminary issue on application of statute:

The first issue for you to decide on (claimant's) **claim against** (defendant) **is whether** (claimant) **was being [cared for] [treated] under emergency circumstances.**

[Care] [treatment] is rendered under emergency circumstances when a [hospital] [physician] renders medical [care] [treatment] required by a sudden, unexpected situation or event that resulted in a serious medical condition demanding immediate medical attention, for which (claimant or decedent) **initially entered the hospital through its [emergency room] [trauma center], before** (claimant or decedent) **was medically stabilized and capable of receiving [care] [treatment] as a nonemergency patient.**

If the greater weight of the evidence does not support that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances then you shall proceed to decide whether** (defendant) **was negligent in [his] [her] [its] [care] [treatment] of** (claimant or decedent).

However, if the greater weight of the evidence supports that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances, then you shall proceed to decide whether** (defendant) **acted in reckless disregard of the consequences in [his] [her] [its] [care] [treatment] of** (claimant or decedent).

(2). Issues regarding negligence:

[If you find that (claimant's or decedent's) **[care] [treatment] was not being rendered under emergency circumstances,] the [next] issue for you to decide is whether** (defendant) **was negligent in** (describe conduct in question); **and, if so, whether that negligence was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made).

"Negligence" is the failure to use reasonable care. Reasonable care on the part of a [hospital] [physician] is that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably careful [hospitals] [physicians]. Negligence on the part of a [hospital] [physician] is doing something that a reasonably careful [hospital] [physician] would not do under like circumstances or failing to do something that a reasonably careful [hospital] [physician] would do under like circumstances.

If the greater weight of the evidence does not support this claim, then your verdict [on this claim] should be for (defendant).

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then your verdict [on this claim] should be for** (claimant) **and against** (defendant).**]**

[However, if the greater weight of the evidence does support (claim-ant's) **claim, then you should consider the defense(s) raised by** (defendant).**]**

(3). Issues regarding reckless disregard:

[If you find that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances,] the [next] issue for you to decide is whether** (defendant) **acted with reckless disregard of the consequences in** (describe conduct in question); **and, if so, whether that reckless disregard was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made).**]**

Reckless disregard is conduct that a [hospital][physician] knew or should have known at the time the services were rendered created an unreasonable risk of injury affecting the life

or health of another. An unreasonable risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers].

If emergency circumstances have not been established by the greater weight of the evidence but the greater weight of the evidence supports (claimant's) **claim of negligence, then [your verdict [on this claim] should be for** (claimant) **and against** (defendant)] **[you should consider the defense(s) raised by** (defendant)].

(Proceed to instructions 402.14 and 402.15)

[However, if the greater weight of the evidence does not support (claimant's) **claim of negligence, then your verdict [on this claim] should be for** (defendant).]

On the other hand, if emergency circumstances have been established by the greater weight of the evidence and the greater weight of the evidence also supports (claimant's) **claim of reckless disregard of the consequences, then [your verdict [on this claim] should be for** (claimant) **and against** (defendant)] **[you should consider the defense(s) raised by** (defendant)].

(Proceed to instructions 402.14 and 402.15)

[However, if the greater weight of the evidence does not support (claimant's) **claim of reckless disregard of the consequences, then your verdict [on this claim] should be for** (defendant) **and against** (claimant).]

402.16b EMERGENCY MEDICAL TREATMENT

(Describe conduct in question) **occurred in the course of [rendering] [or] [failing to render] emergency [care] [treatment] to** (claimant or decedent). **The issue for you to decide is whether** (defendant) **acted with reckless disregard of the consequences in** (describe conduct in question); **and, if so, whether that reckless disregard was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made).

Reckless disregard is conduct that a [hospital][physician] knew or should have known at the time the services were rendered created an unreasonable risk of injury affecting the life or health of another. An unreasonable risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers].

If the greater weight of the evidence does not support (claimant's) **claim, then your verdict [on this claim] should be for** (defendant).

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then your verdict [on this claim] should be for** (claimant) **and against** (defendant).]

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then you should consider the defense(s) raised by** (defendant).]

(Proceed to instructions 402.14 and 402.15)

NOTES ON USE FOR 402.16

1. Instruction 402.16a should be given when there is a jury issue as to whether the care or treatment was being rendered under emergency circumstances. An appropriate special verdict will be necessary to distinguish between a finding that the care or treatment was not being rendered under emergency circumstances, in which case the standard of care is negligence, and a finding that the care or treatment was being rendered under emergency circumstances, in which case the standard of care is reckless disregard of the circumstances. The verdict should contain instructions to guide the jury depending on their finding as to whether the care and treatment was or was not rendered under emergency circumstances. The burden of proof provisions of instruction 402.16a should also be modified to incorporate the instructions in the special verdict. See Appendix A, Model Jury Instructions.

2. Instruction 402.16b should be given when the parties agree that the statute applies or when the court has ruled it applies as a matter of law.

