IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 1D18-0511

SELECT SPECIALTY HOSPITAL – GAINESVILLE, INC.,

Appellant/Cross-Appellee,

vs. L.T. Case No. 01-2014-CA-2848K

CHARLES UTAH BARTH,

Appellee/Cross-Appellant.
_____/

ON APPEAL FROM THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT, IN AND FOR ALACHUA COUNTY, FLORIDA

ANSWER/CROSS-INITIAL BRIEF OF APPELLEE/CROSS-APPELLANT

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STATEMENT OF THE CASE AND FACTS

This case arises from Plaintiff's claims against Defendant, Select Specialty Hospital – Gainesville, Inc. ("Select"), for medical malpractice and violations of the Adult Protective Services Act, Chapter 415 of the Florida Statutes.

Plaintiff filed his medical malpractice action against Select to recover for a pressure ulcer (or bed sore) that he sustained to his sacrum while a patient at Select from April 4 until April 22, 2012. Specifically, Plaintiff alleges that while a patient at Select, he incurred an avoidable deep tissue injury to his sacrum.[1] Plaintiff also seeks to recover under Chapter 415 for Select's illegal and improper use of restraints and the failure of Select's staff to promptly respond to Plaintiff's calls for assistance.

A deep tissue injury is caused by a pressure ulcer that starts at the muscle deep within the body. (T.252; *see* T.27.) Intense or very prolonged pressure causes the muscle to die, and the skin tissue at the surface appears purple or dark red maroon and blisters. (T.252, 257, 260.) Plaintiff's deep tissue injury evolved into open wound with necrotic (or dying) tissue that failed to heal and eventually caused an infection to the bone. (T.242-43.) He required multiple surgeries, including "flap" surgeries to close the wound and a colostomy to keep the buttocks area clean (to help

[1] The sacrum refers to an area that is on the very low part of the back (T.242), near the crack of the buttocks (T.57). The coccyx, also known as the tailbone, is used almost synonymously with the sacrum (T.245). Select's training materials refer to the coccyx/sacral area or the sacral/coccyx, treating the terms interchangeably. (T.20.)

the wound heal). (T.242-43, 273, 515-16.)

Plaintiff was admitted to Select on April 4, 2012. (T.59.) His daughter, Michelle Barth, held a durable power of attorney and signed the intake form on his behalf. (T.1011, 1013; *see* T.676-77.) When Plaintiff was admitted, he had recently been rendered a paraplegic during surgery at Shands UF. (T.59.) Plaintiff was paralyzed from the chest-area down. (T.423.) He was on a ventilator (T.59; T.430; T.712) and was dependent on Select and its staff to care for all his needs. (*See* T.93-94; T.675; T.712; *see also* T.1792.)

Select specializes in treating ventilator-dependent patients and providing wound care. (T.81.) Select billed for the care and services provided to Plaintiff. (*See* T.1013-14; *see generally* R.16750-17286.)

Because of continued respiratory issues, Plaintiff was transferred from Select to Shands UF on April 22, 2012. (T.59; T.265.) After his transfer from Select, and on admission to Shands UF's emergency room, Plaintiff was diagnosed with a deep tissue injury. (T.265-66, 267.) Plaintiff was discharged from Shands UF to Specialty Hospital Jacksonville on May 8, 2012. (T.59.) From there, he was discharged to Heartland of Orange Park ("Heartland") on June 1, 2012. (T.60.)

Before filing suit against Select, Plaintiff complied with the statutory presuit notice requirements of Florida's Medical Malpractice Act, Chapter 766 of the Florida Statutes. (R.7659.)

Pleadings. Plaintiff sued Select and alleged two causes of action: Count I, for medical malpractice; and Count II, for violations of Chapter 415, Florida Statutes. (R.58-67.)

Select filed an answer and affirmative defenses, which incorporated a motion to dismiss Count II. (R.68-77.) As its second affirmative defense, Select pled the comparative negligence of non-party tortfeasors, pursuant to *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993), and *Nash v. Wells Fargo Guard Services*, 678 So. 2d 1262 (Fla. 1996). (R.69-70.) Select amended its second affirmative defense to specifically name Heartland as a *Fabre* defendant. (R.675-76.)

Plaintiff moved to amend his complaint to assert a claim for punitive damages, which the trial court granted. (R.7279-80.) The amended complaint alleged facts to support the allegations that Plaintiff was a "vulnerable adult" and Select was a "caregiver." (R.7285-88.) Plaintiff pled that Select, by failing to respond to this ventilator-dependent patient and improperly and illegally restraining him, committed abuse as defined by Chapter 415. (R.7288-89.) Plaintiff further pled that Select's failure to provide appropriate medical care constituted neglect and did not comply with its statutory duties under Chapter 415. (R.7290-91.) Plaintiff alleged that a prudent person would consider "the aforementioned care, supervision, and services essential for [Plaintiff's] well-being." (R.7291.)

In its answer (R.7294-98) to the amended complaint (R.7281-93), Select again

identified Heartland as a *Fabre* defendant. (R.7296-97.) Select did not include any facts to support its conclusion that the injuries allegedly suffered by Plaintiff were caused by Heartland's negligence. (R.7296-97.)

In reply to Select's affirmative defense, Plaintiff alleged that Select did not identify Heartland's specific negligent acts, as required by Florida law. (R.7307-08.) Because Select failed to plead Heartland's negligence with specificity, Select failed to state a proper legal defense. (R.7308.) Plaintiff also alleged that Select, if found negligent, would be "liable for any and all subsequent negligent healthcare treatment." (R.7308 (citing, *inter alia*, *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977).) Further, Plaintiff added, the claims relating to Heartland were separate and independent, and did not relate to joint failures of treatment. (R.7308.)

Select's comparative fault defense. Before trial, both parties filed numerous motions in limine. Included among Plaintiff's pre-trial motions was his first motion in limine, or alternative motion for summary judgment, on Select's comparative fault affirmative defense. (R.7566-69.) In his motion in limine, Plaintiff relied on *Stuart v. Hertz*, 351 So. 2d 703 (Fla.1977), to argue Select's liability for any negligence of subsequent treating healthcare providers like Heartland. (R.7566-67.) Plaintiff argued that Select did not plead, and could not prove, Heartland's negligence. (R.7567-68.) Consequently, Plaintiff asked that the trial court preclude Select from blaming Heartland for any comparative fault. (R.7567-68.)

On November 20, 2017, two weeks before trial (and one day before the scheduled pre-trial conference (R.7271)), Select filed a response to Plaintiff's first motion in limine. (R.8098-8109.) In that response, Plaintiff also sought leave to amend its second affirmative defense. (R.8098-8109.) Discovery had closed almost thirty days earlier. (R.7273.) For the first time, Select identified Shands UF and Specialty Hospital Jacksonville as subsequent tortfeasors who had allegedly caused or contributed to Plaintiff's injuries. (R.8102-03.) Select asked to amend its second affirmative defense to name Shands UF and Specialty Hospital Jacksonville as additional *Fabre* defendants on the verdict form. (R.8098, 8099-8100, 8103, 8107-08.)

The trial court heard Plaintiff's first motion in limine, together with Select's motion for leave to amend, on November 20, 2017. (Supp. R.21615-16.) Plaintiff opposed Select's belated motion for leave to amend. (Supp. R.21616, 21620.) Plaintiff relied on *Stuart v. Hertz* to argue that Select should be held liable as a matter of law for the subsequent tortfeasors' negligence, and emphasized that Select was not entitled to name UF Shands and Specialty Hospital Jacksonville on the verdict form as *Fabre* defendants. (Supp. R.21615-21.)

Select disagreed, noting that the statute governing joint and several liability, section 768.81, had been amended since *Stuart v. Hertz* was decided. (Supp. R.21616-18.) In the defense's view, *Stuart v. Hertz* does not apply to medical

malpractice claims. (Supp. R.21616-17.) Select argued that because Shands UF, Specialty Hospital Jacksonville, and Heartland were joint tortfeasors responsible for causing a common injury, the three tortfeasors could be added to the verdict form as *Fabre* defendants. (Supp. R.21617-18.)

The trial court agreed with Select that "med mal is distinct." (Supp. R.21620.) Finding no prejudice to Plaintiff, the trial court granted Select's motion to amend its affirmative defense and name Shands UF and Specialty Hospital Jacksonville as *Fabre* defendants. (Supp. R.21621; R.8158-59.) The trial court also denied Plaintiff's first motion in limine on Select's comparative fault defense. (R.8162.)

At the pre-trial conference, held November 21, 2017, Plaintiff asked the trial court to reconsider its ruling on the comparative fault defense. (Supp. R. 21671-76; R.8113-27.) Together with his motion for reconsideration, Plaintiff attached relevant excerpts from the defense experts' deposition testimony, all of whom denied having any opinion on the fault of the non-party healthcare providers. (R.8116-27; Supp. R.21671.) Plaintiff explained that although his expert, Dr. Black, criticized one aspect of Heartland's care, she testified that it made no difference in the outcome. (Supp. R.21671, 21672-73.)

Plaintiff complained that Select had never before pled the comparative fault of Shands UF or Specialty Hospital Jacksonville. (Supp. R.21672-73.) He argued that he was now prejudiced by Select's belated motion to amend its affirmative

defense, which was filed after discovery closed. (Supp. R.21672-73, 21675-76.) Select disagreed, noting that the timing of Plaintiff's wound had been a topic of deposition discovery. (Supp. R.21674.) The trial court denied the motion for reconsideration. (Supp. R.21676.)

Thereafter, on November 27, 2017, Plaintiff filed a motion to strike Select's affirmative defense on comparative fault. (R.8132-34.) Plaintiff argued that Select did not properly plead any facts to support the non-parties' alleged comparative fault. (R.8132-33.) Consistent with its earlier rulings, the trial court denied Plaintiff's motion to strike. (R.8222-23).

Trial. The parties proceeded to a two-week jury trial on Plaintiff's claims. On his claim for medical malpractice, Plaintiff sought only damages for the deep tissue injury to his sacrum. (T.1028.)

Select stipulated at trial that Plaintiff's medical bills were reasonable and necessary, but denied that its treatment caused the entire amount claimed. (T.60.) The medical expenses sought by Plaintiff included treatment and care of the sacral wound provided by Heartland. (*See* R.7661-63; R.16750-17386.) In opening statement, defense counsel questioned whether the sacral wound at issue was related to the same wound first reported at Select. (Supp. T.2449-52 (pdf 358-61).)

Plaintiff's Chapter 415 claim. Plaintiff elicited testimony at trial from Select's former director of quality management (T.124). Ms. Harrison testified that

when Plaintiff was a patient at Select, his ability to communicate was impaired (T.147), and he needed assistance with all activities of daily living (T.145, 159). Although Select provides sophisticated medical treatment, Ms. Harrison agreed that the long-term acute care hospital is also responsible for providing all patient care. (T.145, 153.) Select's handbook, which is given to patients and families, describes any health care providers involved in a patient's care – including Select itself – as a caregiver. (T.147-48, 152.)

Ms. Harrison evaluated whether a patient was suitable for admission to Select. (T.140-41.) Select's decision to admit a patient meant it could meet that patient's needs. (T.141.) If unable to meet a patient's needs, Select sends the patient to another level of care. (T.141.)

With regard to the use of restraints, Ms. Harrison confirmed that Select should protect the patient with the least restrictive means available. (T.150.) Options such as allowing a family to hire a sitter or bring in family members to stay with the patient should be available, in lieu of restraints. (T.150.) Failure to provide those options was improper, and a violation of Select's policies. (T.150.)

Likewise, Plaintiff relied on testimony from Dr. Black, who stated that Select's staff should have allowed the family to stay with the patient to prevent him from pulling out tubes. (T.289, 294; *see* T.293.) She believed there was no need for Plaintiff to be restrained. (T.294.)

Plaintiff introduced evidence that Select did not periodically release the restraints, as required by state and federal law, and Select's own policies. (T.88-90, 90-93; T.290-94; *see* T.649; T.1015-16.)[2]

Effect of restraints on Plaintiff. After Plaintiff's admission to Select, his hearing aids were lost. (T.616.) He was isolated in a room. (T.620.)

Plaintiff's first memory of Select was of being tied down, with both arms restricted to the side of the bed. (T.582-83.) He believed he had been restrained from very soon after he arrived at Select. (T.583-84, 620-21.) His daughters Maggie and Michelle confirmed that Plaintiff had been restrained during his first days at Select. (T.704-05; T.1013-14.) Maggie did not see Select's staff regularly remove her father's restraints. (T.705-07.)

When questioned about the use of restraints, Select's staff explained that Plaintiff was tied down because he had "pulled at some of his tubes" and "had thrown something." (T.1014.) Yet when his family – including Plaintiff's daughter Maggie, a combat medic and nurse (T.709) – offered alternatives in lieu of the restraints, Select refused to allow those options. (T.1014-15.)

Plaintiff remembered being unable to move his arms, which he found very disturbing. (T.620-21.) Plaintiff believed he spent most of his days in restraints.

[2] Plaintiff also sought to introduce evidence of government reports that had cited Select six months earlier for misuse of restraints. That evidence was excluded from the jury. (R.8414.)

(T.649.) His family did not see the staff at Select periodically remove the restraints (T.1015-16), and noted that he was "[v]ery often" in restraints during visits (T.1015). Plaintiff tried to ask for his family, but he had difficulty communicating. He explained that he couldn't breathe, he couldn't go anywhere, and he was tied down. (T.585.)

Effect of failure of Select's staff to respond. With regard to Plaintiff's breathing difficulties, and the failure of Select's nursing staff to respond, Plaintiff also elicited testimony from Select's chief nursing officer. Ms. Slay agreed that struggling to breathe can be extraordinarily frightening to a patient. (T.93.) When a patient is ventilator-dependent, nurses must be timely in responding to the patient call button. (T.93.) Select's medical records reflect that while Plaintiff was on a ventilator, he experienced very thick phlegm that required frequent suctioning. (T.288; *see* T.584.) Plaintiff's nursing expert, Dr. Black, explained that when phlegm plugs the artificial airway (or "trache"), a patient is not able to breathe. (T.241, 288.) This is extremely frightening to a patient, especially one who has been restrained. (T.288, 294.) Dr. Black testified that Select's decision to restrain Plaintiff contributed to his anxiety about his inability to breathe. (T.294.) The nursing notes described Plaintiff as anxious. (T.288.)

