IN THE SUPREME COURT OF FLORIDA

ST. MARY'S HOSPITAL,

Petitioner,
Appellant.

vs.

CASE NO. 65,997
65,998

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

Respondents,
Appellees.
_____/

CONSOLIDATED INITIAL BRIEF ON DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, AND ON APPEAL TO THE SUPREME COURT OF FLORIDA

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SUMMARY OF ARGUMENT

POINT I

The issue presented to this Court is the constitutionality of the limitation of liability provisions contained in Florida Statute 768.54. Since the Plaintiff, JOSEPH TILLMAN, did not assert the unconstitutionality of this statute it is suggested that any issue has been abandoned or has not been preserved on appeal. Florida First National Bank at Key West v. Fryd Construction Corporation, 245 So. 2d 883, 888 (Fla 3rd DCA 1971).

The Fourth District in declaring the limitation of liability unconstitutional relied upon its decision in Florida Medical Center, Inc. v. Von Stetina, 436 So. 2d 1022 (Fla 4th DCA 1983). Contrary to Von Stetina, it is suggested that a more reasonable construction of the statute was presented by the Third District in the case of Mercy Hospital v. Menéndez, 371 So. 2d 1077 (Fla. 3rd DCA 1979) Cert. denied, 383 So. 2d 1198 (Fla 1980). In Mercy, the statue was construed as a limitation on the Plaintiff's right to recover damages and not a limitation restricting judicial authority. As a limitation on liability, the statute passes constitutional muster similar to the Workmens Compensation Statute, the Uniform Contribution Among Joint Tort Feasors Act, and the Florida sovereign immunity statutes. It does not unconstitutionally

encroach upon the rule making power or judicial authority of the court.

Additionally, this Court has previously recognized the contractual nature of the statute in question. Since the Appellant, ST. MARY'S HOSPITAL, has been required to bear the burden of their contract in regard to assessments, they should not be denied the benefits of the statute.

POINT II

The alleged negligence of ST. MARY'S HOSPITAL was its failure to check the size of the femoral component of a knee prosthesis, thereby resulting in a mismatch betwen the femoral and tibial components during surgery. There was, however, no expert testimony that this alleged negligence more likely than not caused the injury to the Plaintiff. In order for the Plaintiff to recover in a medical malpractice action, he must show that the injury more likely than not resulted from the Defendant's negligence. See e.g., Gooding v. University Hospital Building, Inc., 445 So. 2d 1015, 1020 (Fla 1984); Green v. Flewelling, 366 So. 2d 777 (2d DCA Fla 1978).

The Fourth District's holding that the action of this Defendant may have contributed to the ultimate failure of the Plaintiff's surgery is contrary and insufficient under criteria set forth by this Court in Gooding. Taken in the light of the most favorable to the Plaintiff, the

expert witnesses called did not testify that more probably than not the injury sustained by the Plaintiff was a result of the alleged mismatching of component parts. Absent such testimony, the Fourth District opinion sustaining the judgment against St. Mary's should be reversed.

STATEMENT OF FACTS

The Plaintiff, JOSEPH TILLMAN, brought a medical malpractice action against ST. MARY'S HOSPITAL and BRUCE WAXMAN, M.D., an Orthopedic Surgeon. The Plaintiff alleged that ST. MARY'S HOSPITAL was negligent in supplying the Plaintiff with a knee prosthesis femoral component of a size other than requested by the physician. It was further alleged that there was a mismatch between the femoral component and the tibial (plastic) component. (.i.e., a small femoral component and a standard tibial (plastic) component. [1] It was further alleged that this mismatch between the femoral and tibial component required the Plaintiff to undergo additional knee surgery at Shands Teaching Hospital where the prosthesis was removed and right knee compression arthrodesis was performed. Florida Patients Compensation Fund v. Tillman, 453 So. 2d 1376 (4th DCA Fla 1984).