3. Negligence of a patient, which contributes to or causes the medical condition for which treatment is sought, is not available as a defense (as comparative negligence) to subsequent medical negligence which causes a distinct injury. See, *e.g.* , *Norman v. Mandarin Emergency Care Center, Inc* ., 490 So.2d 76 (Fla. 1st DCA 1986); *Matthews v. Williford* , 318 So.2d 480 (Fla. 2d DCA 1975); but see *Vandergrift v. Fort Pierce Memorial Hospital, Inc* ., 354 So.2d 398 (Fla. 4th DCA 1978). Rare circumstances may arise, involving a patient's negligence after emergency care or treatment has begun, in which comparative negligence is a legitimate issue. See generally *Whitehead v. Linkous* , 404 So.2d 377 (Fla. 1st DCA 1981).

4. Pending further developments in the law, the committee reserves the issue of whether comparative negligence is a defense when the reckless disregard standard is in effect. If the court decides that comparative negligence is a defense, then an instruction on simple negligence should be given.

5. "Reckless disregard," as defined and used in the context of *F.S.* 768.13(2)(b), does not appear to have the same meaning as reckless disregard when used in the context of standards for punitive damages. See Fla. Std. Jury Instr. (Civ.) 501.12 and 501.13.

Thomas S. Edwards, Jr.
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501 Riverside Ave., Suite 601
Jacksonville, Florida 32202
Phone 904-399-1609/Fax 904-399-1615
tse@edwardsragatz.com

"Neal Roth"
<NAR@grossmanroth.com>
03/20/2011 08:21 AM

To "Lake Lytal, Jr." <llytal@palmbeachlaw.com>, "J. Charles Ingram" <jci@eifg-law.com>
cc "Tom Edwards" <tse@edwardsragatz.com>, "Lang, Joseph H." <jlang@carltonfields.com>, "Ralph Artigliere" <skywayra@tds.net>, "Jeff Fulford" <jeff@fulfordlaw.com>,
bcc
Subject RE: Jury Instructions --Emergency Medical Services

I am in agreement with Lake. This instruction needs more discussion. Thanks.

Neal A. Roth

2525 Ponce de Leon Blvd

Coral Gables, Florida 33134

305-442-8666(O)

305-285-1668(fax)

nar@grossmanroth.com

From: Lake Lytal, Jr. [mailto:llytal@palmbeachlaw.com]
Sent: Saturday, March 19, 2011 6:24 PM
To: J. Charles Ingram
Cc: Tom Edwards; Lang, Joseph H.; Ralph Artigliere; Jeff Fulford; Boyer, Tyrie; Kest, John; Jodi B Jennings; Amos, Joseph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Bagley, Jerald; Rosenbloum, Louis; Neal Roth; Russo, Elizabeth; Bagley, Judge
Subject: Re: Jury Instructions --Emergency Medical Services

I agree that could be deleted but I still have a big problem with the second sentence in yellow defining unreasonable risk. The conduct the Plaintiff contends was reckless disregard would certainly be unacceptable or inappropriate yet the instruction seems to excuse any conduct that is unacceptable or inappropriate. It would make more sense if "simply" were placed before "created". Maybe we can't rewrite the statute but I continue to have a problem creating a standard instruction based on a statute that makes no sense.Wouldn't a jury who received this istruction be justified in finding for the defense in spite of finding that the Plaintiff was damaged as a result of reckless disregard because the conduct was unacceptable and/or inapporpriate? How can that be?

Sent from my iPhone

On Mar 19, 2011, at 5:31 PM, "J. Charles Ingram" <jci@eifg-law.com> wrote:

The instructions, read together, are certainly convoluted, but I'm not sure we can remedy this.

It gets even worse if there are defenses!

While I'm hesitant to re-open the wording debate, do we need "at the time the services were rendered" in the first sentence? If it were removed, the sentence becomes less unwieldy. Isn't every action judged at the time it occurred? We don't include "at the time the services were rendered" in defining negligence or professional negligence.

Why must we speak of the timing of the knowledge in this instruction?

From: Tom Edwards [mailto:tse@edwardsragatz.com]
Sent: Friday, March 18, 2011 1:38 PM
To: Lake Lytal, Jr.; Lang, Joseph H.
Cc: J. Charles Ingram; Ralph Artigliere; Jeff Fulford; Boyer, Tyrie; Kest, John; Jodi B Jennings; Amos, Joseph; jbailey@jud11.flcourts.org; bartonjm@fljud13.org; Bagley, Jerald; Rosenbloum, Louis; Roth, Neal; Russo, Elizabeth; Bagley, Judge
Subject: RE: Jury Instructions --Emergency Medical Services

Based on the consensus that we use the 2 sentence version proposed by Ralph I have inserted that into the old Emergency Medicine instruction the new "Reckless Disregard" definition we agreed upon. I have not yet adjusted the notes – I have only read through this once so I need to make sure there are no other statutory changes or inconsistencies ---

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The applicable part of instruction 402.16 should be preceded by instructions 402.1, 402.2, 402.3, and 403.6. Instruction 402.4 should not be given in the ordinary sequence as it is, to the extent applicable, incorporated in instruction 402.16. If there are any preliminary vicarious liability issues, instructions 402.9 and 402.10 should also be given.

