

Discoverability of Hospital Incident Reports and taxing Expert Witness Fees in Medical Malpractice Litigation in Florida: Plaintiff's Perspective

Michael Flynn*

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Abstract

In the early morning hours of July 4th, 1985 at approximately 2:30 a.m., Julie, a nineteen year old cook at a local fast food restaurant, climbed into her car at the end of her work shift to drive the two miles back to her parent's house.

KEYWORDS: malpractice, medical, fees

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I. INTRODUCTION

In the early morning hours of July 4, 1985 at approximately 2:30 a.m., Julie, a nineteen year old cook at a local fast food restaurant, climbed into her car at the end of her work shift to drive the two miles back to her parent's house. On her way home, an oncoming car swerved across the centerline of the highway and crashed into Julie's car. The head on collision left Julie severely injured. The paramedics called to the accident scene applied a tourniquet to Julie's leg to stop her bleeding and rushed her to a local hospital. The hospital's medical staff removed the tourniquet from Julie's leg while discussing whether to begin surgical procedures or to transfer Julie to a different hospital. The collective decision of the medical staff was to immediately begin surgery. The medical staff's delay in deciding to begin surgery, after they had already removed the tourniquet from Julie's leg, caused her to lose a substantial amount of blood and she lapsed into shock. Julie's blood loss brought on cardiac arrest. Resuscitation efforts by the medical staff revived Julie and the surgeons successfully operated on her leg. Despite recovering from the physical trauma of the automobile accident, Julie suffered irreversible brain damage because the oxygen supply to her brain had been interrupted due to her loss of blood.

It is hard to imagine a more tragic scenario. Yet lawyers who represent personal injury victims, especially medical malpractice victims, revisit tragedies every day. Part of the task of Julie's lawyers is to discover how such a tragedy could occur - what really happened in the hospital when the doctors and nurses were administering to Julie. To

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properly understand what they discover, Julie's lawyers will need help. In medical malpractice litigation this means consulting medical experts to evaluate and interpret the conduct of the medical personnel involved in Julie's treatment.

The purpose of this article is to examine two aspects of the plaintiff lawyer's search for what really happened in a medical malpractice lawsuit. First, it will examine the discoverability of the hospital incident reports prepared by the medical personnel who treated Julie in the Florida hospital. Second, this article will review and compare under what circumstances Julie may recover from the culpable parties the cost of hiring medical experts to evaluate her claim for medical malpractice. Although these two topics are clearly distinct, both will be discussed in this article because they involve current issues that impact Florida medical malpractice litigation.

II. HOSPITAL INCIDENT REPORTS

Julie's brain damage, sustained during her medical treatment in the hospital, triggers the preparation of hospital incident reports under Florida law.¹ Every hospital or medical facility licensed by the State of Florida or the Department of Health and Rehabilitative Services is required to operate an internal risk management program.² A vital part of the internal risk management program is the establishment of a mandatory incident reporting system.³ The Florida statute provides that all health care providers and all agents and employees of a health care facility⁴ have an affirmative duty to report any injury or adverse incident involving a patient to a hospital risk manager. The risk manager uses these hospital incident reports to develop categories of ad-

1. FLA. STAT. § 395.041(1) (1987).

2. *Id.* See FLA. STAT. §§ 390.001(1)(b), 395.002(2), (6) (1987). In addition, Health Maintenance Organizations (HMO) licensed by the state of Florida are required to implement a risk management program pursuant to FLA. STAT. § 641.55 (1988). The HMO program is identical to the risk management program required for hospitals under FLA. STAT. § 395.041 (1987).

3. FLA. STAT. § 395.041(1), (4) (1987).

4. FLA. STAT. § 395.041(1)(d) (1987). FLA. STAT. § 768.54(1)(b) (1987) defines health care provider to include a physician, physician's assistant, osteopath, podiatrist, health maintenance organization, hospital ambulatory surgical center, or any other medical facility that admits patients on an out-patient basis for diagnostic or non-surgical procedures excluding physician offices or pregnancy termination facilities. Hospital agents or employees would include nurses and other members of the hospital's medical staff.

verse incidents, to identify problem areas of medical treatment within the hospital, and institute appropriate action to correct any problems in the delivery of competent medical services.⁵