Plaintiff repeatedly pushed the call light when he felt as if he couldn't breathe. (T.630, 652.) Alone in his room, he described the call button as his only lifeline; he

stated, "[T]hat's what I had to attract attention that I'm choking, I'm dying, I'm without oxygen." (T.630.) Select's nurses often did not respond (T.629-31, 672), and at times, the call button was placed out of his reach (T.1018). Plaintiff could watch Select's staff from a reflection across the hallway; he testified that he could "watch the nurses laughing and giggling and motioning to watch this," and questioning who among them would respond to his call. (T.629.) Plaintiff believed "it was a game to them." (T.629.) Plaintiff believed Select's staff deliberately did not respond to his call button. (T.629)

Plaintiff would resort to throwing things in the hall or pulling off monitor leads to get the nurses' attention. (T.650-53; T.719; *see* T.289.) His family confirmed the lack of responsiveness of Select's staff. (T.1017-18.) Plaintiff's daughter Michelle testified, for instance, that "we would often have to go and find somebody." (T.1017-18.) Plaintiff remembered "trying to get the nurse, doctor, anyone to come into my room and do a suction on my lungs." (T.650-51.) Select's staff would respond by lecturing Plaintiff about safety and then tighten the restraints. (T.653-54.)

Plaintiff described the panic and anxiety he felt when he had difficulty breathing and the nurses did not respond. (T.584, 627, 630, 650-51.) Plaintiff testified that his inability to breathe when the ventilator became clogged was "a major concern," and his "not being able to call for help at that point was a very –

very much [a] bad thing." (T.627.) His family similarly testified to Plaintiff's frustration when the Select staff repeatedly failed to respond to the call button. (T.719; *see* T.715.) Plaintiff became agitated, especially when he could feel the build-up of phlegm and the nurses did not respond to his call button. (T.1017-18.) As his daughter Michelle testified:

> He would get very agitated…. [A]t the time it was hard for him to hear. He couldn't see very well without []his glasses. He couldn't move. And he was tied so he couldn't move his hands. So he would get agitated, yes.

(T.1019.)

Plaintiff's medical malpractice claim. In support of his claim for medical malpractice, Plaintiff presented the expert testimony of Dr. Black and Dr. Davey.

Dr. Black. Plaintiff elicited expert testimony from Joyce Black, Ph. D. (T.229.) Dr. Black, a registered nurse, has served as a panel member and president of the National Pressure Ulcer Advisory Panel; she has written published articles and taught on the subject of deep tissue injury. (T.232-33.) The National Pressure Ulcer Advisory Panel advises the federal government on the proper prevention, care, and treatment of pressure ulcers. (T.232-33.) The Medicare and Medicaid regulatory schemes related to prevention and treatment of bedsores are derived from the Panel's work. (T.232-33.)

In Dr. Black's opinion, Select's nursing staff failed to prevent an avoidable deep tissue injury on Plaintiff's sacrum, coccyx, and lower buttocks; the nursing

staff also did not follow Select's protocol for identification and treatment of pressure injuries. (T.238.) Among Select's breaches of the standard of care, Dr. Black identified the failure of the nursing staff to keep Plaintiff turned and off his back, and the amount of time he spent either lying on his back in bed or sitting in a chair. (T.241-42, 243-45.) As a result of the nurses' negligence, Plaintiff developed a deep tissue injury to his sacrum.[3] (T.242, 254; *see* T.245-51, 282-83, 340, 413, 415.)

Dr. Black opined that Plaintiff's deep tissue injury presented on April 20, 2012. (T.250-51, 255-58, 361.) A deep tissue injury is caused by a pressure ulcer that starts at the muscle deep within the body. (T.252.) Intense or very prolonged pressure causes the muscle to die, and the skin tissue at the surface appears purple or dark red maroon. (T.252, 257, 260.) "By the time that purple skin is seen, the damage to the muscle has already occurred." (T.436.) While a deep tissue injury can progress from occurrence to a full-thickness wound in seven to ten days (T.364), aggressive management can slow the pace of eruption (T.365-66).

Dr. Black's review of the medical records and photos allowed her to see the natural progression of this original deep tissue injury. (T.264.) Plaintiff's original injury evolved into a large sacral wound that failed to heal. (T.242-43.) Eventually, Plaintiff developed an infection in the bone and needed surgery (referred to as a

[3] Dr. Black identified the sacrum as "the very low part of the back onto [the] tailbone." (T.242.)

"flap" surgery) to cover the wound. (T.243.) Dr. Black testified that the original wound was "absolutely the same wound" that eventually required flap surgery. (T.264; *see* T.266-67, 268-71, 276, 386.) The initial flap surgery was unsuccessful, and Plaintiff has undergone more surgeries since then. (T.243.) Plaintiff also required a colostomy to protect the sacrum wound from fecal matter. (T.273.)

For the flap surgery, Dr. Black explained, Plaintiff's buttocks muscle was split in two; half was pulled over the sacral wound. (T.279.) Because scar tissue is not as good as original skin, Plaintiff will remain at a higher risk for pressure ulcers on both his sacrum and the remaining muscle. (T.276, 278-79.) Dr. Black noted that Plaintiff had also been diagnosed with methicillin-resistant Staphylococcus aureus (MRSA) infections around the flap area (T.279), which will delay healing of any open wound and cause reinfection of existing tissue (T.282).

The expert described photos and explained medical records from Shands UF, Specialty Hospital Jacksonville, and Heartland, all of which reflected the natural evolution of the same wound originally sustained at Select. (T.265-71, 369, 371-72, 373, 380, 385-86, 393.) By early June, 2012, when Plaintiff was admitted to Heartland, the sacral wound was necrotic and required more aggressive treatment by wound care specialists. (T.271-72.)

Dr. Black was asked whether there was anything about Heartland's care that she would have done differently. (T.272.) She responded:

> I would have done different bandages on the wound. But in the end it wouldn't have changed the outcome. The outcome was set in place when it started. We use a phrase in Nebraska, the horses are out of the barn. The horses are out of [the] barn. It's – we can't roll it back anymore.
>
> I would have done different bandaging. I don't think it would have changed anything.

(T.272; *see also* T.284-85 (once the deep tissue injury started and necrosed, "the goal is to keep the wound as small as possibl[e]," but "there's nothing you can do to rescue that dead tissue in the center").)

In Dr. Black's opinion, the care at Heartland "wouldn't have changed [Plaintiff's] need for a doctor or surgeon to come in and clean that dead tissue out" and "wouldn't have changed the fact that he got a bone infection or needed a flap." (T.272-73.) Again, she noted that she "would have just chose[n] a different topical bandage" than Heartland. (T.273.) But, by the time Plaintiff was admitted to Heartland, Dr. Black explained that the horse was "out of the barn" and "[t]he damage had been done." (T.407-08.)

Dr. Black did not express standard of care opinions related to the progression of Plaintiff's sacral wound at Heartland because of her "sense…that the damage had already been done." (T.315-16.) She was asked on cross-examination whether she recalled from reviewing Heartland's records that there was "almost no documentation" of Plaintiff having been turned and that Heartland delayed providing Plaintiff with a specialty mattress and pressure-relief devices. (T.316, 399.) Dr.

Black agreed that conduct, if confirmed by the records, would be breaches of the standard of care. (T.399-400.) She did not know whether a breach of the standard of care by Heartland led to pressure ulcers on Plaintiff's heels and could not identify the specific facility where Plaintiff was first diagnosed with MRSA. (T.400.)

Dr. Davey. Dr. Davey is a family practitioner and geriatrician who is board-certified in wound care. (T.844-45.)

Dr. Davey testified to his opinions within a reasonable degree of medical probability. (T.849-50.) He opined that Plaintiff developed a sacral deep tissue injury at Select that was reasonably preventable with proper care. (T.850, 856.) He also testified that Plaintiff's subsequent treatment and care, including his colostomy and flap surgery, were reasonable and necessary in treating that original deep tissue injury. (T.850-51, 854-55, 869-72, 906-07.) Dr. Davey believed that the original injury substantially contributed to problems that Plaintiff would likely continue to experience with the sacral area. (T.855-56, 872-75.)

In Dr. Davey's opinion, Plaintiff sustained a deep tissue injury to his sacrum while a patient at Select. (T.856-59.) Medical records from April 20, 2012 described the injury as a Stage II wound, which was bloody and dark red purple in color. (T.858-60.) The description of dark red purple (like bruising) is consistent with diagnosis of a deep tissue injury. (T.859-60, 975.)

Two days later, Plaintiff began bleeding. He was transferred to Shands.

(T.861.) The medical records there reflected a suspected deep tissue injury to his coccyx, following his transfer from Select. (T.861-62.) According to Dr. Davey, nurses often refer to the sacrum and the coccyx interchangeably. (T.862.) The wound was described as necrotic, which means that the tissue is dead. (T.862, 997.) As Dr. Davey explained, "[D]ead tissue is not superficial. Dead tissue is deeper." (T.862.) According to Dr. Davey, "[N]ecrotic tissue is always infected. It's dead tissue." (T.998.) Necrosis, together with the deep tissue injury, created a high probability that Plaintiff sustained damage all the way to the bone (the sacrum). (T.863-64.)

On cross-examination, Dr. Davey was asked whether Heartland breached the standard of care by not providing Plaintiff with a low-air mattress for more than 56 days. (T.978-79.) Dr. Davey responded:

> I didn't review records at Heartland in great detail because the damage was already done by then. Kind of didn't make much difference what they did or didn't do because this was already, as you saw in the photos, a badly damaged buttocks. I mean, almost the whole buttocks was injured.

(T.979.) While Dr. Davey agreed that the delay in providing a low-air mattress may be a breach of the standard of care, he reiterated that he had not looked at the Heartland records in detail "because…we already had a damaged buttocks by that time." (T.979.) Similarly, because a patient's "heels need to be protected and…other pressure relieving measures taken," Dr. Davey agreed that a failure to provide Plaintiff with pressure-relieving devices or to reposition the patient every two hours

would be a breach of the standard of care. (T.980, 983-84, 1000.)

Dr. Davey testified on redirect that by the time Plaintiff was admitted to Heartland, he would have needed surgery to repair the sacral wound, regardless of Heartland's care. (T.995-96.) Dr. Davey did not know whether Plaintiff "got good care at Heartland or not, but by then he already had a severely damaged buttocks." (T.995.) The expert also noted that Plaintiff's wound "should have been much better by then." (T.996.)

At trial, the defense sought to elicit testimony from Plaintiff's daughter Michelle that was critical of her father's care at Heartland. (T.1048.) She agreed that Heartland failed to timely address significant changes to her father's condition. (*Id*.) On redirect, Michelle clarified that the only injury at issue was the sacral wound. (T.1051.) Any problems with pressure ulcers on her father's heels and a surgical incision across his back that Plaintiff may have suffered in 2013 (T.1049-50) had nothing to do with the allegations against Select (T.1051).

The defense introduced testimony from two experts: Dr. Sheyner and Nurse Weir.

Dr. Sheyner. Dr. Sheyner specializes in internal medicine, together with geriatric and palliative care. (T.1700.) She serves as the medical director of a skilled nursing facility. (T.1702-03.)

Dr. Sheyner testified that she was familiar with the reasonable and appropriate

care standards for nurses in avoiding, preventing, and treating pressure sores. (T.1708.) Although she reviewed medical records – including complete records from Select and numerous records from Plaintiff's admissions to Shands – she did not review Heartland's medical records. (T.1711-12.) Dr. Sheyner was not provided with Plaintiff's complete medical records after his May 2012 admission to Shands. (T.1758-59; *see* T.1756-57.)

Dr. Sheyner testified that Select's staff did not deviate from the standard of care for the prevention of pressure ulcers. (T.1713-14.) She opined that Plaintiff developed the pressure ulcer on his sacral area, which evolved into a Stage IV pressure ulcer, *after* his discharge from Select. (T.1714.) In Dr. Sheyner's opinion, the sacral wound happened between the end of April (or beginning of May) and mid-May, 2012. (T.1718.) She believed that Plaintiff sustained incontinence-associated dermatitis at Select, instead of a pressure sore or suspected deep tissue injury. (T.1800-01; *see also* T.1714.)

The defense did not elicit any standard of care opinions from Dr. Sheyner with regard to any healthcare providers other than Select. (T.1715-16.) Notably, the defense did not elicit an opinion from Dr. Sheyner as to whether Heartland breached the standard of care or whether Heartland's negligence caused the sacral wound. (T.1716-17 (defense counsel's explanation that Dr. Sheyner "is not going to be saying this [wound] occurred at a particular institution, and certainly not gonna be

saying that it occurred at a particular institution because of negligence on the part of that institution").) Although Dr. Sheyner noted that Plaintiff developed an infection at Heartland (T.1816, 1818), she did not render any opinions criticizing the care given to Plaintiff after his discharge from Select (T.1758-59, 1818).

In Dr. Sheyner's opinion, the eventual Stage IV sacral pressure ulcer, as noted in photographs in August 2012, was not related to the same wound photographed by Select's staff on April 20, 2012. (T.1730-31.) Dr. Sheyner based her opinion on the anatomical location and staging of the wound. (T.1730-31.) The expert testified that all of the care and treatment of the sacral pressure ulcer, which included a diverting colostomy and flap surgery, were reasonable and appropriate. (T.1806.)

Nurse Weir. The defense also elicited testimony from a nursing expert, Nurse Weir. (T.1835.) Nurse Weir reviewed Select's medical records related to Plaintiff, together with certain Shands records. (T.1851-53, 1854-55; 1882-83, 1915.)