No reported decision construes the legislative intent behind this section. Based upon the definition of "reckless disregard" in *F.S.* 768.13(2)(b)3, the committee has concluded that the intent was to limit liability in civil actions for damages arising out of fact situations to which the statute applies to cases where something more than "simple" negligence is established. Therefore, the standard instructions dealing with "simple" negligence are not appropriate for civil damage actions to which the statute applies.

402.16a EMERGENCY MEDICAL TREATMENT — Jury Issue as to Application of *F.S.* 768.13(2)(b)

(1). Preliminary issue on application of statute:

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If the greater weight of the evidence does not support that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances then you shall proceed to decide whether** (defendant) **was negligent in [his] [her] [its] [care] [treatment] of** (claimant or decedent).

However, if the greater weight of the evidence supports that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances, then you shall proceed to decide whether** (defendant) **acted in reckless disregard of the consequences in [his] [her] [its] [care] [treatment] of** (claimant or decedent).

(2). Issues regarding negligence:

[If you find that (claimant's or decedent's) **[care] [treatment] was not being rendered under emergency circumstances,] the [next] issue for you to decide is whether** (defendant) **was negligent in** (describe conduct in question); **and, if so, whether that negligence was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made).

"Negligence" is the failure to use reasonable care. Reasonable care on the part of a [hospital] [physician] is that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably careful [hospitals] [physicians]. Negligence on the part of a [hospital] [physician] is doing something that a reasonably careful [hospital] [physician] would not do under like circumstances or failing to do something that a reasonably careful [hospital] [physician] would do under like circumstances.

If the greater weight of the evidence does not support this claim, then your verdict [on this claim] should be for (defendant).

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then your verdict [on this claim] should be for** (claimant) **and against** (defendant).**]**

[However, if the greater weight of the evidence does support (claim-ant's) **claim, then you should consider the defense(s) raised by** (defendant).**]**

(3). Issues regarding reckless disregard:

[If you find that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances,] the [next] issue for you to decide is whether** (defendant) **acted with reckless disregard of the consequences in** (describe conduct in question)**; and, if so, whether that reckless disregard was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made).]

Reckless disregard is conduct that a [hospital][physician] knew or should have known at the time the services were rendered created an unreasonable risk of injury affecting the life or health of another. An unreasonable risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers].

If emergency circumstances have not been established by the greater weight of the evidence but the greater weight of the evidence supports (claimant's) **claim of negligence, then [your verdict [on this claim] should be for** (claimant) **and against** (defendant)**] [you should consider the defense(s) raised by** (defendant)**]**.

(Proceed to instructions 402.14 and 402.15)

[However, if the greater weight of the evidence does not support (claimant's) **claim of negligence, then your verdict [on this claim] should be for** (defendant).**]**

On the other hand, if emergency circumstances have been established by the greater weight of the evidence and the greater weight of the evidence also supports (claimant's) **claim of reckless disregard of the consequences, then [your verdict [on this claim] should be for** (claimant) **and against** (defendant)] **[you should consider the defense(s) raised by** (defendant)].

(Proceed to instructions 402.14 and 402.15)

[However, if the greater weight of the evidence does not support (claimant's) **claim of reckless disregard of the consequences, then your verdict [on this claim] should be for** (defendant) **and against** (claimant).]

402.16b EMERGENCY MEDICAL TREATMENT

(Describe conduct in question) **occurred in the course of [rendering] [or] [failing to render] emergency [care] [treatment] to** (claimant or decedent). **The issue for you to decide is whether** (defendant) **acted with reckless disregard of the consequences in** (describe conduct in question); **and, if so, whether that reckless disregard was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made).

Reckless disregard is conduct that a [hospital][physician] knew or should have known at the time the services were rendered created an unreasonable risk of injury affecting the life or health of another. An unreasonable risk is substantially greater than the risk created by [acting] [or] [failing to act] in a way considered [un]acceptable and [in]appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers].

If the greater weight of the evidence does not support (claimant's) **claim, then your verdict [on this claim] should be for** (defendant).

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then your verdict [on this claim] should be for** (claimant) **and against** (defendant).**]**

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then you should consider the defense(s) raised by** (defendant).**]**

(Proceed to instructions 402.14 and 402.15)

NOTES ON USE FOR 402.16

1. Instruction 402.16a should be given when there is a jury issue as to whether the care or treatment was being rendered under emergency circumstances. An appropriate special verdict will be necessary to distinguish between a finding that the care or treatment was not being rendered under emergency circumstances, in which case the standard of care is negligence, and a finding that the care or treatment was being rendered under emergency circumstances, in which case the standard of care is reckless disregard of the circumstances. The verdict should contain instructions to guide the jury depending on their finding as to whether the care and treatment was or was not rendered under emergency circumstances. The burden of proof provisions of instruction 402.16a should also be modified to incorporate the instructions in the special verdict. See Appendix A, Model Jury Instructions.