In addition to the individual hospital incident reports filed by medical personnel, the hospital licensing authorities require the risk manager to submit to the licensing authorities an annual incident report that details and summarizes the injuries and adverse incidents in the medical facility.⁶ Aside from the annual report, Florida law provides for special reporting requirements for certain types of patient injuries.⁷ For example, besides the individual hospital incident report, the hospital licensing authorities require the risk manager file a report with the licensing authorities within three days after any adverse incident resulting in death, severe brain or spinal damage to a hospital patient.⁸ In addition, the licensing authority requires a more detailed follow up report within 10 days and may require a more extensive final report to be submitted at a later date.⁹

These statutorily mandated reports are legally significant from the perspective of Julie's lawyers. These hospital incident reports preserve a written record of instances of medical malpractice within health care facilities. The contents of these reports potentially hold the answer to what really happened to Julie when she was being treated by the medical staff. If possible, Julie's lawyers should seek to obtain copies of all of these hospital incident reports.

The Florida legislature also recognized the significance of these hospital incident reports.¹⁰ The legislature's design in mandating an internal risk management program for health care facilities administered by a qualified risk manager was to control and prevent medical accidents and injuries by establishing minimum standards of medical care.¹¹ The legislature balanced a patient's need to know the facts of

5. FLA. STAT. § 395.041(4) (1987).

6. FLA. STAT. § 395.041(5) (1987). In addition, the risk manager must file a quarterly report with the Florida Department of Professional Regulation pursuant to FLA. STAT. § 395.041(5)(b) (1988).

7. FLA. STAT. § 395.041(6), (8), (10) (1988).

8. FLA. STAT. § 395.041(6) (1988).

9. *Id.*

10. FLA. STAT. §§ 395.041(4), 626.941 (1987).

11. FLA. STAT. § 395.001 (1987). FLA. STAT. § 626.941 (1987) sets out the qualifications for a health care risk manager as follows:

(1) Any person desiring to be certified as a health care risk manager shall submit an application on a form provided by the department [of Insur-

any adverse medical incident and the health care facility's ability to provide medical service to a community by allowing limited disclosure of these reports. In particular, the annual report of patient injuries and adverse medical incidents is not discoverable in a medical malpractice civil action.¹² In addition, the specific incident report sent to the licensing authority detailing an adverse incident resulting in death, brain or spinal damage or other statutorily designated injury to a patient is also not discoverable.¹³

However, the individual hospital incident report, prepared on a regular basis by the health care providers and hospital employees, is not protected from discovery.¹⁴ According to Florida law, hospital incident reports are classified as part of the work papers of the lawyers

ance]. In order to qualify, the applicant shall submit evidence satisfactory to the department [of Insurance] which demonstrates the applicant's competence, by education or experience, in the following areas:

- (a) Applicable standards of health care risk management.
- (b) Applicable federal, state, and local health and safety laws and rules.
- (c) General risk management administration.
- (d) Patient care.
- (e) Medical care.
- (f) Personal and social care.
- (g) Accident prevention.
- (h) Departmental organization and management.
- (i) Community interrelationships.
- (j) Medical terminology.

The department [of Insurance] may require such additional information, from the applicant or any other person, as may be reasonably required to verify the information contained in the application.

(2) The department [of Insurance] shall not grant or issue a certificate as a health care risk manager to any individual unless from the application it affirmatively appears that the applicant:

- (a) Is 18 years of age or over;
- (b) Is a high school graduate or equivalent; and
- (c) 1. Has fulfilled the requirements of a 1-year program or its equivalent in health care risk management training which may be developed or approved by the department [of Insurance];
- 2. Has completed 2 years of college level studies which would prepare the applicant for health care risk management, to be further defined by rule; or
- 3. Has obtained 1 year of practical experience in health care risk management. . . .

12. FLA. STAT. § 395.041(5)(b) (1987).

13. FLA. STAT. § 395.041(6) (1988).

14. FLA. STAT. § 395.041(4) (1987).

1988]

who defend the health care facility in litigation relating to the contents of the report.¹⁵ Despite their classification as lawyer work papers, the Florida legislature provided that the incident reports are subject to discovery.¹⁶ The legislature did stop short of permitting unlimited use of the discoverable reports by prohibiting the introduction of the incident reports into evidence in a civil lawsuit.¹⁷ Regardless of the legislature's restrictions, the chance to obtain and use individual hospital incident reports provides an array of possibilities for Julie's lawyers.

Using Julie's case as an example, suppose that despite Julie's lawyers best efforts to expeditiously settle Julie's medical malpractice case using the provisions of the Florida Medical Malpractice Statute,¹⁸ formal discovery continued for three years after Julie's injuries. Although some of the health care providers and hospital employees who attended to Julie may be available for deposition and trial, some or all may have no memory of Julie's incident. To make matters worse, perhaps some of the crucial hospital employees and medical staff involved in Julie's care may have left the hospital and are unavailable for deposition or trial.