Nurse Weir testified that Select met the appropriate standard of care in preventing pressure sores and managing Plaintiff's wound. (T.1853, 1859-62, 1869.) (T.1853). In Nurse Weir's opinion, Plaintiff did not sustain a deep tissue injury while at Select; instead, she believed he suffered minor incontinence-associated dermatitis on his buttocks. (T.1853, 1861, 1863, 1867-68, 1874.)

Nurse Weir did not render opinions related to the care that Heartland provided to Plaintiff, nor did she provide any testimony as to the cause of Plaintiff's Stage IV

sacral ulcer or when that wound occurred. (*See* T.1829, 1831-32, 1833 (explaining that Nurse Weir's testimony would be limited to the nursing standard of care at Select); *see also* T.1853.)

Motions for directed verdict. At the close of Select's evidence, Plaintiff moved for directed verdict on Select's affirmative defenses, including its comparative fault defense seeking to apportion damages to Heartland. (T.1929-30, 2026, 2036.) The trial court denied Plaintiff's motion, ruling that Heartland would remain on the verdict form. (T.2026.)

Charge conference. Plaintiff asked the trial court to instruct the jury on Florida Standard Jury Instruction 501.5c. (R.7786; T.1951-53.) One of three instructions on "other contributing causes of action," instruction 501.5c governs subsequent injuries caused by medical treatment. *See* Fla. Std. Jury Instr. (Civ.) 501.5c & note (citing *Stuart v. Hertz*, 351 So. 2d 703 (Fla. 1977)).

Select objected (T.1951-54), and asked the trial court to also give Florida Standard Jury Instruction 501.5b on "subsequent injuries/multiple events" (T.1954, 1961). Select reiterated its belief that *Stuart v. Hertz* does not apply "when you have a subsequent tort-feasor in a medical negligence claim." (T.1956; *see* T.1961, 1963.) Plaintiff objected to Select's proposed instruction on "subsequent injuries/multiple events." (T.1964.)

Plaintiff objected to the verdict form's inclusion of Heartland. (T.2003.)

Plaintiff also proposed a verdict form incorporating a jury question on Select's liability under *Stuart v. Hertz*. (R.16512-15; T.2005, 2010.) As explained by Plaintiff's counsel, if the jury found that Select caused loss, injury, or damage to Plaintiff, the jury would be allowed to determine whether Select is "also responsible for any additional loss, injury or damage caused by medical care or treatment reasonably obtained" at Heartland for that same injury. (T.2010; R.16513.) Plaintiff argued that if the jury apportioned damages to Heartland, the jury should then answer the question on Select's responsibility for additional treatment. (T.2010.) By framing the issue under *Stuart v. Hertz*, the jury could decide whether Plaintiff acted reasonably in seeking that care at Heartland. (T.2010.)

Select opposed the additional language, arguing that the trial court would preemptively instruct the jury that Select is responsible for any negligence on Heartland's part while he was a patient there. (T.2005.) The trial court agreed. (T.2005.) Moreover, the trial court reasoned that Select's proposed verdict form – which asked the jury to state the percentage of fault charged to Select and/or Heartland for the legal cause of loss, injury, or damage to Plaintiff (R.8240) – "covers this" (T.2010-11). The trial court excluded Plaintiff's proposed question from the final verdict form. (T.2010-11; R.8243-46.)

Plaintiff proposed a verdict form that segregated the damages between his medical malpractice and Chapter 415 claims. (T.2006-07, 2008.) Plaintiff initially

structured his verdict form to recover damages in medical negligence for the pressure ulcer issues, and damages awardable under Chapter 415 for Select's abuse and neglect with regard to use of the restraints. (T.2008.) Plaintiff's counsel proposed this form of the verdict to alleviate concerns of double damages raised by the defense. (T.2006-07.) The defense conceded that Plaintiff had the right to structure his verdict form to segregate the damages. (T.2008.)

Following discussion between counsel and the trial court, however, Plaintiff asked that both the medical negligence and the Chapter 415 counts address Select's use of the restraints and its treatment of the pressure ulcer. (T.2013-14.) In response, the defense reiterated that Plaintiff was "asking for duplicative damages" because "you're asking for damages under each." (T.2014, 2016.) Select's counsel asked the trial court to segregate the damages, as originally proposed by Plaintiff. (T.2014-15 (stating, "I don't know of a better way to do it").) The trial court agreed to the defense's request, adding: "[W]hat we can't have is a verdict form that's going to lead to the jury being able to have a double recovery." (T.2015.) The verdict form segregated the damages between the two counts. (R.8243-46.)

Renewed motion for directed verdict. Plaintiff renewed his motion for directed verdict on all defenses, including Select's *Fabre* defense. (T.2026, 2036.) The trial court denied Plaintiff's motion and reiterated that Heartland would remain on the verdict form. (T.2026, 2036.) However, the trial court directed a verdict on

Select's comparative fault defense as to Shands UF and Specialty Hospital Jacksonville. No question as the fault of those two *Fabre* non-party defendants was submitted to the jury. (R.8243-46.)

Jury Instructions. Together with instructions on negligence, the trial court instructed the jury to use the statutory definitions of abuse, caregiver, facility, neglect, and vulnerable adult in deciding the Chapter 415 claim. (T.2041-43.) Consistent with the verdict form, the jury instructed the jury on the nature of the injuries that Plaintiff claimed under the medical malpractice claim (the failure to prevent bedsores), and the Chapter 415 claim damages (Select's improper use of restraints and failure to provide appropriate care, supervision, and services). (T.2047.)

The trial court informed the jury that if the greater weight of the evidence supported Plaintiff's claims against Select, then the jury was then to decide Select's defenses. (T.2047-48.) As for Select's defenses, the trial court instructed the jury to decide whether Heartland was negligent, and "whether that negligence was a contributing legal cause of the loss, injury or damage" to Plaintiff. (T.2048.) The jury was given both the 501.5(b) instruction for subsequent injuries/multiple events and the 501.5(c) *Stuart v. Hertz* instruction. (T.2049-50.)

The jury was asked to decide whether there was fault on the part of Heartland that was a contributing legal cause of loss, injury, or damage to Plaintiff, and to state

the percentage of any fault charged to Select and Heartland. (T.2053-55; R.8243-44.) Additionally, the verdict form included special interrogatories on Plaintiff's Chapter 415 claim. The jury was asked whether Select was a caregiver under Chapter 415, and whether there was neglect or abuse as defined by Chapter 415 on the part of Select, as related to its use of restraints and its failure to respond, which caused damages to Plaintiff. (T.2055-56; R.8245-46.)

Verdict. The jury returned a verdict finding both that Select's negligence was a legal cause of Plaintiff's loss, injury, or damage relating to the deep tissue injury, and that there was fault on the part of Heartland contributing to that injury. (R.8243.) The jury apportioned 30% of fault to Select, and 70% to Heartland, the *Fabre* defendant. (R.8244.) The jury awarded the total past medical expenses stipulated to by the defense, along with future medical expenses ($125,000) and non-economic damages totaling $200,000. (R.8244-45.)

On Plaintiff's Chapter 415 claim, the jury specifically found that Select was a "caregiver," and that Select's use of restraints and failure to respond to Plaintiff constituted abuse or neglect causing injury to Plaintiff. (R.8245.) The jury awarded Plaintiff $25,000 in damages caused by Select's Chapter 415 violation. (R.8246.)

Post-trial motions. Select and Plaintiff both filed motions to set aside the jury's verdict and to enter directed verdict or, alternatively, grant a new trial. (R.8247-48; R.8250-411.) Plaintiff asked the trial court to set aside the jury's verdict

(JNOV) regarding Heartland, to direct a verdict on the comparative fault issues, and to enter judgment against Select on the total amount of damages awarded by the jury. (R.8250-56.) Plaintiff also moved for a new trial on issues related to the form of the verdict and the belated amendment of Select's comparative fault defense. (R.8412-15; R.8250-56.) The trial court summarily denied all post-trial motions without a hearing. (R.8579-80.)

Final judgment was entered on the jury's verdict on January 17, 2018. (R.8587-88.) Select timely appealed (R.8967-80), and Plaintiff cross-appealed (R.8973-80).

SUMMARY OF ARGUMENT

Main Appeal. Select is not entitled to a directed verdict on Plaintiff's Chapter 415 claim. In an effort to persuade this Court to limit Plaintiff's remedies, Select urges an interpretation of section 415.1111, Florida Statutes, that is contrary to the statute's plain language. The remedies provided by Chapter 415 are "in addition to and cumulative with" other legal remedies available to a vulnerable adult – which include a claim for medical negligence under Chapter 766. Principles of statutory construction, and the statute's legislative history, further demonstrate the legislature's intent to allow an injured plaintiff to pursue claims against hospitals under both Chapter 415 and Chapter 766.

Select cannot point to any Florida law that prohibits a vulnerable adult like Plaintiff from recovering damages against a hospital for both medical malpractice and violations of Chapter 415. Where, as here, a plaintiff complies with the presuit notice requirements of Chapter 766 – and does not rely on the prevailing professional standard of care to prove his claims for statutory abuse and neglect under Chapter 415 – Florida law does not proscribe the available remedies.

Select likewise fails to persuasively argue that it cannot be defined as a "caregiver" under Chapter 415. Select's interpretation contradicts the statute's plain meaning. Plaintiff proved, and the jury found, that Select was a "caregiver." On appeal, Select is not entitled to directed verdict.

Lastly, Select errs in suggesting that Plaintiff did not adequately prove damages attributable to his Chapter 415 claim. Plaintiff did not ask the jury to award the same damages for both counts, as the verdict form itself plainly shows. Plaintiff proved that Select's abuse or neglect was a legal cause of his loss, injury, or damage under Chapter 415, and the jury properly awarded damages to Plaintiff for Select's statutory violation.

Select is not entitled to a directed verdict, or to an order setting aside the jury's verdict, on Plaintiff's Chapter 415 claim.

Cross-Appeal. The trial court erred in denying Plaintiff's motions for directed verdict and JNOV on Select's comparative fault defense. Plaintiff is entitled to

judgment against Select for the full value of damages awarded by the jury on his malpractice claim, without apportionment of fault to Heartland, for two independent reasons.

First, the trial court should not have submitted the issue of Heartland's comparative fault to the jury, or allowed the non-party *Fabre* defendant to remain on the verdict form. Select failed to satisfy its burden of proving, by a preponderance of the evidence, the fault of Heartland in causing the deep tissue injury to Plaintiff's sacrum.

Second, the trial court erred in refusing to rely *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977), to grant directed verdict on Select's comparative fault defense. The Florida Supreme Court's decision in *Stuart v. Hertz* establishes that Select, as the initial tortfeasor, is solely liable for any additional loss, injury, or damage caused by the foreseeable medical care and treatment reasonably obtained by Plaintiff at Heartland, the subsequent tortfeasor.

The jury's apportionment of liability to Heartland should be reversed, and judgment entered against Select for the full value of the damages awarded by the jury on Plaintiff's medical malpractice claim.

Alternatively, Plaintiff is entitled to a new trial. The trial court abused its discretion in allowing Select – after the close of discovery and on the eve of trial – to amend its second affirmative defense to add two new *Fabre* defendants. Select's

second affirmative defense did not adequately plead the comparative fault of any of the *Fabre* defendants, including Heartland, and should have been stricken before trial. The trial court's failure to strike or limit Select's inadequately-pled defense prejudiced Plaintiff in his presentation of the evidence at trial.

The trial court also erred in refusing to submit Plaintiff's proposed *Stuart v. Hertz* special interrogatory to the jury. The special interrogatory proposed by Plaintiff would have allowed the jury – consistent with the evidence, Select's stipulation, and the trial court's instructions – to find that Select alone is responsible for the additional loss, injury, or damage to Plaintiff caused by Heartland's treatment of his sacral injury.

Thus, Plaintiff is entitled to judgment against Select for the full value of damages awarded by the jury, with no apportionment of liability to Heartland or, alternatively, to a new trial on his medical malpractice claim.

ARGUMENT ON MAIN APPEAL

Select appeals only one issue: the denial of directed verdict on Plaintiff's Chapter 415 claim, as alleged in Count II of the complaint. Select does not appeal the jury's findings of liability and damages on Plaintiff's claim for medical malpractice, nor does Select ask this Court to grant a new trial. Select is not entitled to relief on appeal.

Standard of review. "An order on a motion for directed verdict or for

judgment notwithstanding the verdict is reviewed de novo." *Kopel v. Kopel*, 229 So. 3d 812, 819 (Fla. 2017). The evidence and all inferences of fact must be viewed in the light most favorable to the non-moving party. *Id*. (citing *Christensen v. Bowen*, 140 So. 3d 498, 501 (Fla. 2014)). "[I]f any reasonable view of the evidence could sustain a verdict in favor of the non-moving party," this Court must affirm the trial court's denial of the motions for directed verdict and JNOV. *Id*. (quoting *Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So. 3d 247, 250 (Fla. 4th DCA 2009)).

I. Chapter 415 does not prohibit Plaintiff from recovering against Select for statutory abuse and neglect under Chapter 415 and medical negligence under Chapter 766.

Section 415.1111 of Florida's Adult Protective Services Act entitles a vulnerable adult to seek relief against a caretaker for his abuse or neglect, while providing that the civil remedies available under this statute are "in addition to and cumulative with other legal and administrative remedies" available. § 415.1111, Fla. Stat. (2012). By its plain language, section 415.1111 does not prevent this Plaintiff – who indisputably complied with the medical malpractice presuit requirements – from pleading and proving claims against Select under both Chapter 415 and Chapter 766, Florida's Medical Malpractice Act. For the reasons that follow, Select is not entitled to limit Plaintiff's available remedies to medical malpractice alone.

A. The plain language of Chapter 415's civil remedies provision controls.

Section 415.1111, Florida Statutes, establishes that "[t]he remedies provided

in this section are *in addition to and cumulative with* other legal and administrative remedies available to a vulnerable adult." § 415.1111, Fla. Stat. (2012) (emphasis added). The meaning of the statute is clear and must be given effect "according to its plain and obvious meaning." *Biddle v. State Beverage Dep't*, 187 So. 2d 65, 66 (Fla. 4th DCA 1966) (explaining that where "the language of the statute is plain, unambiguous, and conveys a clear and definite meaning, there is simply no occasion for construction or necessity for interpretation").