2. Instruction 402.16b should be given when the parties agree that the statute applies or when the court has ruled it applies as a matter of law.

3. Negligence of a patient, which contributes to or causes the medical condition for which treatment is sought, is not available as a defense (as comparative negligence) to subsequent medical negligence which causes a distinct injury. See, *e.g.* , *Norman v. Mandarin Emergency Care Center, Inc* ., 490 So.2d 76 (Fla. 1st DCA 1986); *Matthews v. Williford* , 318 So.2d 480 (Fla. 2d DCA 1975); but see *Vandergrift v. Fort Pierce Memorial Hospital, Inc* ., 354 So.2d 398 (Fla. 4th DCA 1978). Rare circumstances may arise, involving a patient's negligence after emergency care or treatment has begun, in which comparative negligence is a legitimate issue. See generally *Whitehead v. Linkous* , 404 So.2d 377 (Fla. 1st DCA 1981).

4. Pending further developments in the law, the committee reserves the issue of whether comparative negligence is a defense when the reckless disregard standard is in effect. If the court decides that comparative negligence is a defense, then an instruction on simple negligence should be given.

5. "Reckless disregard," as defined and used in the context of *F.S.* 768.13(2)(b), does not appear to

have the same meaning as reckless disregard when used in the context of standards for punitive damages. See Fla. Std. Jury Instr. (Civ.) 501.12 and 501.13.

Thomas S. Edwards, Jr.

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Third District Court of Appeal

State of Florida, July Term, A.D. 2011

Opinion filed September 28, 2011.
Not final until disposition of timely filed motion for rehearing.

No. 3D10-1018
Lower Tribunal No. 01-14439

The Public Health Trust of Miami-Dade County,
Petitioner/Appellant,

vs.

Shaniah Rolle, etc., et al.,
Respondents/Appellees.

On Petition for Writ of Certiorari to the Circuit Court for Miami-Dade County, William Thomas, Judge.

R. A. Cuevas, Jr., County Attorney, and Eric K. Gressman, Assistant County Attorney; Fowler, White, Burnett, et al., and Christopher E. Knight and June Galkoski Hoffman; Hall Booth Smith & Slover and Jack G. Gresh, Pro-Hac Vice (Atlanta, Ga.), for petitioner/appellant.

Burlington & Rockenbach and Philip M. Burlington (West Palm Beach); Sheldon J. Schlesinger and Crane A. Johnston (Ft. Lauderdale); Michael B. Solomon, for respondents/appellees.

Before WELLS, C.J., and SHEPHERD and SALTER, JJ.

SHEPHERD, J.

The Public Health Trust of Miami-Dade County petitions for certiorari relief from a trial court order denying its motion for summary judgment on its defense of sovereign immunity and motion for judgment on the pleadings, asserting it was immune from liability under Florida's Good Samaritan Act, section 768.13 of the Florida Statutes (2004). We deny the petition.

This is a ten-year-old medical malpractice case in which the respondents, Shaniah Rolle, a minor, through her natural parent, Queen Seriah Azulla Dabrio, and Queen Seriah Azulla Dabrio, individually, have sued some twenty-five medical doctors, their professional associations, the Broward Hospital District d/b/a Memorial Regional Hospital, the Public Health Trust of Miami-Dade County d/b/a Jackson Memorial Hospital, and the University of Miami d/b/a University of Miami School of Medicine, for negligent treatment and care from the day Shaniah was born, August 16, 1996, through the time of suit. Shaniah was born with multiple medical and physical abnormalities and conditions, including gastric perforation, a life-threatening condition for which she underwent surgery the day after her birth at Memorial Regional Hospital. After an extended neo-natal stay in Memorial Regional, she was discharged into the care of multiple pediatric and gastroenterology physicians, some of whom also are named defendants in this action, for her conditions.

On June 11, 1999, Shaniah presented to the emergency room of Jackson Memorial Hospital in danger of death. Emergency room physicians quickly diagnosed Shaniah as suffering from multiple virulent conditions, including ischemia from a disseminated pneumococcal infection, which had stopped the flow of blood to her extremities, and gangrene. After consultation with Shaniah's mother, a team of Jackson physicians conducted a four-extremity amputation on the young girl—removing both arms below the elbow and both of her legs below her knees. Although it is not seriously disputed this emergency surgery saved Shaniah's life, Shaniah and her mother, through counsel, now allege, inter alia, that Jackson emergency physicians failed to act quickly enough—during the first hour and a half or more from Shaniah's arrival at the hospital—to provide her with appropriate fluids and antibiotics, which they contend would have avoided the need for the amputations. Since the filing of this action, Broward Memorial Hospital has settled with Shaniah and her family for the sum of $200,000.

The Public Health Trust advances two principle arguments in support of its petition. First, it argues it is sovereignly immune from suit under section 768.28(5) of the Florida Statutes (2004), because another government entity, the Broward County Hospital District, acting on behalf of Memorial Regional Hospital, has paid up to the amount of the cap for which the State and its political subdivisions can be required to pay in this case. Section 768.28(5) reads as follows:

> Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $100,000 or $200,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature.