Unfortunately, the "unavailable" and "unmemorable" witness is a fact of life for medical malpractice lawyers. What options do Julie's lawyers have?

A. Florida Evidence Rule 613

Florida Evidence Rule 613 provides that when a writing is used to

15. *Id.*

16. *Id.*

17. *Id.*

18. The Florida Legislature enacted sweeping reforms regarding medical negligence claims in 1988 FLA. LAWS ch. 88-1 §§ 50-59. These legislative changes attempt to promote the careful examination and evaluation by both plaintiff and defense lawyers of alleged instances of medical negligence. First, the new statute requires a pre-suit investigation by both plaintiffs and defendants using expert medical opinions to insure that reasonable grounds exist for any claim or defense. 1988 FLA. LAWS ch. 88-1, § 50. The statute provides for liberal discovery rules in order for all parties to competently review an alleged malpractice incident. 1988 FLA. LAWS ch. 88-1, §§ 51-52. The Florida legislature also provided a mechanism whereby any party may challenge, prior to commencement of a civil lawsuit, the merits and basis of any medical malpractice claim or defense. 1988 FLA. LAWS ch. 88-1, § 53. Finally, Florida's new medical malpractice law sets out a voluntary binding arbitration procedure designed, in part, to streamline the resolution of medical negligence claims. 1988 FLA. LAWS ch. 88-1, §§ 54-59. Throughout this new law, the legislature provided and encouraged settlement of medical negligence claims.

refresh a witness' memory while testifying, an adverse party is entitled to inspect and obtain a copy of the writing.¹⁹ In addition, the adverse party may opt to use the writing for cross-examination or place the writing into evidence at trial subject to any evidentiary objections.²⁰ Consequently, in the event a health care provider or other hospital employee uses the hospital incident report to refresh his memory while testifying at deposition or at trial, Julie's lawyers should be able to discover the incident report and use it for cross examination or impeachment purposes.²¹ Yet, the incident report is specifically prohibited from being introduced as evidence in a civil lawsuit.²²

What if a witness does not use the hospital incident report to refresh his memory while testifying but rather only to refresh his memory before actually testifying? The Fourth District Court of Appeal in Florida decided this question in *Merlin v. Boca Raton Community Hospital, Inc.*²³ The court ruled that the provisions of Florida Evidence Rule 613 do not apply to notes prepared by a client at the outset of litigation and reviewed by the client prior to the client's deposition.²⁴ The court reasoned that the attorney-client privilege protected the client notes from discovery.²⁵

However, the Florida legislature did not classify hospital incident reports as documents covered by the attorney-client privilege.²⁶ Rather the legislature labeled the hospital incident reports as "work papers" or work product of the hospital's lawyers.²⁷ As to work product documents, like hospital incident reports, the *Merlin* court left to the discretion of the trial court whether such documents, used by a witness to refresh his memory before testifying, are discoverable.²⁸ Consequently, hospital incident reports reviewed by Julie's doctors or other medical

19. FLA. STAT. § 90.613 (1987).

20. *Id.*

21. *Id.* See also *Scotchell Enter., Inc. v. Velez*, 455 So. 2d 1129 (Fla. 4th Dist. Ct. App. 1984); *R.A.B. v. Florida*, 399 So. 2d 16 (Fla. 3d Dist. Ct. App. 1981); *Garrett v. Morris Kirschman & Co., Inc.*, 336 So. 2d 566 (Fla. 1976).

22. FLA. STAT. § 395.041(4) (1987); *Johnson v. United States*, 780 F.2d 902 (11th Cir. 1986).

23. 479 So. 2d 236 (Fla. 4th Dist. Ct. App. 1985).

24. *Id.* at 239.

25. *Id.* at 239-40.

26. FLA. STAT. § 395.041(4) (1987).

27. *Id.*

28. *Merlin v. Boca Raton Community Hosp., Inc.*, 479 So. 2d 236, 239 (Fla. 4th Dist. Ct. App. 1985).

personnel before their deposition or trial testimony may be subject to production or use by Julie's lawyers for cross examination or impeachment purposes.²⁹ The Florida court's interpretation of the application of Evidence Rule 613, is consistent with the federal court's application of Federal Rule of Evidence 612.³⁰ Because the Florida legislature saw fit to make the hospital incident report subject to discovery, Julie's lawyers may be able to obtain and use the hospital incident report with any "unmemorable" witness who relied on the report to refresh memory either before or while testifying.

