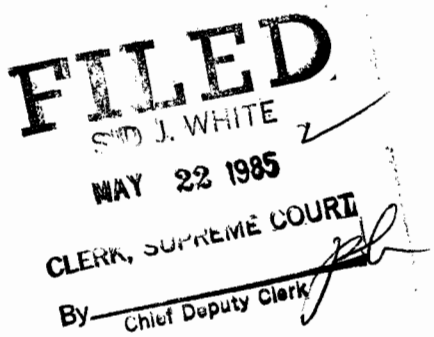
IN THE SUPREME COURT OF FLORIDA

CASE NOS: 65,997 4

65,998 —



ST. MARY'S HOSPITAL,

Petitioner,

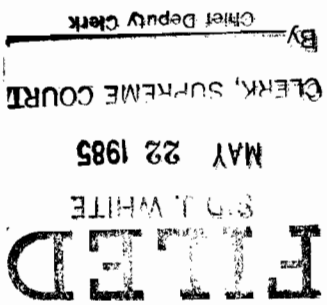
v.

JOSEPH TILLMAN, BRUCE WAXMAN, M.D., et al.,

Respondents.

BRIEF OF RESPONDENT TILLMAN ON THE MERITS

RESPONDING TO BRIEF OF ST. MARY'S



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CITATIONS OF AUTHORITY

STATEMENT OF THE CASE

Tillman had a total knee replacement in his right leg performed by Dr. Waxman, an orthopedic surgeon at St. Mary's Hospital. After the operation it was discovered that the pieces of the prosthesis were mismatched. The femoral component (upper part) was a size "small." The tibial component (lower part) was a size "standard."

Following the operation, within a matter of days, it was determined that Plaintiff had a severe subluxation or complete dislocation of the right knee (R905), resulting in his being unable to walk. Ultimately, Plaintiff was operated on by Dr. Petty, an orthopedic surgeon at Shand's Teaching Hospital in Gainesville, and he found it necessary to remove the prosthesis and perform a fusion (R2324).

Plaintiff sued Dr. Waxman and the Hospital. The claim against the Hospital was essentially that it had negligently failed to check the femoral component to make sure the Hospital had received the correct size before providing it to Waxman to use in the operation (R2322).

The Hospital's manager of surgery admitted that it was the Hospital's responsibility to ensure that the proper components that were ordered by the doctors were received by the Hospital (RA1-2). He also admitted that it was the Hospital's standard custom to check stock numbers against a prosthesis to make sure St. Mary's was supplying the doctor with the correct components (RA3). He could not say why the parts had not been checked in this case (RA4).

The only excuse that Dr. Waxman, and the hospital gave for failing to check the femoral component to make sure it was the correct size was that they did not know that Howmedica manufacturered different sizes of femoral components. However, the evidence showed that in fact the manufacturer had begun making two different sizes in 1977, which was a year or more prior to the Plaintiff's surgery (R114-15).

The salesman for the Howmedica total knee replacement testified that he had attempted to see Dr. Waxman to talk to him about the features of the total knee replacement that Dr. Waxman was using, but Dr. Waxman was always unavailable to him (R111). Prior to the surgery he left information at Dr. Waxman's office indicating the fact that there were different sizes of femoral components (R187-88, 101).

The salesman also testified that in addition to a flyer, St. Mary's had a catalogue and price list indicating that the femoral component came in different sizes (R116, 187). He also discussed that fact with the Hospital's manager of surgery prior to Plaintiff's surgery. The evidence also showed that other Hospitals in the area were well aware that the Howmedica total knee replacement came in different sizes (R357, 366-67, 525, and 578), and had been ordering different sizes for quite some time (R366-67).

At trial the Hospital moved for a directed verdict solely on the basis that Tillman presented no expert testimony that St. Mary's had been negligent (i.e.) breached the accepted standard

of care (RA5-10). There was no argument raised that Tillman had failed to prove proximate cause (A5-10). This argument was raised for the first time on appeal. The Fourth District rejected the Hospital's contention that expert testimony was needed to establish the Hospital's liability, and even though not raised in the trial court by the Hospital, the court further found that there was evidence that the Hospital's supplying of mismatched components had caused injury to Plaintiff.

STATEMENT OF THE FACTS

Dr. Volz testified that Plaintiffs knee was very wobbly, the ligaments were not tight (RA11); that the knee was for all intents and purposes, totally dislocated (RA12); that Plaintiff had a gap between the femoral and tibial portion of his prosthesis (RA13); that one of the ways you make sure the ligaments are tight is to use the proper size prosthesis, which will eliminate ligamentous instability (RA14-15); that had a correctly matched prosthesis been used there would have been added stability with a lessened chance of dislocation (RA16).