The argument does not afford the Trust any relief at this non-final stage of this proceeding. Assuming the Trust has some liability to Shaniah and her mother for her condition, it is by no means certain at this time that the Trust's alleged negligence "[arose] out of the same incident or occurrence" as did the alleged negligence of Memorial Regional Hospital, now settled. This is a question for another day, should it arrive. Moreover, as we recently have explained, even if the Rolles have been paid the statutory maximum permitted under the statute, the trial court still has jurisdiction to enter a judgment against the Trust for purposes of supporting a potential claims bill to the legislature. See State Dep't of Envtl. Prot. v. Garcia, No. 3D10-1625, 2011 WL 3300540, at *4 (Fla. 3d DCA Aug. 3, 2011) (citing Gerard v. Dep't of Transp., 472 So. 2d 1170 (Fla. 1985)).

The Trust next asserts it is immune from suit under Florida's Good Samaritan Act, section 768.13, Florida Statutes (2004). This Act provides that any health care provider, including a public hospital, such as Jackson Memorial

Hospital, "**shall not be held liable** for any civil damages as a result of [emergency] medical care or treatment unless such damages result from providing, or failing to provide, medical care or treatment under circumstances demonstrating a reckless disregard for the consequences so as to affect the life or health of another." § 768.13(2)(b)1., Fla. Stat. (2004) (emphasis added); see also Recent Developments, 32 Fla. St. U. L. Rev. 973, 997 (2005) (discussing parameters for liability under the Act). The Trust argues the Rolles have not properly pled around the ordinary negligence bar contained in the statute. However, even if they have, it is our view that, despite some language in the statute that arguably might lead to a contrary conclusion,[1] the Act, by its terms, provides the Trust with a defense to liability if it meets the exculpatory requirements of the Act, but it does not provide it sovereign immunity from suit.

Our reading of the Act is consistent with guidance recently received from the Florida Supreme Court in Wallace v. Dean, 3 So. 3d 1035 (Fla. 2009), clarifying the difference between lack of duty and thus non-liability and sovereign immunity. The Florida Supreme Court stated:

> When addressing the issue of governmental liability under Florida law, we have repeatedly recognized that a duty analysis is

[1] Section 768.13(2)(c)3 states that the legislative intent of the immunity provision of the Act "is to encourage health care practitioners to provide necessary emergency care to all persons without fear of litigation." We find this sub-sub paragraph of the Act unhelpful on the immunity from liability/immunity from suit issue we are called upon to decide in this case.

> *conceptually distinct* from any later inquiry regarding whether the governmental entity remains sovereignly immune from suit notwithstanding the waiver present in section 768.28, Florida Statutes.

Id. at 1044 (footnote omitted). As the court further explained, "the *absence of a duty of care* renders the defendant *nonliable* as a matter of law because his, her, or its actions are therefore non-tortious vis-à-vis the plaintiff." Id. at 1045. Based on Wallace, just days ago in Miami Dade County v. Rodriguez, No. 3D10-856, slip op. at 5 (Fla. 3d DCA Aug. 31, 2011), we clarified our own decisional law in this area, stating we "will no longer exercise our certiorari jurisdiction to review orders either denying motions to dismiss or denying motions for summary judgment where the sovereign argues that it is not liable as alleged because no duty can be demonstrated." As Professor Prosser succinctly stated, "Duty is only a word with which we state our conclusion that there is or is not to be liability." William L. Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1, 15 (1953).

In this case, the sovereign seeks to invoke a provision of the Act to except it on the facts and circumstances of this case from the "waive[r of] sovereign immunity for liability for torts" provided by section 768.28(1) of the Florida Statutes. This is a fact-specific defense for which the Trust will have the burden of affirmative proof at trial. See, e.g., Christensen v. Cooper, 972 So. 2d 207, 209 (Fla. 5th DCA 2007) (asserting the Act as an affirmative defense); accord N. Miami Med. Ctr. v. Prezeau, 793 So. 2d 1142 (Fla. 3d DCA 2001); Frawley v. City

of Lake Worth, 603 So. 2d 1327 (Fla. 4th DCA 1992). It does not fall within that narrow range of cases involving "discretionary functions of government [that] are inherent in the act of governing and are [therefore] immune from suit." See Trianon Park Condo. Ass'n v. City of Hialeah, 458 So. 2d 912, 918 (Fla. 1985) (citing Commercial Carrier Corp. v. Indian River Cnty., 371 So. 2d 1010 (Fla. 1979)).

Petition denied.

Memorandum

TO: JOSEPH LANG, LAKE LYTAL, AND DAVID SALES

FROM: NEAL A. ROTH, ESQ.

RE: PROFESSIONAL NEGLIGENCE SUBCOMMITTEE

DATE: JUNE 11, 2012

Gentlemen, thank you for taking the time to participate in today's call. This memo will summarize our recommendations with respect to the outstanding issues which are reflected in the minutes from our last meeting:

1. Insofar as Larry Stewart's letter is concerned in which he points out that certain notes on use were deleted on the instructions relating to professional negligence, it is the suggestion of the Professional Negligence Subcommittee that these notes on use not be reincorporated into the Standard Jury Instructions. It is felt that it would be a rare circumstance where a party would request either of the instructions outlined in Larry's letter.