B. Florida Civil Procedure Rule 1.280(b)(2)

Absent the use of the hospital incident report by a witness to refresh memory prior to or while testifying, Julie's lawyers still may be able to obtain a copy of such reports. The hospital incident report, legislatively labelled as a "work paper" of the lawyers for the hospital, becomes part of the litigation materials of hospital's lawyers.³¹ Florida Rule of Civil Procedure 1.280(b)(2) protects litigation materials from discovery.³² However, if Julie's lawyers can show that they need the hospital incident report for the preparation of Julie's lawsuit and that to obtain the hospital incident report or its equivalent by other means involves an undue hardship, then Julie's lawyers may require the hospital to turn over the reports.³³ In so ordering the production of the hos-

29. *Supra*, note 23.

30. *Berkley Photo, Inc. v. Eastman Kodak Company*, 74 F.R.D. 613 (S.D. N.Y. 1977); *Julian v. Raytheon Company*, 93 F.R.D. 138 (D. Del. 1982); *In re Comair Air Disaster Litigation No. 79-104*, 100 F.R.D. 350 (E.D. Ky. 1983); and *Deil v. National Semiconductor Corp.*, 105 F.R.D. 463 (E.D. Pa. 1984). *See also* *Petition of Massachusetts Trustees of Eastern Gas and Fuel Associates*, 200 F.Supp. 625 (E.D. Va. 1962) (*Admiralty Case*).

31. FLA. STAT. § 395.041(4) (1987). FLA. R. CIV. P. 1.280(b)(2) (1987).

32. FLA. R. CIV. P. 1.280(b)(2) (1987).

33. *Id.* *Dade County Medical Association v. Hlis*, 372 So. 2d 117 (Fla. 3d Dist. Ct. App. 1979); *Associated Medical Institute Inc., v. Trube*, 394 So. 2d 563 (Fla. 3d Dist. Ct. App. 1981); *Dade County Public Health Trust v. Zaidman*, 447 So. 2d 282 (Fla. 3rd Dist. Ct. App. 1983); *North Broward Hospital District v. Judson*, 439 So. 2d 946 (Fla. 4th Dist. Ct. App. 1983); and *Humana of Florida, Inc., v. Evans*, 519 So. 2d 1022 (Fla. 5th Dist. Ct. App. 1987). *See also* *Florida v. Rabin*, 495 So. 2d 257 (Fla. 3rd Dist. Ct. App. 1986) and *Hartford Accident & Indemnity Co., v. McGann*, 402 So. 2d 1361 (Fla. 4th Dist. Ct. App. 1981). However, a hospital's failure to claim the work product privilege permits a plaintiff in a medical malpractice lawsuit to discover the hospital incident reports without meeting the requirements of FLA. R. CIV. P. 1.280(b)(2). *Hospital Corp. of Am. v. Dixon*, 330 So. 2d 737 (Fla. 1st Dist. Ct. App.

personnel before their deposition or trial testimony may be subject to production or use by Julie's lawyers for cross examination or impeachment purposes.²⁹ The Florida court's interpretation of the application of Evidence Rule 613, is consistent with the federal court's application of Federal Rule of Evidence 612.³⁰ Because the Florida legislature saw fit to make the hospital incident report subject to discovery, Julie's lawyers may be able to obtain and use the hospital incident report with any "unmemorable" witness who relied on the report to refresh memory either before or while testifying.

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pital incident report after motion by Julie's lawyers, the court must protect from disclosure a hospital lawyer's or representative's legal opinions or conclusions.³⁴ In addition, the disclosure of the hospital incident reports would not restrict the ability of the hospital's lawyers to gather information regarding any alleged medical malpractice incident and to present a legal defense to Julie's claim.

There are no Florida cases detailing the showing required to satisfy the "need for trial preparation" or "undue hardship" criteria as to hospital incident reports.³⁵ However, given the relevance of the information contained in the hospital incident report and either the lack of memory or availability of key health care providers or other hospital personnel, Julie's lawyers make a strong case for disclosure of the reports. By prohibiting discovery of the hospital incident report in this instance, Julie's lawyers would be left with incomplete information and forced to rely on legal constructs, like *res ipsa loquitur*, in presenting Julie's case.³⁶ Rather than relying on inference and speculation, the

1976).