"Other legal…remedies available to a vulnerable adult" necessarily must include a claim for damages brought against a hospital under Florida's Medical Malpractice Act, Chapter 766. Like Chapter 415, Chapter 766 does not provide an exclusive remedy for any and all causes of action against hospitals, physicians, or nurses. *See, e.g.*, *Nat'l Deaf Academy, LLC v. Townes*, 242 So. 3d 303 (Fla. 2018) (providing framework for determining whether a claim sounds in ordinary negligence or medical malpractice); *Quintanilla v. Coral Gables Hosp., Inc.*, 941 So. 2d 468, 469 (Fla. 3d DCA 2006) (allowing ordinary negligence action against hospital for injuries to patient, who was injured when a nurse spilled scalding hot tea on him; court rejected hospital's contention that because the nurse used medical judgment to give the patient hot tea, she provided a "medical service"); *cf. Integrated Health Care Servs., Inc. v. Lang-Redway*, 840 So. 2d 974, 976 (Fla. 2002) (if a complaint included "both a count alleging a violation of chapter 400 and a separate

claim for professional malpractice under the common law, the presuit requirements of chapter 766 would probably apply to the lawsuit").

The language of Chapter 766 contemplates that other remedies can be pursued by a medical malpractice claimant. *See, e.g.*, § 766.207(7), Fla. Stat. (2012) (recognizing that if the parties agree to voluntary binding medical malpractice arbitration, such agreement "shall preclude recourse to *any other remedy* by the claimant against any participating defendant") (emphasis added). If Chapter 766 provided the only remedy for medical negligence, the legislature would have had no need to enact a provision precluding recourse to "any other remedy." *See id*. The legislature, however, "does not intend to enact useless provisions." *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 199-200 (Fla.2007) (noting that courts "must give effect to every word, phrase, sentence, and part of the statute") (quotations omitted).

Section 415.1111 expressly exempts from its scope any civil actions for damages against a nursing home or an assisted living facility. § 415.1111, Fla. Stat. (2012). The statute directs that those actions "shall be brought" under Chapter 400 (the Nursing Home Act) or Chapter 429 (the Assisted Living Facilities Act). *Id*.

(citing §§ 400.023 & 429.29, Fla. Stat.).[4] Thus, under the plain language of section 415.1111, nursing homes and assisted living facilities cannot be sued by a vulnerable adult seeking relief under Chapter 415. *See id*.

Select is not a nursing home or an assisted living facility, but a hospital. Nowhere within section 415.1111's plain language does the statute preclude a vulnerable adult from suing hospitals, physicians, and nurses under both Chapter 415 and Chapter 766. Again, the remedies provided by Chapter 415 are "in addition to and cumulative with" other legal remedies available to a vulnerable adult. § 415.1111, Fla. Stat. The trial court correctly denied Select's attempt to limit Plaintiff's recovery to a Chapter 766 medical malpractice claim.

B. Plaintiff's interpretation is consistent with principles of statutory construction and the legislative history of Chapters 415 and 766.

Assuming, for the sake of argument, that the language of section 415.1111 is ambiguous, courts "will apply established principles of statutory construction to resolve the ambiguity." *Barco v. Sch. Bd. of Pinellas Cnty.*, 975 So. 2d 1116, 1122 (Fla. 2008). Principles of statutory construction – together with the statute's legislative history – demonstrate that the legislature intended to allow an injured plaintiff to pursue claims against hospitals, physicians, and nurses under both

[4] Section 415.1111 further provides that a licensee or entity under Chapter 400 or Chapter 429 "shall not be vicariously liable for the acts or omissions of its employees or agents or any other third party in an action brought under this section." *Id*.

Chapter 415 and Chapter 766. *See, e.g.*, *Bennett v. St. Vincent's Med. Ctr., Inc.*, 71 So. 3d 828, 844 (Fla. 2011) (noting that "it is helpful to review the history of legislative changes…in determining legislative intent") (citing *Seagrave v. State*, 802 So. 2d 281, 288 (Fla. 2001)).

Under Florida law, "express exceptions made in a statute give rise to a strong inference that no other exceptions were intended." *Biddle v. State Beverage Dep't*, 187 So. 2d 65, 67 (Fla. 4th DCA 1966). Here, because the legislature expressly exempted only nursing homes and assisted living facilities from the civil remedies available under Chapter 415, the legislature must *not* have intended to create the same exception for hospitals. *See Biddle*, 187 So. 2d at 65 (explaining Latin rule of "expression unius est exclusion alterius": "the mention of one thing implies the exclusion of another"). Indeed, if the legislature had intended to exempt hospitals from any claim brought by a vulnerable adult under section 415.1111 – or to require that an action for medical negligence must be brought exclusively under Chapter 766 – it would have done so "clearly and unequivocally." 187 So. 2d at 65.

Select cannot ask this Court to rewrite section 415.1111 to limit Plaintiff's available civil remedies. *See Estate of Jones v. Mariner Health Care of Deland, Inc.*, 955 So. 2d 43, 47 (Fla. 5th DCA 2007) (recognizing that "courts cannot rewrite [a] statute by inserting that which the Legislature did not include"); *see also Thrivent Fin. for Lutherans v. State Dep't of Fin. Servs.*, 145 So. 3d 178, 182 (Fla. 1st DCA

2014) ("this court may not rewrite statutes contrary to their plain language") (quotation omitted). On appeal, Select asks this Court to do, by judicial fiat, what the legislature has repeatedly refused to do.

Notably, in 2001, the legislature revised section 415.1111 to exclude nursing homes and assisted living facilities from Chapter 415's civil remedies provision. *See* Ch. 2001-45, § 12, Laws of Fla. (2001). At the same time, the legislature amended the statute governing nursing homes to establish Chapter 400 as the exclusive remedy for any cause of action for the personal injury or death of a nursing home or assisted living facility resident arising out of negligence or a violation of that resident's statutory rights. *See* Ch. 2001-45, § 4, Laws of Fla. (2001) (codified as § 400.023(1) (governing nursing homes)); Ch. 2001-45, § 39 (codified as § 400.429(1), Fla. Stat. (2001) (governing assisted living facilities)).[5]

The same year that substantive changes were made with regard to the liability of nursing homes and assisted living facilities, hospitals within Florida likewise asked to be excluded from Chapter 415. (R.2405; *see* R.78-81, 88-89.) The legislature rejected the proposal. (R.2405; *see* R.78-81, 88-89.) Hospitals have since repeatedly asked that the legislature either exclude hospitals from Chapter 415 or, alternatively, establish Chapter 766 as an exclusive remedy. (R.81, 89-90.) The

[5]The statutory provisions governing assisted living facilities, initially designated as Part III of Chapter 400, were renumbered as Chapter 429 in 2006. *See* § 429.429(1), Fla. Stat. (2006).

legislature has rejected those efforts. (*See id*.)

Chapter 415's statutory definition of a "caretaker" is broadly written,[6] and entitles Plaintiff to seek relief against Select for his neglect and abuse. Absent statutory language excluding hospitals, physicians, or nurses from liability under Chapter 415 – or exempting claims arising in medical negligence from Chapter 415's civil remedy provisions – the trial court correctly ruled that Plaintiff could seek relief against Select under both Chapter 415 and Chapter 766. Section 415.1111's remedies are "in addition to and cumulative with" other legal remedies, including a cause of action arising in medical negligence.

C. Florida law does not otherwise preclude Plaintiff from pursuing claims under both Chapter 415 and Chapter 766.

Select admits that few cases discuss the interaction between Chapter 415 and Chapter 766. (Initial Br. 22.) Of the cases cited by Select, however, not one expressly prohibits a vulnerable adult like Plaintiff from recovering damages against a hospital for both medical malpractice and violations of Chapter 415. (*See id*. at 15, 22) (citing *Tenet S. Fla. Health Sys. v. Jackson*, 991 So. 2d 397 (Fla. 3d DCA 2008); *Bohannon v. Shands Teaching Hosp. & Clinics, Inc.*, 983 So. 2d 717 (Fla. 1st DCA 2008).) This is true especially where, as here, a plaintiff *complies* with the medical malpractice presuit requirements. *Cf. Jackson*, 991 So. 2d at 720-21; *Bohannon*, 983

[6]For a discussion of the statutory definition of "caretaker," *see infra* Argument II.

So. 2d at 720-21; *see also Haslett v. Broward Health Imperial Point Med. Ctr*., 197 So. 3d 124 (Fla. 4th DCA 2016) (ruling that because complaint was based on medical malpractice, the trial court "properly dismissed it for failure to comply with the Medical Malpractice Act").

In *Bohannon*, this Court rejected the defendant's contention that an acute care hospital can never be held liable under Chapter 415. 983 So. 2d at 720. The *Bohannon* court recognized that scenarios could arise in which acute care hospitals could become "caregivers" of "vulnerable adults" and then "neglect" or "abuse" those vulnerable adults, as defined by Chapter 415. *Id*. Because the amended complaint in *Bohannon* did not adequately allege facts to support the plaintiff's conclusory allegations, however, dismissal was warranted. *Id*. at 720-21.

Select relies on *Bohannon* to argue that Plaintiff "cannot recover the same damages under the same facts for a claim under both the Medical Malpractice Act and the Adult Protective Services Act." (Initial Br. 15.) Select emphasizes the language of *Bohannon* that Chapter 415 "was not intended by the Florida Legislature to provide an alternate cause of action for medical negligence." *Id*. at 721. (*See, e.g.*, Initial Br. 15.)

But in *Bohannon*, the issue was one of pleading and statutory presuit requirements. 983 So. 2d at 720-21. The First District rejected the *Bohannon* plaintiff's attempt to circumvent the statutory requirements and limitations of

Chapter 766 by stating his claim under Chapter 415. *See id*. at 718, 720-21 (relying on the "somewhat similar context" of *Lang-Redway*, in which the Court noted that "a plaintiff must comply with the pre-suit requirements of chapter 766 'if it seeks to make a defendant vicariously liable for the actions of a health care provider under the medical negligence standard of care'"). And, the plaintiff in *Bohannon* simply failed to state a cause of action under Chapter 415. *Id*. at 721. "The allegations of this amended complaint," the court ruled, were "mere conclusions tracking the language of the statutory definitions, unsupported by facts, and…legally insufficient." *Id*.

Likewise, the decision of the Third District in *Tenet South Florida Health Systems v. Jackson*, 991 So. 2d 396 (Fla. 3d DCA 2006), does not preclude Plaintiff's claim under Chapter 415. *Id*. at 399-400. *Jackson*, like *Bohannon*, considers the effect of a plaintiff's failure to comply with the presuit notice requirements of Chapter 766, notwithstanding allegations that the hospital breached the medical negligence standard of care. 991 So. 2d at 399-400. *Jackson* did not permit the plaintiff to circumvent the statutory presuit requirements simply by alleging a claim for elder abuse under Chapter 415. *See id*.

Notably, both *Bohannon* and *Jackson* incorporate and rely on the Florida Supreme Court's decision in *Lang-Redway*. In that case, the Florida Supreme Court ruled that when a plaintiff sues a nursing home for statutory violations under Chapter

400 – and does not include allegations relating to the prevailing professional standard of care – the Nursing Home Act governs. 840 So. 2d at 979-81. The Chapter 766 presuit requirements need not be met. *Id*. at 980. If, however, a plaintiff alleges the "prevailing professional standard of care" in his statutory claim against the nursing home, that plaintiff must satisfy the medical malpractice presuit requirements under Chapter 766. *See id*. at 975-76, 980.

Consistent with the rationale of *Lang-Redway*, the district courts in *Bohannon* and *Jackson* reasoned that if a plaintiff relies on the prevailing professional standard of care to state a Chapter 415 claim against a healthcare provider, that plaintiff must comply with Chapter 766's presuit requirements. Failure to comply with the presuit requirements will result in dismissal. Neither *Bohannon* nor *Jackson*, however, prohibits a plaintiff from relying on allegations of medical negligence in a statutory claim under Chapter 415, as Select has claimed.

D. Select's analysis is flawed.

Notwithstanding the plain language of section 415.1111, Select attempts to limit Plaintiff to a single claim for medical malpractice. According to Select, because Plaintiff introduced evidence related to *medical* care to prove the caregiver's neglect and abuse under Chapter 415, his claim necessarily arises in medical malpractice claim under Chapter 766. Select again misinterprets Florida law.

1. The statutory definitions of "neglect" and "abuse" allow for proof of the "medical services" provided by Select.

First, Select errs in suggesting that Plaintiff could not rely on evidence related to his medical care to prove the hospital's abuse and neglect under Chapter 415. (*Contra* Initial Br. 15, 17.) Select ignores the statutory definitions of "neglect" and "abuse."

Section 415.102(16) defines "neglect" to mean the failure or omission of a caregiver to provide "**care, supervision, and services** necessary to maintain the physical and mental health of the vulnerable adult, **including, but not limited to**, food, clothing, medicine, shelter, supervision, and **medical services**, which a prudent person would consider essential for the well-being of a vulnerable adult." § 415.102(16), Fla. Stat. (2012) (emphasis added). "Neglect" can be "repeated conduct" or "a single incident of carelessness which produces or could reasonably be expected to result in serious physical or psychological injury or a substantial risk of death." *Id*. This definition necessarily allows a vulnerable adult to focus on the failure or omission of a caretaker to provide necessary "medical services" in proving "neglect."

Similarly, subsection (1) defines "abuse" to mean "any willful act or threatened act" by a caregiver that causes, or is likely to cause, "significant impairment to a vulnerable adult's physical, mental, or emotional health." § 415.102(1), Fla. Stat. (2012). Given that the statutory definition of "abuse" – like

that of "neglect" – contemplates proof of the impairment to a vulnerable adult's "physical, mental, or emotional health," Select does not persuasively argue that evidence of its "medical care of Plaintiff" can be relevant only to a medical malpractice claim. (*Contra* Initial Br. 14-15, 17.)