2. The subcommittee considered once again the issue of Florida Statute §768.13 relating to immunity with respect to emergency care. There are two proposed notes which the Subcommittee would like the full committee to consider and they are as follows:

a. This statute was amended in 2003 and the following instructions should be used only in cases which the statute, prior to the amendments, apply. The Standard Jury Instruction Committee has considered the statute as amended over a considerable length of time. The Committee has concluded that it cannot draft a plain English instruction pertaining to §768.13(2)(b)(3) without interpreting legislative intent and conflicting with recognize principles of tort laws adopted by Florida courts. The Committee will again consider an appropriate instruction for the statute once guidance is available from decisions of the Florida appellate courts.

The alternative note would read as follows:

a. Florida Statute §768.13(b)(3) was amended in 2003. The Committee has attempted to write a plain English instruction which would

represent a correct statement of the law. It cannot do so without rendering an interpretation of legislative intent which is beyond the purview of the Committee.

Additionally, inasmuch as the Third District issued an opinion in *Public Health Trust of Miami-Dade County v. Rolle* (36 Fla.L.Weekly D2139), it is the view of the Subcommittee that an additional note should be included in the instructions. It would read as follows:

> Pursuant to *Public Health Trust of Miami-Dade County v. Rolle,* (36 Fla.L.Weekly D2139), the immunity provided for in §768.13(b)(3) must be pled as an affirmative defense and the burden of proof rests with the defendants to establish every element of the defense.

3. The Subcommittee also considered the issue of the standard jury instruction relating to reduction of damages to present money value and as it relates to §768.77. The Subcommittee recommends the following note:

a. It is noted that this instruction may conflict with §768.77(2)(a)(2), Fla. Stat., in medical malpractice cases where a party has requested that future damages be paid by periodic payments. No standard instruction or statute has been adopted as this statute is seldom used.

We believe that we have appropriately covered the outstanding issues which were discussed at the last full committee meeting as well as the additional matter of Larry Stewart's letter to Judge Barton.

If anyone has any additional thoughts or questions, please let me know and I will share them with the rest of the Subcommittee.

FW: Professional Negligence Subcommittee
Neal Roth to: 'Jodi B Jennings' (jjenning@flabar.org) 06/19/2012 04:51 PM

Please include this as well. We will discuss these points at the meeting. Thanks.

Neal A. Roth
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Coral Gables, Florida 33134
305-442-8666(O)
305-285-1668(fax)
nar@grossmanroth.com
From: skywayra tds.net [mailto:skywayra@tds.net]
Sent: Thursday, June 14, 2012 11:21 AM
To: Donald M. Hinkle; Neal Roth
Cc: Charles Ingram (jci@eifg-law.com); david@salesappeals.com; Gregorio Francis (gfrancis@forthepeople.com); Jeffrey Fulford (jeff@fulfordlaw.com); Jerald Bagley (jbagley@jud11.flcourts.org); John Kest (ctjujk1@ocnjcc.org); Lytal, Lake (llytal@lytalreiter.com); Pete DeMahy (pdemahy@dldlawyers.com); Louis Rosenbloum (lrosenbloum@rosenbloumlaw.com); Russo, Elizabeth (ekr@russoappeals.com); Tyrie Boyer (TWBoyer@coj.net); Barton, James; jlang@carltonfields.com; 'Jodi B Jennings' (jjenning@flabar.org)
Subject: Re: Professional Negligence Subcommittee

Neal,

I am sorry I missed the call. I was traveling for judicial education.

I agree with the results of the good work done as expressed in the memo, with the following clarification. I assume the following language recommending an additional comment is designed to ensure that the jury is instructed on burden of proof on the defense. If so, we may want to cross reference the specific standard instruction that accomplishes this. If not, then this is not a matter for committee comment. Also, the idea that statutory immunity is an affirmative defense is not a revelation, is it? I am not saying I oppose it. I just want to confirm why a new comment is recommended at this point.

"Additionally, inasmuch as the Third District issued an opinion in Public Health Trust of Miami-Dade County v. Rolle (36 Fla.L.Weekly D2139), it is the view of the Subcommittee that an additional note should be included in the instructions. It would read as follows:

> Pursuant to Public Health Trust of Miami-Dade County v. Rolle, (36 Fla.L.Weekly D2139), the immunity provided for in §768.13(b)(3) must be pled as an affirmative defense and the burden of proof rests with the defendants to establish every element of the defense."

I appreciate the good efforts of those who participated in the call and regret that I was not able to be on the line.

Ralph Artigliere

On Wed, Jun 13, 2012 at 7:06 PM, Donald M. Hinkle <don@hinkleforan.com> wrote:
Excellent – sorry I was late to the call. I would much rather have been speaking with you than deposing a most recalcitrant witness.