34. FLA. R. CIV. P. 1.280(b)(2) (1987).

35. *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464 (11th Cir. 1984) sets out the boundaries for what constitutes "need for trial preparation" and "undue hardship" under FED. R. CIV. P. 26(b)(3). FED. R. CIV. P. 26(b)(3) is identical to FLA. R. CIV. P. 1.280 (b)(2). See also *In re Int'l. Sys. & Control Corp. etc.*, 693 F.2d 1235 (1982) and *Hamilton v. Canal Barge Co., Inc.*, 395 F.Supp. 975 (E.D. La. 1974). Although there is no reported Florida appellate court decision, the issue has been raised at the trial court level with the opposing parties declining to appeal the court's ruling.

36. FLA. STAT. § 768.45(4) (1987) states:

The existence of a medical injury shall not create any inference or presumption of negligence against a health care provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the health care provider. However, the discovery of the presence of a foreign body, such as a sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical examination, or diagnostic procedures, shall be prima facie evidence of negligence on the part of the health care provider.

See also *Marrero v. Goldsmith*, 486 So. 2d 530 (Fla. 1986) ("*res ipsa loquitur*" applies to unexplainable injuries to a patient's body part unrelated to surgical procedure) and *Borghese v. Bartley*, 402 So. 2d 475 (Fla. 1st Dist. Ct. App. 1981) ("*res ipsa loquitur*" may not apply to unexplainable injuries to a patient's body part involved in a surgical procedure). See generally, PROSSER & KEATON, LAW OF TORTS, § 39 (5th ed. 1984); Note, *Medical Malpractice Use of Res Ipsa Loquitur*, 46 MINN. L. REV. 1043 (1962); and Note, *Application of Res Ipsa Loquitur in Medical Malpractice Litigation*, 44 INS. COM. J. 634 (1977).

hospital incident report would allow all of the parties, the court, and ultimately a jury to understand what really happened to Julie in the hospital and to more satisfactorily evaluate the conduct of the hospital's medical personnel.

III. EXPERT WITNESS FEES AS TAXABLE COST

Another primary focus of discovery for Julie's lawyers is gathering experts to evaluate the alleged malpractice claim. Consequently, successful litigation of a medical malpractice case requires not only time, preparation, and skill, but perhaps most of all money. The staggering rise in the costs of retaining expert witnesses in the preparation and trial of a medical malpractice lawsuit raises the stakes in the outcome. But if Julie's trial lawyers prevail, part of the spoils of victory is the recovery of taxable costs including expert witness fees. Or is it? Recent Supreme Court opinions signal that this may not be the case in federal court.

In the consolidated cases of *Crawford Fitting Company v. J. T. Gibbons, Inc.*³⁷ and *Champion International Corporation v. International Woodworkers of America, AFL-CIO,CLC*,³⁸ the United States Supreme Court limited the amount of expert witness fees recoverable by a prevailing party as taxable costs. In the *Crawford* case the prevailing party defendant in an antitrust lawsuit sought to recover the full amount of its \$220,000 in litigation costs from J.T. Gibbons.³⁹ Crawford's expert witness fees comprised a substantial portion of its costs.⁴⁰ The Court also specifically found that Crawford's expert witness testimony was indispensable to its defense.⁴¹ The court of appeal reversed the trial court's award of full reimbursement for expert witness fees.⁴² In the *Champion* case the prevailing party defendant in a Title VII civil rights action requested reimbursement for the full amount of its costs, including expert witness fees.⁴³ The trial court denied Champion's request for full reimbursement for expert witness fees and the court of appeal affirmed that ruling.⁴⁴ After both cases were consoli-

37. 107 S. Ct. 2494 (1987).

38. *Id.*

39. *Id.* at 2496.

40. *Id.*

41. *Id.* at 2499.

42. *Id.* at 2496.

43. *Id.*

44. *Id.*

dated for appeal, the Supreme Court affirmed the rulings of both courts of appeal.⁴⁵

The Supreme Court's majority opinion in the *Crawford* and *Champion* case, written by Justice Rehnquist, based its conclusion on the interpretation of Federal Rule of Civil Procedure 54(d) and two federal statutes.⁴⁶ Federal Rule of Civil Procedure 54(d) states in part that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs"⁴⁷ To define the costs referred to in Rule 54(d), Justice Rehnquist looked to 28 U.S.C. § 1920,⁴⁸ which provides in part that "[a] judge or clerk of any court of the United States *may* tax as costs . . . *fees and disbursements for printing and witnesses.*"⁴⁹ Finally, the Court interpreted 28 U.S.C. § 1821 to restrain a court's discretion in taxing expert witness fees as costs against a non-prevailing party.⁵⁰ Title 28 U.S.C. § 1821 provides that "[e]xcept as otherwise provided by law, a *witness in attendance* at any court of the United States . . . shall be paid the fees and allowances provided by this section. . . . A *witness shall be paid an attendance fee of \$30 per day for each day's attendance.*"⁵¹