In support of its position the Plaintiff first called as an expert witness by deposition Dr. William Petty, the orthopedic surgeon performing the removal of the knee prosthesis and the right knee compression arthrodesis at Shands Teaching Hospital. Dr. Petty testified that the Plaintiff had a failed knee replacement most likely due to

[1] It should be noted that there was no allegation against ST. MARY'S HOSPITAL that the tibial (plastic) component was other than the size as requested by the physician.

instability (A-1). As to the causes of the instability, Dr. Petty was of the opinion that during surgery either excessive bone was removed or too small a prosthesis (tibial and femoral) was put in place (A-2, 3). Although Dr. Petty felt that the prosthesis (both tibial and femoral) was too small, he did not testify that there was mismatch causing instability (i.e., small femoral and standard tibial). Although Dr. Petty felt that the femoral component was "smaller than ideal" he did not state that it was a small compared to a standard nor did he state that there was a mismatch between the femoral and tibial components (A-4, 5). When specifically asked "Do you have an opinion as to whether those two components [femoral and tibial] were, in fact, mismatched?" Dr. Petty replied "No". (A-5). Dr. Petty also testified that a "thicker tibial component" would have made the knee more stable. (A-6). Likewise, he stated that he attempted to place a thicker tibial component into the knee during surgery but was unable to succeed. (A-6). Dr. Petty was also of the opinion that the ultimate responsibility for the right size prosthesis was that of the surgeon. (A-7).

In addition to Dr. Petty, the Plaintiff also called as a witness Dr. Robert Volz. Dr. Volz testified that there was only one condition by which the prosthesis could be failing and that was that the ligaments were not tight

enough to hold the component parts together resulting in an extremely unstable knee (A-8, 9). It was Dr. Volz's opinion that the ultimate responsibility of the instability was the operating surgeon. (A-10). Specifically, it was Dr. Volz's opinion that either too much bone was removed or not thick enough plastic component (tibial) was inserted. (A-11). Predicated upon a hypothetical question, Dr. Volz did say that if a standard femoral component were used with a standard tibial component there would be "some added measure of stability" over what would be observed when a small femoral component was mated with a standard tibial component." (A-12, 13). Nevertheless, the doctor testified that any issue of mismatching might not have been a problem at all if the physician had used a wider piece of plastic (tibial component). The critical deficiency in Dr. Volz's opinion was the improper sized tibial component. (A-14, 15, 16).

POINT I

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THE LIMITATION OF LIABILITY PROVISIONS OF FLORIDA STATUTE 768.54 UNCONSTITUTIONAL.

The Plaintiff, JOSEPH TILLMAN, did not assert the unconstitutionality of the limitation of liability provisions of Florida Statute 768.54 at the trial court or upon appeal. As such, it is suggested that any issue as to the constitutionality has been abandoned or has not been preserved on appeal. Florida First National Bank at Key West v. Fryd Construction Corporation, 245 So. 2d 883, 888 (Fla 3d DCA 1971).

Nevertheless, in response to ST. MARY'S HOSPITAL request that if the judgment was reversed as to the Patients Compensation Fund, the judgment against ST. MARY'S HOSPITAL should be limited to $100,000, the District Court of Appeal held:

> "ST. MARY'S HOSPITAL argues if the judgment is reversed as to the Fund, the judgment against ST. MARY'S HOSPITAL should be limited to $100,000, under §768.54, Florida Statute. However, we held in Florida Medical Center, Inc. v. Von Stetina, 436 So. 2d 1022, 1028 (Fla 4th DCA 1983) that §768.54 (2)(b), Florida Statute (1977), "imposes no substantive limitation upon the Plaintiffs right to judgment in the full amount" and found that section unconstitutional. Therefore, the Plaintiff is entitled to recover against ST. MARY'S HOSPITAL without limitation.

Florida Patients Compensation Fund, Supra at 1382.

The Von Stetina decision and specifically the constitutionality of the limitation of liability pursuant to Florida Statute 768.54 is currently under consideration by this Court. That issue has been thoroughly and ably briefed and argued before this Court. Therefore, no purpose would be served by the Appellant, ST. MARY'S HOSPITAL, merely reiterating, restating or rewriting those arguments. To the extent not inconsistent herewith, the Appellant, ST. MARY'S HOSPITAL, would therefore adopt and incorporate by reference, those matters contained in the briefs and arguments of the parties in the Von Stetina matter, asserting the constitutionality of the limitation of liability provisions of Florida Statute 768.54.