2. Plaintiff's claims arising from Select's abuse and neglect do not sound exclusively in medical malpractice.

Select also argues that because Plaintiff's allegations of neglect and abuse "relate[] to his medical care and treatment," he "must rely upon the medical negligence standard of care." (Initial Br. 17 (quoting *Jackson*, 991 So. 2d at 399).) As such, Select contends, Plaintiff cannot rely on those allegations to plead or prove a statutory claim for damages under Chapter 415.

Plaintiff's Chapter 415 claims for neglect and abuse do not sound exclusively in medical malpractice. "[O]nly claims that arise out of an action or inaction directly related to medical care or services, which require the use of professional judgment or skill, sound in medical malpractice." *Nat'l Deaf Academy v. Townes*, 242 So. 3d 303, 313 (Fla. 2018). As the Florida Supreme Court reasoned in *Townes*, "This inquiry involves determining whether proving the claim requires the plaintiff to establish that the allegedly negligent act 'represented a breach of the prevailing professional standard of care,' as testified to by a qualified medical expert." *Id*. at 311-12.

That standard is not met here. Plaintiff instead was required to prove that

Select failed to provide care, supervision, and services "necessary to maintain the physical and mental health of the vulnerable adult, including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services, which a **prudent person would consider essential for the well-being** of a vulnerable adult." § 415.102(16), Fla. Stat. (emphasis added).

Notably, Select persuaded the trial court to prohibit Plaintiff's reliance on expert testimony to prove his Chapter 415 claims. (R.7325-31; R.7548-49.) Having successfully advocated for a burden of proof under Chapter 415 that does *not* require expert medical evidence, Select should not be permitted to argue the opposite on appeal. (*E.g.*, Initial Br. 17, 23 (arguing Plaintiff "must rely upon the medical negligence standard of care" (citation omitted); *id*. at 18 ("the actions Plaintiff alleges as neglect and abuse could only have violated the nursing standard of care"); *id*. at 21 ("the failure to properly respond to a patient" is "a breach of the nursing standard of care").) *See Fleming v. Swisher Int'l, Inc./Broadspire Kimper Ins. Grp.*, 120 So. 3d 160, 161-62 (Fla. 1st DCA 2013) (recognizing that the equitable doctrine of judicial estoppel "prevents litigants from taking totally inconsistent positions in separate judicial proceedings to the prejudice of the adverse party").

Nor do the actions or inactions of Select's staff, from which Plaintiff's claims for abuse and neglect arise, "directly relate[] to medical care or services, which require the use of professional judgment or skill." *Townes*, 242 So. 3d at 311. Again,

Plaintiff's allegations of statutory neglect and abuse did not depend on a breach of the prevailing professional standard of care. (R.7285-92; *see* R.61-66.)

Instead, Plaintiff sought relief for Select's violations of his statutory rights under Chapter 415. (R.7285-92.) Plaintiff relied on the statutory definition of "neglect," alleging that Select's failure to render the care, supervision, and services that "[a] prudent person would consider…essential for [Plaintiff's] well-being" resulted in his serious physical and psychological injury. (R.7291, ¶ 19 (emphasis added)); *see* § 415.102(16), Fla. Stat. Such injuries, Plaintiff alleged, are preventable "by providing basic levels of human care and support services, most, or all of which, can be provided by non-medical personnel." (R.7291, ¶ 19 (emphasis added).) Indeed, certain Select staff – like its certified nursing assistants – are not even governed by a prevailing professional standard of care. *Cf. Lang-Redway*, 840 So. 2d at 980-81 (considering different nursing home employees).

And, at trial, Plaintiff proved that Select's use of restraints violated state and federal law. Select's staff conceded that the illegal use of restraints is per se abuse. (T.88-89.) Select also ignored its own policies by failing to offer less restrictive options to Plaintiff. Even if, as Select contends, the initial use of restraints may have been to facilitate care (*see* Initial Br. 19), the continued illegal use of restraints by Select and its staff did not require professional judgment or skill. *See Quintanilla v. Coral Gables Hosp., Inc.*, 941 So. 2d 468, 469 (Fla. 3d DCA 2006) (rejecting

hospital's contention that "because the nurse used her medical judgment" in giving a patient hot tea, "the actual act of serving the hot tea amounts to a medical service").

Plaintiff also proved that Select's staff neglected or abused Plaintiff by failing to timely respond to his calls, even when this ventilator-dependent patient had trouble breathing. Notwithstanding that the failure to properly respond to a patient can be a breach of the nursing standard of care (Initial Br. 21), Plaintiff's statutory claims for abuse and neglect did not depend on satisfying that standard. Instead, Plaintiff showed that Select's staff, in refusing to timely respond to his calls for assistance, failed to provide services that "a prudent person would consider essential for the well-being of a vulnerable adult." § 415.102(16), Fla. Stat. Under the "prudent person" standard of Chapter 415, Plaintiff proved that he was neglected and abused by Select and its staff.

Select's misconduct in illegally restraining Plaintiff and ignoring his repeated calls for help was careless at best, and abusive at worst. Either way, Plaintiff's Chapter 415 claims of abuse and neglect do not depend on proof that Select breached the prevailing professional standard of care. *Cf. Integrated Health Care Servs., Inc. v. Lang-Redway*, 840 So. 2d 974, 980 (Fla. 2002) (because plaintiff's claim against nursing home was based solely on the violation of Chapter 400, which provides its own standard of care, the medical negligence standard of care and presuit requirements of Chapter 766 do not apply).

Select cannot show that Plaintiff's Chapter 415 claim arises "out of any act directly related to medical care or services that required the use of professional judgment or skill." *Townes*, 242 So. 3d at 313 (construing *Shands Teaching Hosp. & Clinics, Inc. v. Estate of Lawson*, 175 So. 3d 327 (Fla. 1st DCA 2015)). In its effort to limit Plaintiff's available remedies, Select ignores its own advocacy before the trial court in limiting Plaintiff's expert testimony under Chapter 415, and advances an unreasonably broad interpretation of medical negligence. *See Townes*, 242 So. 3d at 313. Simply because Plaintiff's injuries occurred in a hospital does not "automatically transform the claim into one for medical malpractice." *Id*. at 313 n.7; *accord Holmes Reg'l Med. Ctr., Inc. v. Dunigan*, 151 So. 3d 1282, 1286 (Fla. 5th DCA 2014); *Joseph v. Univ. Behavioral LLC*, 71 So. 3d 913, 917 (Fla. 5th DCA 2011). To accept Select's interpretation "would render essentially any claim arising out of a negligent act by a health care provider subject to the onerous presuit requirements in chapter 766 and the shortened statute of limitations for medical malpractice claims." *Townes*, 242 So. 3d at 313. This is not the law in Florida. *See id*.

3. Select is not entitled to a directed verdict even if Plaintiff's Chapter 415 claim arises from allegations of the hospital's medical negligence. Plaintiff complied with the presuit requirements of Chapter 766.

Even if Plaintiff's statutory claims for abuse and neglect arise solely in medical negligence, Select is not entitled to relief. To the extent Plaintiff relies on

allegations of medical negligence to prove Select's abuse and neglect under Chapter 415, he must comply with the presuit requirements of Chapter 766. *Cf. Bohannon*, 983 So. 2d at 720-21 (noting that "a plaintiff must comply with the pre-suit requirements of chapter 766 if he 'seeks to make a defendant vicariously liable for the actions of a health care provider under the medical negligence standard of care") (quoting *Integrated Health Care Servs., Inc. v. Lang-Redway*, 840 So. 2d 974, 976 (Fla. 2002)). Only if Plaintiff failed to comply with Chapter 766's presuit requirements could Select seek a directed verdict on the Chapter 415 claim. *Cf. Jackson*, 991 So. 2d at 399-400 (quashing order denying hospital's motion to dismiss; because Chapter 415 claim arose in medical negligence, plaintiff was required to satisfy statutory presuit obligations of Chapter 766).

Here, however, Plaintiff did comply with the medical malpractice presuit requirements. (R.66; R.510; R.7292.) In fact, Select stipulated to Plaintiff's compliance. (R.7659.) Because Plaintiff satisfied Chapter 766's presuit requirements, he may rely on a medical negligence standard of care to prove that Select violated its statutory duties under Chapter 415. *Cf. Lang-Redway*, 840 So. 2d at 976; *Bohannon*, 983 So. 2d at 720-21; *Jackson*, 991 So. 2d at 399-400.

Plaintiff did not bring his Chapter 415 claim in an effort to circumvent Chapter 766 or its requirements. *Cf. Haslett v. Broward Health Imperial Point Med. Ctr.*, 197 So. 3d 124 (Fla. 4th DCA 2016) (ruling that because complaint was based on medical

malpractice, the trial court "properly dismissed it for failure to comply with the Medical Malpractice Act"); *S. Miami Hosp., Inc. v. Perez*, 38 So. 3d 809, 812 (Fla. 3d DCA 2010) (finding that plaintiff could not avoid failure to comply with Chapter 766 presuit obligations by pleading decedent was a "business invitee" of the hospital); *Jackson*, 991 So. 2d at 399-400 (quashing order denying hospital's motion to dismiss Chapter 415 claim, which arose in medical negligence, for failure to comply with Chapter 766 presuit requirements). Select simply cannot show that Plaintiff sought to "disguise a medical malpractice action as something else" in an attempt to "evade the medical negligence standard." (Initial Br. 22.) Select is not entitled to a directed verdict on Plaintiff's Chapter 415 claim for abuse and neglect.

II. Consistent with the jury's finding, Select met the statutory definition of a "caretaker" liable for abuse and neglect of a vulnerable adult under Chapter 415.

Next, Select claims that because it is not a "caretaker" under the facts of this case, directed verdict should have been entered on Plaintiff's Chapter 415 claim. Select's interpretation of Chapter 415 again contradicts the statute's plain meaning. Plaintiff proved – and the jury found – that Select was, in fact, a "caregiver" pursuant to Chapter 415. (*See* R.8245.) Select is not entitled to a directed verdict.

Section 415.102(5), Florida Statutes, defines "caregiver" to mean "a person who has been entrusted with or has assumed the responsibility for frequent and regular care of or services to a vulnerable adult on a temporary or permanent basis

and who has a commitment, agreement, or understanding with that person or that person's guardian that a caregiver role exists." § 415.102(5), Fla. Stat. (2012). This statutory definition "includes, but is not limited to, relatives, household members, guardians, neighbors, and employees and volunteers of facilities as defined in subsection (9)." *Id*.

Plaintiff elicited ample evidence that Select satisfied both prongs of the statutory definition of "caregiver." First, Plaintiff proved at trial that Select assumed the responsibility for "frequent and regular care of or services" to Plaintiff, a "vulnerable adult," on a temporary basis. § 415.102(5), Fla. Stat.; *see also* § 1.01(3), Fla. Stat. (2012) (defining "person" to include corporations "and all other groups or combinations"). Second, Plaintiff proved that Select had a "commitment, agreement, or understanding" with Plaintiff or his guardian that "a caregiver role exist[ed]." § 415.102(5), Fla. Stat. The jury affirmatively responded to a special interrogatory, which asked: "Was Defendant a caregiver under Chapter 415, Florida Statutes?" (R.8245.)

In an effort to avoid its role as a "caretaker," however, Select contends that it did not provide "day or residential care" or "the necessities essential to a vulnerable adult's well-being." (Initial Br. 23.) Select's contentions are belied by the record. Select is a long-term acute care hospital that, in the words of its CEO, is "designed to take care of the chronically and critically ill." (T.69.) Select held itself out as a

hospital specializing in wound care and in treating ventilator-dependent patients. (T.81.) Select's goal is to prepare a patient for the next lower level of care. (T.84.) Select was expected to meet all of its patients' needs, including medical care, nutrition, hydration, and positioning to avoid pressure ulcers, along with assistance in dressing, grooming, brushing teeth, combing hair, and other activities of daily living. (T.105-106.)

Select provided Plaintiff with "frequent and regular care" and "services." § 415.102(5), Fla. Stat. When admitted, Plaintiff was a chest-down paraplegic who was dependent on a ventilator. (T.59; T.712.) He also had a feeding tube and needed assistance with toileting. (T.712.) As Plaintiff's daughter Maggie testified: "He required complete care. He had to be dressed, shaved, everything." (*Id*.) Plaintiff depended on Select and its staff to provide all of his care and needs. (T.675; T.712.)

Not only did Select provide Plaintiff with "frequent and regular care" and "services," the evidence at trial established a "commitment, agreement, or understanding" with Plaintiff's family that Select would fulfill a caregiver role. Select assured the family that Plaintiff would be provided all of the care he needed while a patient there. (T.713, 714; T.1012-13.) Plaintiff's daughter Michelle held the durable power of attorney on her father's behalf and signed the intake form for his admission. (T.1011, 1013; *see* T.676-77.) Thereafter, Select billed for the "frequent and regular care" and "services" provided to Plaintiff. (*See* T.1013-14; *see generally*

R.16750-17286.)

On appeal, Select concedes that Plaintiff was transferred there "for the purpose of receiving critical medical treatment" and even that he may have received "some caregiving, as is the case in all hospitals." (Initial Br. 25.) Nonetheless, Select contends that its status as a Class I hospital necessarily does not satisfy the definition of a "caregiver." (Initial Br. 25-26.) The defendant urges the Court to "closely scrutinize any attempt to assume that Select is a caregiver" under Chapter 415. (*Id*.) Otherwise, Select argues, "all hospitals" would be subject "to an unwarranted statutory duty" each time a new patient was admitted. (*Id*. at 26.)

Select ignores that Plaintiff seeks only to establish this hospital's Chapter 415 liability on the facts. Here, Plaintiff proved – and the jury found – that Select "assumed the responsibility for frequent and regular care of or services to a vulnerable adult on a temporary…basis" and had a "commitment, agreement, or understanding" with Plaintiff and his family to assume that caregiver role. § 415.102(5), Fla. Stat.