The majority of the Court concluded that the attendance fee provision contained in 28 U.S.C. § 1821 constituted the exclusive compensation for expert witnesses taxable as costs.⁵² The Court in so ruling rejected the argument that Rule 54(d) permits the discretionary award of additional expert witness expenses and fees as taxable costs.⁵³

Justice Marshall in the dissenting opinion argued that the roster of costs contained in 28 U.S.C. § 1821 that *may* be taxed is not the exclusive list of taxable costs.⁵⁴ The dissenting opinion went on to posit that because of the unavoidable need for expert witness testimony in modern litigation and the resulting costs, to deny reimbursement to the prevailing party for the expense of such testimony is inequitable.⁵⁵

45. *Id.* at 2499.

46. *Id.* at 2496-99.

47. *Id.* at 2497-98; FED. R. CIV. P. 54(d).

48. 107 S. Ct. at 2496-97.

49. *Id.* at 2497; 28 U.S.C. § 1920 (1978)(emphasis added).

50. 107 S. Ct. at 2497-99.

51. *Id.* at 2497 (emphasis added); 28 U.S.C. § 1821 (1978).

52. 107 S. Ct. at 2499.

53. *Id.* at 2497-99.

54. *Id.* at 2500-01.

55. *Id.* at 2502.

The impact of *Crawford* and *Champion* is unmistakable. Most recently in *Dominic v. Hess Oil V.I. Corp.*, a federal appellate court applied *Crawford* and *Champion* in denying full reimbursement of expert witness fees to a prevailing plaintiff in a products liability action.⁵⁶ The effect of the Supreme Court's ruling on medical malpractice lawsuits is equally disturbing. Because medical malpractice cases directly involve a battle of the plaintiff's and defendant's expert witnesses regarding liability and damages, the *Crawford* and *Champion* decision not only discourages a lawyer from spending the money necessary to retain experts in order to adequately prepare for a medical malpractice trial but also deters commencing such lawsuits in federal court. In short, the Supreme Court's ruling renders the federal courts an inadvisable forum for personal injury victims.

In contrast, Florida recognizes the expense of using expert witnesses in litigation and makes provision for taxing such necessary expenses as costs.⁵⁷ Florida law provides:

Any expert or skilled witness who shall have testified in any cause shall be allowed a *witness fee* including the cost of any exhibit used by such witness *in the amount of \$10 per hour or such amount as the trial judge may deem reasonable, and the same shall be taxed as costs.* (emphasis added)⁵⁸

In comparison, the discretion allowed a trial judge in Florida to set and award reimbursement of expert witness fees as costs mirrors the discretion afforded federal judges under Federal Rule of Civil Procedure 54(d).⁵⁹ However, the Florida appellate courts, unlike their federal counterparts, have refrained from tampering with the trial court's discretion to tax expert witness fees as costs.

For example, in *Baker v. Varela*,⁶⁰ the First District Court of Appeal held steadfast to the discretionary scheme of taxing expert witness fees as costs. In its opinion, the appellate court upheld the trial court's award of full reimbursement of costs, including expert witness fees, to the successful plaintiff in a medical malpractice trial.⁶¹ The court noted that the taxing of costs against the losing party was not an abuse of the

56. 841 F.2d 513 (3rd Cir. 1988).

57. FLA. STAT. § 92.231(2) (1987).

58. *Id.*

59. Compare FLA. STAT. § 92.231(2) (1987) with FED. R. CIV. P. 54(d).

60. 416 So. 2d 1190 (Fla. 1st Dist. Ct. App. 1982).

61. *Id.* at 1192-94.

trial court's discretion despite the fact that the total amount of costs and attorney fees taxed against the losing party exceeded the amount of the plaintiff's judgment.⁶²

Most recently, in *National Foundation Life Insurance Co. v. Ward*,⁶³ the Fourth District Court of Appeal confirmed that upon a showing of reasonableness and absent an abuse of discretion by the court, an award of over \$2,000 in expert witness fees in a medical malpractice case would be proper. These two cases exemplify the Florida courts' design to retain the state courts as a forum for personal injury trials, especially medical malpractice lawsuits.