From: Neal Roth <nar@grossmanroth.com<mailto:nar@grossmanroth.com>>
Date: Wednesday, June 13, 2012 6:05 PM
To: "Ralph Artigliere (skywayra@tds.net<mailto:skywayra@tds.net>)" <skywayra@tds.net <mailto:skywayra@tds.net>>, "J. Charles Ingram" <jci@eifg-law.com<mailto:jci@eifg-law.com >>, David Sales <david@salesappeals.com<mailto:david@salesappeals.com>>, Don Hinkle < don@hinkleforan.com<mailto:don@hinkleforan.com>>, "Gregorio Francis (gfrancis@forthepeople.com<mailto:gfrancis@forthepeople.com>)" < gfrancis@forthepeople.com<mailto:gfrancis@forthepeople.com>>, Jeffrey Fulford < jeff@fulfordlaw.com<mailto:jeff@fulfordlaw.com>>, "Hon. Jerald Bagley" < jbagley@jud11.flcourts.org<mailto:jbagley@jud11.flcourts.org>>, "Hon. James Marshall Kest" <ctjujk1@ocnjcc.org<mailto:ctjujk1@ocnjcc.org>>, "Lytal, Lake (llytal@lytalreiter.com <mailto:llytal@lytalreiter.com>)" <llytal@lytalreiter.com<mailto:llytal@lytalreiter.com>>, Neal Roth <nar@grossmanroth.com<mailto:nar@grossmanroth.com>>, "Pete DeMahy (pdemahy@dldlawyers.com<mailto:pdemahy@dldlawyers.com>)" <pdemahy@dldlawyers.com <mailto:pdemahy@dldlawyers.com>>, Louis Rosenbloum <lrosenbloum@rosenbloumlaw.com <mailto:lrosenbloum@rosenbloumlaw.com>>, "Elizabeth K. Russo" <ekr@russoappeals.com <mailto:ekr@russoappeals.com>>, "Hon. Tyrie Boyer" <twboyer@coj.net<mailto: twboyer@coj.net>>, James Barton <BARTONJM@fljud13.org<mailto: BARTONJM@fljud13.org>>, Joseph Lang <jlang@carltonfields.com<mailto: jlang@carltonfields.com>>
Cc: Jodi B Jennings <jjenning@flabar.org<mailto:jjenning@flabar.org>>
Subject: FW: Professional Negligence Subcommittee

Attached is the report on our outstanding issues. Only a few of us were on the call so I wanted to share this with you in the event you have a different view. I believe Jodi would like this report submitted by June 18th. Please feel free to offer any comments. Thanks.

Neal A. Roth
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From: Mary B. Nagler
Sent: Monday, June 11, 2012 11:50 AM
To: Neal Roth
Subject: Professional Negligence Subcommittee

Mary Nagler
Legal Assistant to Neal A. Roth
Grossman Roth, P.A.
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Coral Gables, Florida 33134
(305) 442-8666
(305) 285-1668

Memorandum

TO: PROFESSIONAL NEGLIGENCE SUBCOMMITTEE OF THE FLORIDA STANDARD CIVIL JURY INSTRUCTIONS COMMITTEE

FROM: NAR

DATE: FEBRUARY 6, 2013

As promised, this memo will set forth several alternatives suggested by the subcommittee members with respect to dealing with the Emergency Medical Services instruction. I will convene one final conference call to see if we can get a clear consensus on which of the alternatives to use. We may wind up combining some of the ones I am setting forth in this memo, but I am taking this from the e-mail exchanges that have taken place thus far.

Emergency Medical Services – No. 1

The Florida Legislature amended §768.13(b)(3), effective September 15, 2003. For instructions applicable to causes action arising prior to that date see Appendix ____ to this book.

The Committee has attempted to write a plain English instruction for the amended statute, but has been unable to do so. The Committee will consider an appropriate instruction once guidance is provided from decisions of the Florida Appellate courts.

In regard to the application of §768.13(b)(3), see *Public Health Trust of Miami Dade County v. Rolle*, 88 So.3d 191 (Fla. 3d DCA 2011).

Emergency Medical Services – No. 2

The Florida Legislature amended §768.13(b)(3), effective September 15, 2003. For instructions applicable to causes action arising prior to that date see Appendix ____ to this book.

The Committee has attempted to write a plain English instruction for the amended statute, but has been unable to do so. The Committee will consider

an appropriate instruction once guidance is provided from decisions of the Florida Appellate courts.

In regard to the application of §768.13(b)(3), see *Public Health Trust of Miami Dade County v. Rolle*, 88 So.3d 191 (Fla. 3d DCA 2011) *Florida Board of Trustees v. Stone*, 92 So.3d 264 (Fla. 1st DCA 2012).

Emergency Medical Services – No. 3

The Florida Legislature amended §768.13(b)(3), effective September 15, 2003. For instructions applicable to causes action arising prior to that date see Appendix ____ to this book.

The Committee has attempted to write a plain English instruction for the amended statute, but has been unable to do so without interpreting legislative intent. The Committee will consider an appropriate instruction once guidance is provided from decisions of the Florida Appellate courts.