Dr. Petty testified the femoral component was too small (RA17); that two small a prosthesis was used, including the small femoral component (RA18-20); that Plaintiff's knee instability was caused by either excessive bone being removed or use of too small a prosthetic device (RA18) "or a combination of those two and those two are very closely related and it is difficult to say either/or" (RA21-22); but that he was sure these were the causes of Plaintiff's problem "more likely than not" (RA19).

QUESTIONS PRESENTED

POINT I

THE FOURTH DISTRICT DID NOT ERR IN HOLDING THE LIMITATION OF LIABILITY PROVISION OF SECTION 768.54 F.S. UNCONSTITUTIONAL

POINT II

ST. MARY'S NEVER RAISED IN THE TRIAL COURT THAT PLAINTIFF FAILED TO PROVE ST. MARY'S NEGLIGENCE "MORE LIKELY THAN NOT" CAUSED INJURY TO PLAINTIFF; AND THERE WAS SUFFICIENT EVIDENCE IN ANY EVENT.

SUMMARY OF ARGUMENT

Section 758.54 is unconstitutional to the extent that it limits the amount of any judgment that can be entered against the health care provider (St. Mary's). Such limitation takes rights away from a plaintiff without providing a reasonable alternative, as is required.

St. Mary's never raised in the trial Court the argument that it was entitled to a directed verdict or new trial because there was no proof that its negligence "more likely than not" caused Plaintiff's injury. Therefore, this Court should not address the issue. In any event, sufficient evidence was presented to meet the more likely than not standard.

ARGUMENT

THE FOURTH DISTRICT DID NOT ERR IN HOLDING THE LIMITATION OF LIABILITY PROVISION OF SECTION 768.54 F.S. UNCONSTITUTIONAL

St. Mary's first argues that Plaintiff never argued that §768.54 was unconstitutional. What St. Mary's fails to point out is that in a reply brief to the appeal taken by theFund, St. Mary's contended, for the first time on appeal that if the judgment was reversed as to the Fund, the Judgment against the Hospital should be limited to $100,000. This was an issue interjected into the appeal by St. Mary's and therefore, was properly decided by the Fourth District.

In holding that Section 768.54(2)(b) did not in fact impose a limitation on the Plaintiff's right to have judgment entered for the full amount, and was also unconstitutional for infringing upon the inherent authority of the Court to enforce its judgment, the Fourth District in this case relied upon its prior decision in FLORIDA MEDICAL CENTER, INC., v. VON STETINA, 436 So. 2d 1022, 1028 (Fla. 4th D.C.A. 1983). That decision is presently under review by this Court, has been briefed and orally argued. One of the issues this Court will decide in VON STETINA is whether §768.54(2)(b) limits judgment against a health care provider to $100,000 and if so, whether such a provision is unconstitutional. As stated in St. Mary's brief, this issue has been thoroughly briefed and argued in VON STETINA. Tillman relies upon the briefs and arguments set forth by the Plaintiff in that case and incorporates them herein by reference.

The Fourth District correctly provided that §768.54 does not limit the amount of a judgment against the health care provider, but merely prescribes the manner of collection of the judgment. Limiting judgment against the health care provider to $100,000 would clearly be unconstitutional. The limitation of liability provision under the workman's compensation statutes and sovereign immunity statutes relied upon by St. Mary's can be easily distinguished. Under both statutes, the plaintiff was given rights that were nonexistent before. That is not true under Section 768.54, wherein the legislature has taken away rights. This Court has previously held that the legislature is not allowed to take away existing rights without providing a reasonable alternative to protect the plaintiff's rights. KLUGER v. WHITE, 281 So.2d 1 (Fla. 1973). Section 768.54 provides no such reasonable alternative. If the statute is construed as to limit any judgment that can be entered against a health care provider, then it takes away the plaintiff's rights and substitutes nothing in return. This is particularly true here where St. Mary's argument is premised upon the Fund not being liable at all.

POINT II

ST. MARY'S NEVER RAISED IN THE TRIAL COURT THAT PLAINTIFF FAILED TO PROVE ST. MARY'S NEGLIGENCE "MORE LIKELY THAN NOT" CAUSED INJURY TO PLAINTIFF; AND THERE WAS SUFFICIENT EVIDENCE IN ANY EVENT.