Yet, the recovery of the full amount of expert witness fees by a prevailing party as taxable costs may not be a closed issue on the federal level. In the recent case of *Paszko v. United States*,⁶⁴ a federal district court judge restricted the application of 28 U.S.C. § 1821. The *Paszko* case arose under the Federal Tort Claims Act and involves a claim of medical malpractice.⁶⁵ *Paszko* was successful at trial and sought, as the prevailing party, to recover his expert witness fees as taxable costs.⁶⁶ The United States in opposing *Paszko's* request, argued that the *Crawford* and *Champion* cases limited *Paszko's* recovery of expert witness fees as taxable costs to the \$30 per day witness attendance fee authorized by 28 U.S.C. § 1821.⁶⁷

Rather than countering with Justice Marshall's dissenting argument in the *Crawford* and *Champion* cases, *Paszko* fashioned a new argument to support his request for expert witness fees. *Paszko* argued that 28 U.S.C. § 1821 only limits the attendance fee that may be taxed for any witness.⁶⁸ Consequently, *Paszko* conceded that he may only recover as taxable costs \$30 per day for each day spent by his experts

62. *Id.*

63. 13 Fla. L. Weekly 827 (Fla. 4th Dist. Ct. App. 1988).

64. Order Granting Plaintiff's Motion to Tax Costs, *Paszko v. United States*, (S.D. Fla. 1988)(No. 86-6444).

65. Plaintiff's Motion to Tax Costs and Memorandum of Law, *Paszko v. United States*, (S.D. Fla. 1988) (No. 86-6444).

66. *Id.*

67. Defendant's Opposition and Counterclaim to Plaintiff's Motion for Costs, *Paszko v. United States*, (S.D. Fla. 1988) (No. 86-6444).

68. Plaintiff's Motion to Tax Costs and Memorandum of Law and Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion to Tax Costs, and Opposition to Defendant's Counterclaim for Costs, *Paszko v. United States*, (S.D. Fla. 1988) (No. 86-6444).

testifying in court.⁶⁹ However, Paszko further argued that 28 U.S.C. § 1821 does not limit the trial judge's discretion under Federal Rule of Civil Procedure 54(d) or 28 U.S.C. § 1920 to tax an additional amount for the fees charged by an expert witness outside of his actual attendance and testimony at trial.⁷⁰ The judge initially adopted Paszko's argument.⁷¹ In doing so, Paszko's expert witness fees taxed against the United States amounted to full reimbursement for all of the expenses incurred by the expert witnesses for work outside of court plus the maximum \$30 per day attendance fee for trial testimony. The federal district court judge then reversed his ruling by granting the United States' Motion for Reconsideration.⁷² However, Paszko's appeal from this Order is still pending.

Paszko's argument is attractive for several reasons. First, by limiting the application of 28 U.S.C. § 1821 to the allowance for attendance fees, the court would recognize the indispensable role that expert witnesses play in medical malpractice cases. Second, for those causes of action for which the federal forum is exclusive, like claims arising under the Federal Tort Claims Act, adopting Paszko's position would not unfairly penalize an aggrieved party because of the identity of the parties involved, the situs of the injury sustained, or the trial forum authorized. In the broader sense, the court would relegitimize the federal forum as an option for litigants. Finally, Paszko's argument allows the court to adhere to a strict construction of 28 U.S.C. § 1821 while not needlessly penalizing a prevailing party.

In any event, a prudent litigator would be wise to consider carefully the impact that commencing a medical malpractice lawsuit or, for that matter, any lawsuit in federal court might have on the capability of taxing expert witness fees as costs against a losing party.⁷³

69. *Id.*

70. *Id.*

71. Order Granting Plaintiff's Motion to Tax Costs, *Paszko v. United States*, (S.D. Fla. 1988)(No. 86-6444).

72. Defendant's Motion for Reconsideration of Court's Order Granting Plaintiff's Motion to Tax Costs and Order on Motion for Reconsideration, *Paszko v. United States*, (S.D. Fla. 1988)(No. 86-6444).

73. Aside from medical malpractice litigation, the *Crawford* and *Champion* decision effects all types of federal court litigation. In *Glenn v. General Motors Corp.*, 841 F.2d 1567 (11th Cir. 1988) the court of appeals applied the *Crawford* and *Champion* ruling in limiting the amount of expert witness fees recoverable as taxable costs in an Age Discrimination in Employment Act case to the \$30 per day attendance fee. See also *Elvins v. Adventist Health Sys.2/E. & Middle Am., Inc.*, 660 F.Supp. 1255 (D.