Although not set forth specifically in the instant decision, the Fourth District in Von Stetina appears to have predicated its determination as to unconstitutionality upon a finding that the statute "impermissibly encroaches upon the powers granted exclusively to the judicial branch of our government." Florida Medical Center, Inc. v. Von Stetina, 436 So. 2d 1022, 1028 (4th DCA Fla 1983). It is suggested that a more reasonable construction of the statute was presented by the Third District in the case of Mercy Hospital v. Menendez, 371 So. 2d 1077 (Fla 3rd DCA 1979), Cert. denied, 383 So. 2d 1198 (Fla 1980). There, the statute was construed as a limitation on the Plaintiff's

right to recover against a health care provider rather than any limitation restricting judicial authority. It is suggested that this is clearly a more proper reading, interpretation, and construction of the statute's intent and purpose.

As a limitation of liability provision, this statute is no more unconstitutional than the Workmens' Compensation Statute which also modifies a Defendant's common law liability. Similarly, the Uniform Contribution Among Joint Tort Feasors Acts which changes common law liability of Defendants has been held constitutional. Village of El Portal v. City of Miami Shores, 362 So. 2d 275 (Fla 1978). Also, Florida sovereign immunity statutes have limited liability of individual employees and limited the source of payment from the state or its sub-divisions. Cauley v. City of Jacksonville, 403 So. 2nd 379 (Fla 1981).

Florida Statute 768.54 does not encroach upon any rule making power or judicial authority. It merely provides for an adjustment of the substantive rights of Defendants.

This Court has previously recognized that the statute in question is in essence a contract between the Fund and its members. Department of Insurance v. Southeast Volusia Hospital District, 438 So. 2d 815 (Fla 1983). In return for paying fees and assessment as set out in the statute,

health care providers get the benefit of the limitation of liability as provided in Florida Statute 768.54 (2) (b). Although the Appellant, ST. MARY'S HOSPITAL, was so required to bear the burden of their contract in regard to assessments, the Fourth District's opinion denies them any benefit gained (i.e., limitation of liability).

This result becomes even more anomalous in the context of the present litigation. The Patients Compensation Fund takes the position before this Court that the Plaintiff is unable to have judgment against it, because the Plaintiff failed to join the Fund within the applicable statute of limitations period. Thus, should this Court sustain the Fund's position, and also determine the limitation of liability provisions unconstitutional, it could be contended that ST. MARY'S HOSPITAL has therefore lost its contract for protection for amounts above $100,000 as a result of the Plaintiff's failure to comply with the statute and through no fault of its own. Such should not be the interpretation and construction of the statute in question. To do so would frustrate the intent, purpose and meaning of legislation.

POINT II

THE DISTRICT COURT ERRED IN SUSTAINING THE JUDGMENT AGAINST ST. MARY'S HOSPITAL, SINCE THERE WAS NO EVIDENCE OF A BREACH OF STANDARD OF CARE BY ST. MARY'S HOSPITAL WHICH MORE PROBABLY THAN NOT CAUSED THE INJURY TO THE PLAINTIFF.

Predicated upon the expert testimony presented by the Plaintiff at trial, the negligence causing the injury to the Plaintiff was one or more of a combination of three things: (1) Too much bone removed; (2) a too thin a plastic component (tibial); or (3) too small a prosthesis (tibial and femoral). Since the alleged negligence of ST. MARY'S HOSPITAL was its failure to check the size of the femoral component, thereby resulting in a mismatch, there was no expert testimony that the alleged negligence of ST. MARY'S HOSPITAL caused or contributed to the injury of the Plaintiff. It was incumbent upon the Plaintiff to present expert testimony as to the negligence of ST. MARY'S HOSPITAL in causing one or a combination of the above. This the Plaintiff failed to do and thus directed verdict was appropriate. See e.g., Sasser v. Humana of Florida, Inc., 404 So. 2d 356 (Fla 1st DCA 1981).