St. Mary's moved for a directed verdict solely arguing that Plaintiff had failed to adduce expert testimony that it was negligent at all, (i.e.) that no expert was presented to say it had breached its duty to Plaintiff (RA5-10). It was Plaintiff's

position that expert testimony on the issue of negligence was unnecessary under the caselaw of O'GRADY v. WICHMAN, 213 So. 2d 321, (Fla. 4th D.C.A. 1968); SOUTH MIAMI HOSPITAL v. SANCHEZ, 386 So.2d 39 (Fla. 3rd D.C.A. 1980); DOHR v. SMITH, 14 So. 2d 29 (Fla. 1958); STEPIEN v. BAYLOR MEMORIAL MEDICAL CENTER, 397 So. 2d 333 (Fla. 1st D.C.A. 1981); ATKINS v. HINES, 110 So. 2d 663 (Fla. 1959). This is particularly true since the furnishing of the proper equipment for an operation is the duty of a hospital, BUZAN v. MERCY HOSPITAL, INC., 203 So. 2d, 11 (Fla. 3rd D.C.A. 1967), and since the Hospital's own Manager of Surgery admitted the Hospital had the duty to ensure that the proper components of the prosthesis were given to Dr. Waxman and could not say why the components had not been checked (RA1-4).

Now, on appeal, for the first time the Hospital has raised a new and different argument not raised in the trial court, either as a basis for a Motion for a Directed Verdict or a Motion for New Trial. St. Mary's now agrees that Plaintiff failed to prove that it's negligence "more likely than not" caused any damage. Since this argument was never raised in the trial court, it should not be entertained by this Court. This court has held time and time against that it will not consider matters not presented to and ruled upon by the trial court. In Re BEVERLY, 342 So. 2e 481 (Fla. 1977); NORTHEAST POLK COUNTY HOSP. DIST. v. SNIVELY, 162 So. 2d 657 (Fla. 1964); LIPE v. CITY OF MIAMI, 141 So. 2d 738 (Fla. 1962); STEIN v., BROWN PROPERTIES INC., 104 So.2d (Fla. 1958); MARIANI v. SCHLEMAN 94 So. 2d 829 (Fla. 1957).

St. Mary's argument that it was entitled to a directed verdict because there was no evidence that its negligence more likely than not caused injury to the Plaintiff relies upon GOODING v. UNIVERSITY HOSPITAL BUILDING, INC., 445 So.2d 1015 (Fla. 1948) and GREEN v. FLUWELLING, 366 So.2d 77 (Fla. 2nd D.C.A. 1978). Those cases hold that a plaintiff must show that his injury resulted from a defendant's negligence "more likely than not". This was demonstrated in the present case. Dr. Volz' testimony was that had correctly matched parts of the prosthesis been used Plaintiff would have had less instability and a lessened chance of dislocation, which is the condition that occurred after the mismatched parts were placed in Plaintiff's knee (RA16). This testimony alone was sufficient to establish the mismatched parts as a proximate cause of damage to Plaintiff "more likely than not".

Dr. Petty also testified that either two small a prosthesis or excessive bone was removed, "or a combination of the two and those two are very closely related and it is difficult to say either/or" (R21-22). However, he was sure that these factors were "more likely than not" the causes of Plaintiff's knee instability (RA19).

It is evident that the evidence in this case was that the mismatched parts had caused some of the Plaintiff's knee instability. The removal of too much bone was also causing knee instability. The testimony was that these were the causes, "more likely than not" and it was for the jury to determine to what extent each cause was contributing to Plaintiff's injury.

CONCLUSION

The Fourth District's holding that §768.54 F.S. is unconstitutional should be affirmed. The "more likely than not" argument was not raised in the Trial Court and cannot be raised by St. Mary's at the Appellate level. In any event, there was ample evidence to establish that the mismatched components caused injury to Plaintiff "more likely than not".

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: RICHARD B. COLLINS, P. O. Drawer 5286, Tallahassee, FL 32314; ROBERT M. KLEIN, One Biscayne Tower, Suite 2400, Miami, FL 33131; L. MARTIN FLANAGAN, P. O. Drawer E, WPB, FL 33402; DAVID CROW, Suite 500-Barristers Bldg., 1615 Forum Place, WPB, FL 33401; FRED HAZOURI, P. O. Box 3466, WPB, FL 33402; and to MICHAEL DAVIS, Post Office Box 2966, WPB, FL 33402, this 17th day of MAY, 1984.

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