IV. CONCLUSION

Litigating medical malpractice cases is a specialized, complicated, risky and expensive endeavor often involving tragic circumstances. The

Kan. 1987). *But see* Freeman v. Package Mach. Co., (D. Mass. Sept. 2, 1987)(Westlaw 16456, at 13) (*Crawford* and *Champion* do not apply to a fee shifting statute like the ADEA) and Furr v. A T & T Technologies, Inc., 824 F.2d 1537 (10th Cir. 1987) (court permitted recovery of expert witness fees as part of the recoverable attorney fees, not as a taxable cost).

In addition, the *Crawford* and *Champion* opinion may affect a prevailing party's recovery of expert witness fees in civil rights cases, in particular 42 U.S.C. § 1983 lawsuits. In *International Woodworkers of Am. v. Champion Int'l. Corp.*, 790 F.2d 1174 (5th Cir. 1986) the court of appeals *en banc*, overruled *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981) *cert. dismissed*, 453 U.S. 950 (1981) by disallowing the recovery of expert witness fees as taxable cost beyond the \$30 per day attendance fee permitted by 28 U.S.C. § 1821 in a civil rights lawsuit. *See also* Kivi v. Nationwide Mut. Ins. Co., 695 F.2d 1285 (11th Cir. 1983); *Osterneck v. E.T. Barwick Ind.*, 825 F.2d 1521 n.15 (11th Cir. 1987); *Boring v. Kozakiewicz*, 833 F.2d 468 (3rd cir. 1987); *Leroy v. Houston*, 831 F.2d 576 (5th Cir. 1987) (Voting Rights Act case); *Catlett v. Missouri Highway and Transp. Comm'n.*, 828 F.2d 1260 (8th Cir. 1987); *Ecos, Inc. v. Brinegar*, 671 F.Supp. ____ , 81 n.12 (M.D.N.C. 1987); *Alberti v. Sheriff of Harris County*, ____ F.Supp. ____ (S.D. Tex. Aug. 26, 1987); and *Guernsey, The School Pays the Piper, but How Much? Attorneys' Fees in Special Education Cases After the Handicapped Children's Protection Act of 1986*, 23 WAKE FOREST L. REV. 237 (1988).

In contrast, Justices Blackmun, Marshall, and Brennan specifically noted that the *Crawford* and *Champion* decision did not address whether expert witness fees may be awarded under 42 U.S.C. § 1988. *Crawford* and *Champion*, 107 S.Ct. at 2494, 2499, 2500 n.1 (1987); *Glenn*, 841 F.2d at 1567 n.20. Some federal courts have specifically allowed for the recovery of expert witness fees beyond the \$30 per day attendance fee authorized by 28 U.S.C. § 1821 in civil rights cases. *Mennor v. Fort Hood Nat'l. Bank*, 829 F.2d 553 (5th Cir. 1987) (Title VII case allowing full recovery of expert witness fees as taxable costs); *United States v. Yonkers Bd. of Educ.*, 118 F.R.D. 326 (S.D.N.Y. 1987); and *Jones v. Chicago* (N.D. Ill. Nov. 10, 1987)(1987 Westlaw 19800, at 8-9).

However, it is important to note that the prevailing parties, whether relying on FED. R. CIV. P. 54(d) or a particular fee shifting statute, did not present the argument made by *Paszko's* lawyers in requesting expert witness fees.

42 U.S.C. § 1983 also applies to medical treatment performed by physicians as federal employees. For example, in *Estelle v. Gamble*, 429 U.S. 97, 105-106 (1976), the United States Supreme Court ruled that intentional indifference, not merely medical negligence, to the serious medical needs of a jail prisoner constituted a violation of the eighth amendment of the United States Constitution prohibiting cruel and unusual punishment and will support a 42 U.S.C. § 1983 lawsuit. Consequently, the *Crawford* and *Champion* decision may also impact the taxing of expert witness fees as costs in

discovery and use of the statutorily required hospital incident reports may help to remove part of the guessing game and deception from medical malpractice cases in the Florida courts. However, the benefit gained from the use of the hospital incident reports may be lost in federal court litigation of medical malpractice claims due to the limitation in the recovery of expert witness fees as taxable costs. From the plaintiff's perspective, medical malpractice litigation becomes a little less complicated but a lot more expensive.