Nevertheless, the District Court of Appeal in upholding the judgment against the Defendant, ST. MARY'S HOSPITAL, held:

> Because the fact that the Hospital failed to check the components before surgery constituted an obvious breach of duty, and because a smaller femoral component than what was ideal for the patient may have contributed to the ultimate failure of the operation, the trial court did not error in denying ST. MARY'S HOSPITAL motion for directed verdict. [Emphasis supplied]

The District Court of Appeal, in upholding the judgment against ST. MARY'S HOSPITAL, however, misapplied existing law. In order for a Plaintiff to recover in a medical malpractice action, he must show that the injury more likely than not resulted from the Defendants negligence. See. e.g., Gooding v. University Hospital Building, Inc., 445 So. 2d 1015, 1020 (Fla 1984); Green v. Flewelling, 366 So. 2d 777 (2d DCA Fla 1978).

In Gooding the Plaintiffs expert witness testified that the inaction of the emergency room staff violated accepted medical standards. That expert, however, did not testify that immediate diagnosis and surgery more likely than not would have enabled the Plaintiff to survive. Id. at 1017. This Court in upholding the District Court reversal of the trial court's denial of a motion of directed verdict held "the Plaintiff must show that the injury more likely than not resulted from the Defendants negligence in order to establish a jury question on proximate cause." Id. at 1020. As indicated by this

court in Gooding, the mere possibility of such causation is not enough and when the matter remains one of true speculation or conjecture or if the possibilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the Defendant. Id. at 1018.

Similarly, in Green supra, the Plaintiff claimed that he had lost his ability to smell and taste as a result of an automobile accident. In upholding a trial court's order setting aside a jury verdict for the Plaintiff, the Second District held that "the evidence at best raises a mere possibility of legal causation and nothing more". Id.at 781. Such a possibility of causation was held by the court to be insufficient to allow a claimant to recover."

The Fourth District's holding that the actions of this Defendant "may have contributed" to the ultimate failure of the Plaintiff's surgery is clearly contrary and insufficient under the criteria and standards set forth by this court in Gooding. Presumably in so holding the Fourth District Court of Appeal followed its decision in Dawson v. Weems, 352 So. 2d 1200 (4th DCA Fla 1978). That decision, however, was expressly repudiated by this court in Gooding.

Taken in the light most favorable to the Plaintiff, the expert witnesses called by the Plaintiff did not testify that more probably than not the injury sustained by the Plaintiff was the result of the alleged mismatching

of component parts. To the contrary, both experts testifying for the Plaintiff placed critical deficiencies upon the operating surgeon. Although Dr. Volz did testify predicated upon a hypothetical question that a standard femoral with a standard tibial would offer somewhat more stability than a small femoral and standard tibial component, he did not testify that any alleged mismatch more probably than not caused the failure of Plaintiff's surgery. Absent such testimony, the Fourth District's opinion sustaining the judgment against ST. MARY'S HOSPITAL was erroneous.

CONCLUSION

For the reasons stated herein, the decision of the Fourth District Court of Appeals should be reversed and judgment be entered in favor of the Defendant, ST. MARY'S HOSPITAL. Likewise, the District Court's opinion as to the unconstitutionality of Florida Statute 768.54 should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 28th day of March, 1985, to: EDNA CARUSO, ATTORNEY, 1615 Forum Place, Suite 4B, West Palm Beach, FL 33401 (hand delivered), and a copy mailed to MICHAEL B. DAVIS, ESQ., Post Office Box 2966, West Palm Beach, FL 33402; PHILLIP HOUSTON, ESQ., Post Office Box 1427, West Palm Beach, FL 33402; ROBERT M. KLEIN, ESQ., One Biscayne Tower, Suite 2400, Miami, FL; and RICHARD B. COLLINS, ESQ., Post Office Drawer 5286, Tallahassee, FL 32314.

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