Select also disregards the statute's plain language – which does not limit the definition of a "caregiver" only to "facilities." *See* § 415.102(5), Fla. Stat. "Employees and volunteers" of a section 415.102(9) "facility" are listed as one of many examples of the kind of "caregiver" relationship governed by Chapter 415. *See id*. Even then, subsection (9) defines a "facility" as "any location providing day

or residential care *or treatment* for vulnerable adults"; the term "may include, but is not limited to, any hospital …." § 415.102(9), Fla. Stat. (emphasis added).

Select seeks to distance itself from the plain language of the statute, suggesting that because it is not an "assisted living facility, adult day center, or the like," it cannot be liable as a "caregiver." (Initial Br. 25.) Contrary to Select's interpretation, this Court's opinion in *Bohannon* expressly rejected a statutory interpretation that would preclude acute care hospitals from Chapter 415 liability as "caregivers" of "vulnerable adults." 983 So. 2d at 720-21; *see also Jackson*, 991 So. 2d at 399 (emphasizing its limited ruling, based on the specific allegations of that complaint; adding that "[t]his is not to say that a hospital such as North Shore cannot be a caregiver" under Chapter 415).

Select likewise errs in suggesting that a caregiver's Chapter 415 liability cannot arise from "a violation of the medical standard of care," or that a caregiver becomes liable only if a patient is intentionally mistreated. (Initial Br. 26.) Nowhere within the statute does the legislature exempt "medical care" or "medical services" from the "frequent and regular care…or services" that a "caregiver" provides to a vulnerable adult. *See* § 415.102(5), Fla. Stat. And, Chapter 415 specifically defines "neglect" to include a caregiver's failure to provide "the care, supervision, and services necessary to maintain the physical and mental health of the vulnerable adult, including, but not limited to…**medical services**." § 415.102(16), Fla. Stat.

(emphasis added). A finding of "neglect" does not require intentional or even repeated misconduct, but can arise from "a single incident of carelessness which produces or could reasonably be expected to result in serious…psychological injury." *Id*.

Contrary to Select's claim, Plaintiff presented ample proof that Select failed "to provide the necessities which a prudent person would consider essential for the well-being of a vulnerable adult" and "act[ed] in a careless manner resulting in injury." *Jackson*, 991 So. 2d at 398-99; *see* § 415.102(16), Fla. Stat. The trial court correctly allowed the jury to consider whether Select in fact met the definition of a "caretaker" under Chapter 415. Select is not entitled to a directed verdict.

III. Plaintiff adequately proved damages attributable to Select's abuse and neglect.

Finally, Select errs in arguing that Plaintiff failed to prove damages attributable to his Chapter 415 claims. (Initial Br. 27-29.) Because Chapter 415 includes elements separate from medical negligence, Select contends, the evidence relied on by Plaintiff to prove medical negligence "cannot be used to support a claim for damages under Chapter 415." (*Id*. at 29.) Select also claims that Plaintiff has not demonstrated any injury or damages other than those arising from the hospital's breach of the "medical standard of care." (*Id*. at 28.) Select's arguments lack merit. Plaintiff did not "show damages once" to "recover twice." (*Id*.)

First, in suggesting that evidence of medical negligence cannot support a

claim for damages under Chapter 415, Select again misstates the law. (*See supra* at Argument I.)

Plaintiff did not ask the jury to award the same damages for both counts. (*Contra* Initial Br. 29.) The verdict form – as initially proposed by Plaintiff, and adopted by Select – segregated Plaintiff's damages between the two counts. (*See* R. 8243-46.) For instance, on Plaintiff's claim for medical malpractice, the jury was specifically asked whether there was negligence on the part of Select that was "a legal cause of loss, injury or damage to Plaintiff relating to a deep tissue injury or pressure ulcer." (R.8243.) Plaintiff only sought damages for the deep tissue injury to his sacrum that resulted from Select's breach of the prevailing professional standard of care. (R.8243; *see* T.1028, 2536-37, 253840.) The jury awarded the past medical expenses stipulated to by the defense. (R.8244; *see* T.37; Supp. T.2536.)

The damages sought by Plaintiff on his Chapter 415 abuse and neglect claims, however, related to Select's improper and illegal use of restraints, together with the nursing staff's failure to respond to Plaintiff's complaints. (R.8244-45; *see* Supp. T.2540-41.) Not only was the jury asked whether Select was a "caretaker" under Chapter 415, the verdict form included another special interrogatory; specifically, whether there was "neglect or abuse as defined by Chapter 415" by Select or its employees "related to the use of restraints and the failure to respond which was a legal cause of loss, injury or damage to Plaintiff." (R.8245.) The jury determined

that "the amount of loss, injury or damage to Plaintiff caused by such violation" of Chapter 415 was $25,000. (R.8246.)

To the extent Select believed Plaintiff's segregation of damages to be improper, the defendant waived any objection when it adopted Plaintiff's proposed verdict form and the trial court's instructions to the jury explaining that form. *See Baker v. R.J. Reynolds Tobacco Co.*, 158 So. 3d 732, 737 (Fla. 4th DCA 2015); *see also Gupton v. Village Key & Saw Shop, Inc.*, 656 So.2 d 475, 478 (Fla. 1995) (explaining invited error rule).

Select likewise overlooks the limited evidence on Plaintiff's Chapter 415 claims that the defense asked the trial court to impose. Before trial, Select persuaded the trial court to prohibit Plaintiff from eliciting expert testimony on his Chapter 415 claims. (R.7325-31; R.7548-49.) In granting defendant's motion in limine, the trial court agreed with Select's rationale that the admission of expert testimony on the Chapter 415 claims would invade the province of the jury. (R.7326-30; *see* R.7548.) Now, on appeal, Select cannot argue that Plaintiff should have elicited expert testimony on his Chapter 415 claims. *See, e.g.*, *Flowers v. State*, 149 So. 3d 1206, (Fla. 1st DCA 2014) ("[A] party cannot successfully complain about an error for which he or she is responsible or of rulings that he or she invited the court to make.") (quoting *Anderson v. State*, 93 So. 3d 1201, 1203 (Fla. 1st DCA 2012)).

In any event, Plaintiff elicited evidence of damages attributable to Select's

Chapter 415 neglect and abuse separate and apart from the evidence of damages arising from Select's medical negligence. Plaintiff proved that Select's neglect and abuse caused serious psychological injury and significant impairment to his mental and emotional health. (*See, e.g.*, R.657 (Plaintiff believed he was treated neglectfully at Select and deliberately abused).)

Plaintiff relied, for instance, on Select's training manuals on the use of restraints. Consistent with the training manual, Select's chief nursing officer, Ms. Slay, agreed that the improper use of restraints is abusive. (T.88.) Restraints are known to enhance the risk of significant psychological stress and should be used only as a last resort. (T.88, 96.) Use of restraints can demean a patient and cause him great distress. (T.92-93.)

Plaintiff and his family all testified to the serious psychological impact and significant emotional impairment that Plaintiff suffered from Select's improper and almost continuous use of restraints. (*See* T.1019; *see also* T.290, 292-94 (Dr. Black's testimony regarding Select's inappropriate use of restraints).)

Plaintiff described the panic and anxiety he felt when he had difficulty breathing and the nurses did not respond. (T.584, 627, 630, 650-51.) His family similarly testified to Plaintiff's frustration when the Select staff repeatedly failed to respond to the call button. (T.715, 719.) Plaintiff became agitated, especially when he could feel the build-up of phlegm and the nurses did not respond to his call button.

(T.1017-18.) As his daughter Michelle testified:

> He would get very agitated…. [A]t the time it was hard for him to hear. He couldn't see very well without []his glasses. He couldn't move. And he was tied so he couldn't move his hands. So he would get agitated, yes.

(T.1019.)

Plaintiff proved that Select's abuse or neglect, as defined by Chapter 415, was a legal cause of loss, injury, or damage to Plaintiff. Evidence supports the jury's award of damages to Plaintiff for Select's violation of Chapter 415. (R.8245-46.) Select fails to show that Plaintiff is not entitled to recover damages on his Chapter 415 claim.

ARGUMENT ON CROSS-APPEAL

I. Select's failure to satisfy its burden of proving that Heartland's negligence was a legal cause of injury entitled Plaintiff to a directed verdict on Select's *Fabre* defense. The apportionment of fault to Heartland must be set aside.

Standard of Review. The trial court erred in denying Plaintiff's initial and renewed motions for directed verdict as to the comparative fault of the non-party, Heartland. Select failed to prove, by a preponderance of the evidence, Heartland's fault in causing the deep tissue injury to Plaintiff's sacrum. The trial court should not have submitted the issue of Heartland's fault to the jury. The apportionment of fault to Heartland must be set aside, and judgment entered against Select for the full value of the damages awarded by the jury.

Select sought to establish the fault of Heartland, a non-party, pursuant to the

Florida Supreme Court's decision in *Fabre v. Marin* and section 768.81(3)(a), Florida Statutes. However, to include Heartland on the verdict for purposes of apportioning fault, Select had the burden of proving that the non-party's fault contributed to Plaintiff's injury. *See, e.g.*, *Nash v. Wells Fargo Guard Servs., Inc.*, 678 So. 2d 1262, 1264 (Fla. 1996); § 768.81(3)(a)2., Fla. Stat. (2012). Section 768.81(3)(a)2., Florida Statutes, specifically provides:

> In order to allocate any or all fault to a nonparty and include the named or unnamed nonparty on the verdict form for purposes of apportioning damages, a defendant must prove at trial, by a preponderance of the evidence, the fault of the nonparty in causing the plaintiff's injuries.

§ 768.81(3)(a)2., Fla. Stat. (2012).

Select failed to satisfy its burden of proving that any fault of Heartland was a contributing cause of the deep tissue injury to Plaintiff's sacrum. At trial, Select chose not to elicit opinions from its experts on any aspect of Heartland's care and treatment of Plaintiff. (*See* T.1715-16; T.1829, 1831-32, 1833.) Instead, Select sought to rely entirely on the testimony of Plaintiff's experts, Dr. Black and Dr. Davey.

Yet both Dr. Black and Dr. Davey testified that any issues related to Heartland's care and treatment would not have changed the outcome of Plaintiff's sacral wound. Both experts opined that by the time Plaintiff was admitted to Heartland, the damage had been done. (T.272-73, 407-08; T.979.) Although Dr.

Black stated that she would have chosen to use different bandages than Heartland, she explained:

> But in the end it wouldn't have changed the outcome. The outcome was set in place when it started. We use a phrase in Nebraska, the horses are out of the barn…. [W]e can't roll it back anymore.

(T.272.) Dr. Black reiterated that her preference for different bandaging "wouldn't have changed [Plaintiff's] need for a doctor or surgeon to come in and clean that dead tissue out" and "wouldn't have changed the fact that [Plaintiff] got a bone infection or needed a flap." (T.272-73.)

Likewise, Dr. Davey testified, within a reasonable degree of medical probability, that by the time Plaintiff was admitted to Heartland, he would have needed the flap surgery to repair the sacral wound – regardless of Heartland's care. (T.995-96.) Plaintiff's wound "should have been much better by then." (T.996.) Dr. Davey added that he did not know whether Plaintiff "got good care at Heartland or not, but by then he already had a severely damaged buttocks." (T.995.)

Plaintiff's medical malpractice claim against Select was limited to a single injury: the deep tissue injury to his sacrum. The defense repeatedly questioned Plaintiff's experts at trial about other injuries that Plaintiff may have sustained at Heartland. None of Heartland's other purported breaches of the standard of care, even if proven, established that the fault of the non-party was a contributing legal cause of the deep tissue injury to Plaintiff's sacrum. Whether Heartland may have

acted negligently in causing *other* injuries to Plaintiff is irrelevant.

Select never proved that Heartland breached the standard of care in its care and treatment of Plaintiff, or that any breach by Heartland of the standard of care – even if shown – was a contributing legal cause of the damages arising from the sacral wound. Because Select did not satisfy its burden of proof under *Fabre*, the trial court should have granted Plaintiff's motion for directed verdict and excluded Heartland from the verdict form.

The trial court's denial of Plaintiff's initial and renewed motions for directed verdict (JNOV) is error. The apportionment of comparative fault to Heartland should be reversed and judgment entered against Select for the full amount of Plaintiff's damages. Alternatively, Plaintiff is entitled to a new trial on damages.

II. The trial court erred in refusing to direct a verdict against Select on its comparative fault defense under the rule of *Stuart v. Hertz*.

Plaintiff is entitled to a directed verdict for a second, and independent, reason: the trial court erred in refusing to rely on *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977), to grant directed verdict on Select's comparative fault defense. (R.8421-23.) The Florida Supreme Court's decision in *Stuart* establishes that Select, as the initial tortfeasor, is solely liable for any additional loss, injury or damage caused by the foreseeable medical care and treatment that Plaintiff reasonably obtained at Heartland, the subsequent tortfeasor. *See Stuart v. Hertz*, 351 So. 2d 703, 707 (Fla. 1977); *accord Beverly Enters.-Fla., Inc. v. McVey*, 739 So. 2d 646, 650 (Fla. 2d

DCA 1999); Fla. Std. Jury Instr. (Civ.) 501.5c. The final judgment on the jury's verdict should be reversed, and judgment entered against Select for the entire amount of damages awarded by the jury for Plaintiff's deep tissue injury. Alternatively, Plaintiff is entitled to a new trial on damages.

A. The law of *Stuart v. Hertz*

The Florida Supreme Court's decision in *Stuart v. Hertz* establishes the law governing the reasonable foreseeability of a subsequent torfeasor's medical negligence in treating an initial injury. 351 So. 2d 703, 707 (Fla. 1977). As the Court's opinion explains:

> Where one who has suffered personal injuries by reason of the negligence of another exercises reasonable care in securing the services of a competent physician or surgeon, and in following his advice and instructions, and his injuries are thereafter aggravated or increased by the negligence, mistake, or lack of skill of such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskillful treatment thereof, and holds him liable therefor.

Id. at 707 (quotations omitted).