In regard to the application of §768.13(b)(3), see *Public Health Trust of Miami Dade County v. Rolle*, 88 So.3d 191 (Fla. 3d DCA 2011) and *University of Florida Board of Trustees v. Stone*, 92 So.3d 264 (Fla. 1st DCA 2012).

Emergency Medical Services – No. 4

The Florida Legislature amended §768.13(b)(3), effective September 15, 2003. For instructions applicable to causes action arising prior to that date see Appendix ____ to this book.

The Committee will consider an appropriate instruction once guidance is provided from decisions of the Florida appellate courts.

In regard to the application of §768.13(b)(3), see *Public Health Trust of Miami Dade County v. Rolle*, 88 So.3d 191 (Fla. 3d DCA 2011) and *University of Florida Board of Trustees v. Stone*, 92 So.3d 264 (Fla. 1st DCA 2012).

To: "'Jodi B Jennings' (jjenning@flabar.org)" <jjenning@flabar.org>
Cc:
Bcc:
Subject: FW: Emergency Medical Services - Nos. 1-4
From: Neal Roth <NAR@grossmanroth.com> - Saturday 02/16/2013 10:12 AM

From: David Sales [mailto:david@salesappeals.com]
Sent: Monday, February 11, 2013 10:21 AM
To: Pete DeMahy
Cc: Donald M. Hinkle; Neal Roth; Ralph Artigliere (skywayra@tds.net); Charles Ingram (jci@eifg-law.com); Gregorio Francis (gfrancis@forthepeople.com); Jeffrey Fulford (jeff@fulfordlaw.com); Jerald Bagley (jbagley@jud11.flcourts.org); Lytal, Lake (llytal@lytalreiter.com); Louis Rosenbloum (lrosenbloum@rosenbloumlaw.com); Russo, Elizabeth (ekr@russoappeals.com); tdukes@mmdorl.com; Tyrie Boyer (TWBoyer@coj.net); Barton, James; 'Jodi B Jennings' (jjenning@flabar.org)
Subject: Re: Emergency Medical Services - Nos. 1-4

I would go with 3. Here is a possible slight modification.

The Committee has attempted to write a plain English instruction for the amended statute, but has been unable to do so without attempting to discern the intent of the Legislature, which is not stated. The Committee will consider an appropriate instruction once guidance is provided from decisions of the Florida Appellate courts.

On Mon, Feb 11, 2013 at 9:47 AM, Pete DeMahy <pdemahy@dldlawyers.com> wrote:
that's an oxymoron..."legislative intellect"...cant say that either!

Pete L. DeMahy
Coral Gables/Miami
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<http://www.linkedin.com/groups?gid=4227207&trk=hb_side_g>
<http://www.linkedin.com/company/dld-lawyers>
<http://www.facebook.com/pages/DLD-Lawyers/125022064280249>
<http://dldpc.wordpress.com>

please immediately notify me by forwarding this e-mail to pdemahy@dldlawyers.com, or by telephone at 305.443.4850 and then delete the message and its attachments from your computer.

On 2/10/13 5:56 PM, "Donald M. Hinkle" <don@hinkleforan.com> wrote:

>Thank you Neal. I can go with three. While we cannot say this, I must
>note the problem is not a lack of legislative intent. It is a lack of
>legislative intellect. The statute is unintelligible:
>
>3.□For purposes of this paragraph, "reckless disregard" as it applies to
>a given health care provider rendering emergency medical services shall
>be such conduct that a health care provider knew or should have known, at
>the time such services were rendered, created an unreasonable risk of
>injury so as to affect the life or health of another, and such risk was
>substantially greater than that which is necessary to make the conduct
>negligent.
>
>Sent from my iPhone
>
>On Feb 10, 2013, at 10:45 AM, "Neal Roth"
><NAR@grossmanroth.com<mailto:NAR@grossmanroth.com>> wrote:
>
>Attached is my memo summarizing the 4 ideas to solve the ER instruction
>issue. If we can get consensus then only one will be presented to the
>full committee. If not we will present the top 2,or 3,or 4,or,5 or
>6.....Please respond via e-mail. If we need one more call it will be at the
>end of this week. Thanks.
>
>Neal A. Roth
>2525 Ponce dc Leon Blvd
>Coral Gables, Florida 33134
>305-442-8666(O)
>305-285-1668(fax)
>nar@grossmanroth.com<mailto:nar@grossmanroth.com>
>
>From: Mary B. Nagler
>Sent: Wednesday, February 06, 2013 2:40 PM
>To: Neal Roth
>Subject: Emergency Medical Services - Nos. 1-4
>
>
>

>Mary Nagler
>Legal Assistant to Neal A. Roth
>Grossman Roth, P.A.
>2525 Ponce de Leon Boulevard
>Suite 1150
>Coral Gables, Florida 33134
>(305) 442-8666
>(305) 285-1668
>
><Memo - Professional Negligence Committee - forwarding Emergency Medical
>Services Nos. 1-4.doc>

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