Consequently, where a plaintiff injured by the negligence of another reasonably seeks medical treatment, Florida law deems that the "negligence in the administration of that medical treatment is foreseeable and will not serve to break the chain of causation." *Letzer v. Cephas*, 792 So. 2d 481, 485 (Fla. 4th DCA 2001) (citing *Stuart*, 351 So. 2d at 707). "Stated another way, an initial tortfeasor may be

held responsible for all subsequent injuries, including those caused by medical negligence." *Saunders v. Dickens*, 103 So. 3d 871, 879 (Fla. 4th DCA 2012), *rev'd on other grounds*, 151 So. 3d 434 (Fla. 2014); *accord Caccavella v. Silverman*, 814 So. 2d 1145, 1148 (Fla. 4th DCA 2002).

B. Florida's adoption of statutory comparative fault does not abrogate the rule of *Stuart v. Hertz*. Similarly, there is no prohibition against application of the *Stuart v. Hertz* rule in medical malpractice cases.

The trial court erred in suggesting that Florida's adoption of comparative fault somehow abrogated *Stuart v. Hertz*, or that the decision does not govern medical malpractice cases. (*See* Supp. R.21618-21621; R.8421.)

Florida's comparative fault statute does not legislatively overrule *Stuart v. Hertz*. *See Holmes Reg'l Med. Ctr., Inc. v. Allstate Ins.*, 225 So. 3d 780, 788 (Fla. 2017); *Caccavella*, 814 So. 2d at 1148-49; *Ass'n for Retarded Citizens-Volusia, Inc. v. Fletcher*, 741 So. 2d 520, 524-25 (Fla. 5th DCA 1999). Section 768.81(3), Florida Statutes, provides that in a negligence action, judgment shall be entered "against each party liable on the basis of such party's percentage of fault and not on the basis of joint and several liability." § 768.81(3), Fla. Stat. (2012). Yet because the rule in *Stuart v. Hertz* does not concern joint and several liability, Florida's appellate courts have consistently found that section 768.81 has not legislatively overruled the supreme court's decision. *See Caccavella*, 814 So. 2d at 1149; *accord Holmes*, 225 So. 3d at 788; *Ass'n for Retarded Citizens-Volusia*, 741 So. 2d at 524-25.

Stuart v. Hertz remains established law notwithstanding the amendments to section 768.81. *See Holmes*, 225 So. 2d at 788 (considering 2011 statute). (*Contra* Supp. R.21618 (pdf 53).) The Tort Reform and Insurance Act of 1986, chapter 86-160, Laws of Florida, first adopted comparative fault in Florida. As originally enacted, section 768.81(3) provided that in a negligence action, "the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of joint and several liability." Laws of Fla., Ch. 86-160, § 60 (codified as § 768.81(3), Fla. Stat.); *see also* § 768.81(4)(a), Fla. Stat. (1986) ("This section applies to negligence cases."). While the legislature has amended section 768.81 since 1986, the essential language of subsection (3) – which abrogates joint and several liability in favor of comparative fault – remains unchanged. *Compare* § 768.81(3), Fla. Stat. (1987) *with* § 768.81(3), Fla. Stat. (1999); § 768.81(3), Fla. Stat. (2006); § 768.81(3), Fla. Stat. (2012). "Had it been the intent of the legislature to abrogate the well-settled common law rule relating to subsequent medical malpractice, the legislature no doubt would have specifically said so." *Ass'n for Retarded Citizens-Volusia*, 741 So. 2d at 525; *see also Seagrave v. State*, 802 So. 2d 281, 290 (Fla. 2001) ("Florida's well-settled rule of statutory construction [is] that the legislature is presumed to know the existing law when a statute is enacted, including judicial decisions on the subject") (quotations omitted).

Stuart v. Hertz also remains good law in medical malpractice cases. (*Contra* Supp. R.21617, 21618, 21620 (pdf 52, 53, 55).) The rule of *Stuart v. Hertz* "applies 'even where the initial tortfeasor is a physician as well.'" *Caccavella*, 814 So. 2d at 1147; *accord Saunders v. Dickens*, 103 So. 3d 871, 879 (Fla. 4th DCA 2012), *rev'd on other grounds*, 151 So. 3d 434 (Fla. 2014); *Letzter v. Cephas*, 792 So. 2d 481, 485 (Fla. 4th DCA 2001); *see also Beverly Enters.-Fla., Inc. v. McVey*, 739 So. 2d 646, 650 (Fla. 2d DCA 1999) (ruling that plaintiff who sued nursing home for negligence and violations of resident's statutory rights was entitled to recover the entirety of his damages from the initial tortfeasor; subsequent tortfeasor (the V.A. Hospital where decedent was transferred) was not properly included on the verdict form); *Davidson v. Gaillard*, 584 So. 2d 71, 73-74 (Fla. 1st DCA 1991) (applying *Stuart v. Hertz* in medical malpractice action), *disapproved on other grounds*, *Barth v. Khubani*, 748 So. 260 (Fla. 1999); *cf*. *Barrios v. Darrach*, 629 So. 2d 211, 213 (Fla. 3d DCA 1993) (finding plaintiff in medical malpractice action was entitled to *Stuart v. Hertz* instruction, but granting new trial because trial court declined to instruct jury on other, inconsistent theories of causation) (cited with approval in *Haas v. Zaccaria*, 659 So. 2d 1130, 1133-34 (Fla. 4th DCA 1995) (medical malpractice)).

Nowhere within *Stuart v. Hertz* did the Florida Supreme Court preclude application of the rule to medical malpractice actions. 351 So. 2d at 706-07. The

Stuart Court considered its holding to conform with established law, which allows a plaintiff who "suffered personal injuries by reason of the negligence of another" to recover damages for the reasonably foreseeable consequences of subsequent negligent medical treatment from the initial tortfeasor. *Id*. at 707 (citations omitted). The opinion does not limit the nature of the initial tortfeasor's negligence or otherwise specify the kind of "personal injuries" that a plaintiff must sustain to avail himself of the *Stuart v. Hertz* rule. *See id*.

Similarly, the *Stuart v. Hertz* jury instruction, recently adopted as Florida Standard Jury Instruction (Civil) 501.5c, may be used in any cause of action arising in negligence. *See* Fla. Std. Jury Instr. (Civ.) 501.5c ("Subsequent injuries caused by medical treatment"). Nothing in the language of the instruction suggests that it applies only to motor vehicle negligence cases. *See* Fla. Std. Jury Instr. (Civ.) 501.5c & committee note. To the extent the trial court ruled otherwise, this was error.

C. The trial court erred in refusing to apply *Stuart v. Hertz* to grant Plaintiff's motions for directed verdict and JNOV.

The trial court should have relied on the rule of *Stuart v. Hertz* to grant Plaintiff's motions for directed verdict. The trial court erred not only in denying Plaintiff's motion for directed verdict at trial, but also in refusing to set aside the jury's verdict as a matter of law. *See* Fla. R. Civ. P. 1.480.

1. Select and Heartland did not act as joint tortfeasors, but as initial and subsequent tortfeasors.

First, the evidence at trial was undisputed that Select and Heartland did not act as joint tortfeasors to produce the single injury at issue: the deep tissue injury to Plaintiff's sacrum. Instead, the evidence established that only Select negligently and proximately caused that injury to Plaintiff. As a matter of law, Select is liable for any aggravation of that original injury by Heartland, without apportionment of fault to the subsequent tortfeasor. *See, e.g.*, *McVey*, 739 So. 2d at 650. Because Plaintiff is entitled to recover the entire amount of damages awarded by the jury against Select, the trial court erred in denying Plaintiff's motion for directed verdict.

Florida law defines "joint tortfeasors" to include "two or more negligent entities whose conduct combines to produce a single injury." *Caccavella v. Silverman*, 814 So. 2d 1145, 1148 (Fla. 4th DCA 2002) (quoting *D'Amario v. Ford Motor Co.*, 806 So. 2d 424, 435 n.2 (Fla. 2001)); *Jackson v. York Hannover Nursing Ctrs.*, 876 So. 2d 8, 12-13 (Fla. 5th DCA 2004). To be joint tortfeasors, "each actor must have committed some wrong that results in an injury or damage to another." *Jackson*, 876 So. 2d at 13. The allegedly tortious acts need not "precisely coincide in time" to be considered joint tortfeasors, so long as "the sequence of their tortious acts produces a single injury." *Id*. (citation omitted).

Ordinarily, whether allegedly negligent entities act as joint tortfeasors is a question of fact, "determined by the circumstances of the particular case." *Caccavella*, 814 So. 2d at 1148. Here, however, the evidence indisputably

established that Select and Heartland did not act together to cause the deep tissue injury to Plaintiff's sacrum. The negligence of Select alone proximately caused Plaintiff's injury.

Plaintiff's expert, Dr. Black, testified that Plaintiff sustained the deep tissue injury to his sacrum on April 20, 2012, two days *before* his discharge from Select. Based on her review of the medical records and photos, Dr. Black opined that this deep tissue injury to Plaintiff's sacrum at Select was "absolutely the same wound" that eventually required flap surgery. (T.264.) Yet Heartland did not treat Plaintiff until weeks later, following Plaintiff's treatment at two other facilities: Shands and Specialty Hospital Jacksonville.

Even notwithstanding the remoteness in time, Heartland was not the legal cause of Plaintiff's injury. The record is devoid of evidence to prove that Heartland's negligence, if any, was a legal cause of the deep tissue injury to Plaintiff's sacrum.

Notably, Plaintiff's experts did not criticize Heartland's care and treatment of this injury. While Dr. Black noted that she may have used a different topical bandage than Heartland, that "wouldn't have changed the outcome." (T.272.) "The outcome was set in place when it started." (*Id.*; *accord* T. (Dr. Davey)) Regardless of the care provided at Heartland, Plaintiff's need for surgeries to clean and ultimately repair the damage to his sacrum – and caused by Select's negligent care – would not have changed. (T.272.)

Dr. Black did concede on cross-examination that certain conduct by Heartland, if shown by the medical records, would have breached the standard of care. (T.399-400.) Yet Dr. Black was never asked whether those alleged breaches of the standard of care – even if true – proximately caused the deep tissue injury to Plaintiff's sacrum. (*See id*.)

Select's experts, Dr. Sheyner and Nurse Weir, did not criticize Heartland's care and treatment of the deep tissue injury to Plaintiff's sacrum. The defense did not elicit opinions from Nurse Weir related to the cause of Plaintiff's sacral ulcer, when that wound occurred, or Heartland's care and treatment of Plaintiff. (*See* T.1829, 1831-32, 1833, 1853.) Similarly, Select did not seek an opinion from its expert internist, Dr. Sheyner, as to whether Heartland breached the standard of care or whether Heartland's negligence caused Plaintiff's sacral wound. (T.1716-17.) Although Dr. Sheyner noted that Plaintiff developed an infection at Heartland (T.1816, 1818), she did not render any opinions criticizing the care given to Plaintiff after his discharge from Select (T.1758-59, 1818).

Select introduced evidence at trial that Plaintiff, while at Heartland, suffered from pressure ulcers to his heels and experienced serious infections. (T.945-47, 951, 986-87.) Evidence of these and other injuries that Plaintiff may have sustained at Heartland is irrelevant. Plaintiff sought to recover medical negligence damages only for the deep tissue injury to his sacrum. Select failed to prove that Heartland's

negligence proximately caused Plaintiff's deep tissue injury, which he sustained weeks before his admission to Heartland.

Because the conduct of Select and Heartland did not combine to cause Plaintiff's sacral wound, Select and Heartland are not joint tortfeasors. Instead, the evidence indisputably established that Select and Heartland acted as initial and subsequent tortfeasors.

Moreover, Select stipulated at trial that Plaintiff's medical bills related to the sacral wound, which included his treatment at Heartland, were "reasonable and necessary." (T.59-60.) The defense even agreed to the amount of past medical expenses sought by Plaintiff for the deep tissue injury to his sacrum, including the medical expenses incurred for Heartland's care and treatment of that wound. (T.37, 59-60; Supp. T.2536; *see generally* R.16750-17386.) Dr. Sheyner, one of the defense's experts, conceded that all of Plaintiff's care and treatment for the sacral wound, including the colostomy and the flap surgery, was reasonable and appropriate. (T.1806.) Select never claimed, then, that Plaintiff acted unreasonably in seeking medical care and treatment from Heartland for the deep tissue injury to his sacrum.

These facts entitle Plaintiff to a directed verdict. Under the rule of *Stuart v. Hertz*, Select alone is responsible for the entire amount of damages sustained by Plaintiff for the deep tissue injury to his sacrum. As a matter of law, Select must be

liable for any additional loss, injury, or damage caused by Heartland's reasonable and necessary medical care and treatment of Plaintiff's deep tissue injury. The trial court should have directed a verdict against Select and refused to submit the affirmative defense of apportionment to the jury. *See, e.g.*, *McVey*, 739 So. 2d at 650. The trial court's denial of Plaintiff's motion for directed verdict was error.

2. Plaintiff is entitled to JNOV on Select's comparative fault defense.

Additionally, the trial court erred in denying Plaintiff's renewed motion for directed verdict (JNOV), and in refusing to set aside the jury's apportionment of fault to Heartland. Plaintiff is entitled to judgment against Select for the full value of the damages awarded by the jury on his medical malpractice claim.

At the conclusion of trial, the jury found that Select's negligence was "a legal cause of loss, injury, or damage to Plaintiff relating to a deep tissue injury or pressure ulcer," and that Heartland's fault was a contributing legal cause of that loss, injury, or damage. (R.8243.) The jury awarded the entire amount of past medical expenses sought by Plaintiff, including the damages related to care and treatment of the deep tissue injury at Heartland. (R.8244; *see* T.59-60.) Again, because Select stipulated at trial that the medical care rendered to Plaintiff was reasonable and necessary (T.59-60), there was no dispute that Plaintiff acted reasonably in obtaining medical care and treatment at Heartland for the deep tissue injury.

Once the jury found that Select's negligence was the legal cause of Plaintiff's loss, injury, or damage related to the deep tissue injury – and awarded all of the past medical expenses for treatment that Plaintiff reasonably obtained – the trial court should have granted Plaintiff's renewed motion for directed verdict (JNOV). Once again, the evidence related to causation was unrefuted. Select and Heartland did not act as joint tortfeasors. Instead, Select alone caused the original injury: the deep tissue injury to Plaintiff's sacrum. Any fault of Heartland in contributing to Plaintiff's loss, injury, or damage – as found by the jury (R.8243-44) – is attributable as a matter of law to Select, the initial tortfeasor. *See Stuart*, 351 So. 3d at 707.

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Therefore, the trial court should have set aside the jury's apportionment of fault to Heartland and entered judgment against Select for the full value of damages awarded by the jury on Plaintiff's claim for medical negligence. The trial court erred in denying Plaintiff's initial and renewed motions for directed verdict (JNOV) and his motion for new trial on damages.

III. Alternatively, Plaintiff is entitled to a new trial on his medical malpractice claim against Select.

Standard of Review. The trial court's denial of Plaintiff's motion for new trial is reviewed under the abuse of discretion standard. *See, e.g.*, *Subaqueous Servs., Inc. v. Corbin*, 25 So. 3d 1260, 1267 (Fla. 1st DCA 2010). Rulings on motions to amend a pleading and motions in limine are likewise within the trial court's

discretion, and the trial court's decisions will not be reversed on appeal absent an abuse of discretion. *See, e.g.*, *Morgan v. Bank of N.Y. Mellon*, 200 So. 3d 792, 794-95 (Fla. 1st DCA 2016) (rulings on motion to amend); *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 780 (Fla. 4th DCA 2006) (rulings on motion in limine).

Plaintiff should be granted a new trial on his medical malpractice claim against Select for two reasons. First, the trial court abused its discretion in allowing Select – after the close of discovery and on the eve of trial – to amend its affirmative defense to add two new non-parties as *Fabre* defendants, and in denying Plaintiff's motions to limit and to strike Select's comparative fault defense as to all three *Fabre* defendants, including Heartland. Second, the trial court erred in refusing to submit to the jury Plaintiff's proposed verdict form, which would have allowed the jury to determine whether Select should in fact be responsible for any additional loss, injury, or damage caused by Heartland's care and treatment of Plaintiff's deep tissue injury, negligently caused by Select.

A. Plaintiff is entitled to a new trial as to Select's liability, without any apportionment of fault to the non-party *Fabre* defendants.

First, the trial court erred in allowing Select to amend its affirmative defense and add two new non-party *Fabre* defendants on the eve of trial, and in denying Plaintiff's pre-trial motions to limit or strike that comparative fault defense. The trial court permitted Select to proceed to trial on its second affirmative defense without

pleading any facts to support the allegations of the non-parties' comparative fault. For the reasons that follow, this was an abuse of the trial court's discretion.

Under Florida law, a party alleging the comparative fault of any non-party bears the burden of pleading and proving that the non-party's fault contributed to Plaintiff's injury. *See, e.g.*, *Nash v. Wells Fargo Guard Servs., Inc.*, 678 So. 2d 1262, 1264 (Fla. 1996); § 768.81(3)(a)2., Fla. Stat. (2012). To include a non-party on the verdict form under *Fabre*, the defendant "must plead as an affirmative defense the negligence of the nonparty and specifically identify the nonparty." *Nash*, 678 So. 2d at 1264. While a defendant may move to amend the pleadings to assert a non-party's negligence pursuant to Florida Rule of Civil Procedure 1.190, notice must be given *before* trial. *Nash*, 678 So. 2d at 1264. As the Florida Supreme Court ruled in *Nash*: "[N]otice prior to trial is necessary because the assertion that noneconomic damages should be apportioned against a nonparty may affect both the presentation of the case and the trial court's rulings on evidentiary issues." *Id*.

Additionally, Florida law requires that a party's claims or defenses must be pled with sufficient particularity. *See, e.g.*, *Cady v. Chevy Chase Sav. & Loan, Inc.*, 528 So. 2d 136, 137 (Fla. 4th DCA 1988). "Certainty is required when pleading defenses, and pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient." *Id*. at 137 (citations omitted); *cf*. *Morgan v. Bank of N.Y. Mellon*, 200 So. 3d 792, 796 (Fla. 1st DCA 2016) (citing *Cady*). Allegations of

negligence that are nothing more than "bare conclusions failing to set forth the act or omission causing the damage complained of" are plainly inadequate. *Cady*, 528 So. 2d at 137. To allow a defendant to amend its pleadings without alleging ultimate facts, after the close of discovery, and contrary to the pretrial order is to permit "trial by ambush." *Cf. Fla. Marine Enters. v. Bailey*, 632 So. 2d 649, 652 (Fla. 4th DCA 1994) (affirming striking of witnesses not timely disclosed under the pretrial order).

Nowhere in either the initial or amended second affirmative defense did Select state ultimate facts to support the comparative fault of any of the *Fabre* defendants, including Heartland. (*See* R.67-76; R.8107-08.) At best, Select's second affirmative defense included nothing more than bare conclusions as to the *Fabre* defendants' negligence, without any allegations of ultimate fact setting forth the complained-of acts or omissions. (R.675-76; R.8107-08.) Not only was Select's belated attempt to amend its second affirmative defense prejudicial to Plaintiff, the amendment itself was futile. *See Thompson v. Bank of N.Y.*, 862 So. 2d 768, 770 (Fla. 4th DCA 2003) (finding that "a proposed amendment is futile where it is insufficiently pled"); *see also N. Am. Speciality Ins. Co. v. Bergeron Land Dev., Inc.*, 745 So. 2d 359, 362 (Fla. 4th DCA 1999) (stating, as a general rule, that "[l]eave to amend should not be denied unless the privilege has been abused, there is prejudice to the opposing party, or amendment would be futile").

Moreover, the trial court allowed Select to amend its second affirmative defense after the close of discovery, and on the eve of trial. Notably, even though Select claimed the conduct of Shands UF and Specialy Hospital Jacksonville had been the focus of discovery, Select did not seek leave to amend its second affirmative defense until after Plaintiff sought to limit the comparative fault defense to Heartland, the only *Fabre* non-party defendant initially named by Select. Nonetheless, the trial court granted Select leave to amend to amend and add two new *Fabre* defendants: Shands UF and Specialty Hospital Jacksonville.

Notwithstanding that Rule 1.190(a) provides that leave to amend a pleading "shall be given freely when justice so requires," Fla. R. Civ. P. 1.190(a), Select waited until just two weeks before trial to seek leave to amend its affirmative defense and add two new *Fabre* defendants. (R.8098-8109.) Even Rule 1.190's liberal amendment policy "diminishes as a case progresses to trial." *Morgan*, 200 So. 3d at 796. This is particularly true where the proposed amendment prejudices a plaintiff's ability to prepare for the new defense just before trial, and after the close of discovery. *Cf. id*. ("[w]hether granting the proposed amendment would prejudice the opposing party is analyzed primarily in the context of the opposing party's ability to prepare for the new…defenses prior to trial"). Such prejudice is evident here, where Select's proposed amendment to apportion fault to three non-parties, each of whom treated Plaintiff after Select, significantly affected the presentation of Plaintiff's

case. *See, e.g.*, *Nash*, 678 So. 2d at 1264 (explaining why defendant must give notice of anticipated *Fabre* defense before trial).

For the same reasons, the trial court abused its discretion in denying Plaintiff's first motion in limine, along with his motion to strike Select's comparative fault defense, or for summary judgment on that claim. The trial court had multiple opportunities to strike or limit Select's *Fabre* affirmative defense, which was insufficiently pled and proven. The trial court's decisions allowing Select to amend its affirmative defense, and to proceed to trial on its allegations of comparative fault, prejudiced Plaintiff. At trial, Plaintiff was required to elicit evidence in a manner that anticipated and refuted Select's attempts to blame Shands UF, Specialty Hospital Jacksonville, and Heartland for the deep tissue injury to Plaintiff's sacrum. Thus, Plaintiff tried his entire case in chief without knowing how Select would attack and litigate the comparative fault issues that related to the *Fabre* defendants. This impaired the fair presentation of his case. The trial court's rulings prejudiced Plaintiff in his presentation of the evidence.

Ultimately, the trial court agreed with Plaintiff that Select could not prove the comparative fault of at least two of the three *Fabre* non-party defendants: Shands UF and Specialty Hospital Jacksonville. The trial court directed a verdict against Select as to those two *Fabre* defendants and did not allow the jury to apportion fault to Shands UF and Specialty Hospital Jacksonville. (T.2039, 2047-49; R.8243-46.)

By this time, however, the damage was done. Plaintiff had already suffered the very prejudice in his presentation of the evidence that the Florida Supreme Court's ruling in *Nash* was intended to prevent.

Select cannot show that the trial court's errors were harmless. *See Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014). Plaintiff is entitled to a new trial on his claim against Select for medical malpractice.

B. The trial court should have allowed the jury to decide whether Select was in fact responsible for the additional damages caused by Plaintiff's medical care or treatment at Heartland.

Plaintiff is entitled to a new trial for yet another reason. The trial court erred in refusing to submit Plaintiff's proposed verdict form to the jury. The question proposed by Plaintiff would have allowed the jury to find as fact that Select should be responsible for any additional loss, injury, or damage, caused by medical care or treatment reasonably obtained by Plaintiff at Heartland, for the injury that he initially sustained at Select.

At the close of the evidence, the trial court gave the *Stuart v. Hertz* jury instruction requested by Plaintiff (Florida Standard Jury Instruction 501.5c), together with the subsequent injuries/multiple events" instruction requested by Select (Florida Standard Jury Instruction 501.5b). (T.2049-50.) Consistent with the instructions, the jury was asked to decide whether there was fault on the part of Heartland that was a "contributing legal cause of loss, injury or damage to Plaintiff,"

and to apportion the percentages of fault between Select and Heartland. (R.8243-44.)

Consistent with the theories of causation, Plaintiff asked that the trial court add a special interrogatory to the verdict form. Specifically, Plaintiff proposed that the verdict form include the following:

> If you find that Select Specialty Hospital caused loss, injury or damage to Plaintiff, Charles Barth, then do you find that Select Specialty Hospital is also responsible for any additional loss, injury or damage caused by medical care or treatment reasonably obtained by Charles Barth for any injury you find he sustained at Select Specialty Hospital as to the following:
>
> Defendant, Heartland of Orange Park YES____ NO____

(R.16512.) The trial court refused to add this special interrogatory to the verdict form. (T.2010-11; *see* R.8243-46.)

In refusing to submit Plaintiff's proposed interrogatory to the jury, the trial court abused its discretion. Once again, Select had already stipulated that Plaintiff reasonably obtained medical care and treatment for his sacral injury at Heartland. To the extent, then, that the jury found that Select caused the loss, injury, or damage to Plaintiff relating to the deep tissue injury, the jury should have been allowed to decide Select's responsibility for the additional loss, injury, or damage caused by medical care or treatment reasonably obtained by Plaintiff for his sacral injury at Heartland. (R.16512.)

Evidence supported Plaintiff's *Stuart v. Hertz* theory, and the trial court gave the standard *Stuart v. Hertz* instruction. (T.2049-50.) The special interrogatory proposed by Plaintiff would have allowed the jury, consistent with the trial court's instructions, to find, as fact, that Select is responsible for the additional loss, injury, or damage caused by the reasonable and necessary treatment and care obtained by Plaintiff at Heartland for his sacral wound. This determination would have resolved once and for all the question of comparative fault.

The trial court erred in refusing to submit this additional question related to comparative fault to the jury. Where, as here, a jury trial involves comparative negligence, Florida's courts have found that "a special verdict with an interrogatory on comparative negligence is mandatory." *Ryan v. Atlantic Fertilizer & Chem. Co.*, 515 So. 2d 324, 327-28 (Fla. 3d DCA 1987) (reversing trial court's failure to allow special verdict form that would have permitted jury to assign percentages of fault to each party) (citing *Lawrence v. Fla. E. Coast Ry.*, 346 So. 2d 1012 (Fla. 1977)).

Even if this Court finds that Plaintiff is not entitled to a directed verdict or JNOV as to Select's comparative fault defense, the jury should have been permitted to decide whether Select should also be held responsible for Heartland's additional care and treatment of Plaintiff. Had the jury been allowed to decide this question, it necessarily would have determined – in accordance with the facts and the law – that Select was also responsible for the additional loss, injury or damage resulting from

Heartland's treatment and care of Plaintiff's sacral wound. Again, this would have entitled Plaintiff to a judgment against Select for the full value of the damages awarded by the jury. Select cannot show that the trial court's error was harmless. *See Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014).

For these reasons, Plaintiff is entitled to reversal of the judgment on the jury's verdict, and to a new trial on his medical malpractice claim against Select. To the extent the trial court, on remand, allows the jury to consider Select's affirmative defense of comparative negligence as to Heartland, the jury must likewise determine whether Select is in fact responsible for any additional loss, injury, or damage caused by Plaintiff's treatment at Heartland.

CONCLUSION

For all the foregoing reasons, Plaintiff asks that this Court affirm the denial of Select's motions for directed verdict and JNOV related to the Chapter 415 claim, as alleged in Count II of Plaintiff's complaint and proven at trial. As to Plaintiff's claim against Select for medical malpractice (Count I of Plaintiff's complaint), Plaintiff asks this Court to reverse the trial court's denials of directed verdict and JNOV on Select's comparative fault affirmative defense, together with the final judgment apportioning liability to Heartland. On remand, Plaintiff is entitled to a judgment against Select for the full value of damages awarded by the jury for the medical malpractice claim, with no apportionment of liability to Heartland. Alternatively,

should the Court determine that Plaintiff is not entitled to directed verdict or a JNOV, Plaintiff asks the Court to grant a new trial on his claim for medical malpractice.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the eDCA system on October 22, 2018, and an electronic copy has been furnished to the following counsel of record:

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I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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