

IN THE SUPREME COURT OF FLORIDA

ST. MARY'S HOSPITAL,  
Petitioner,

vs.

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

CASE NO. 65,998  
65,997  
FILED  
OCT 24 1994  
CLERK, SUPREME COURT  
By \_\_\_\_\_  
Chief Deputy Clerk

ON PETITION TO INVOKE DISCRETIONARY  
REVIEW OF A DECISION OF THE  
DISTRICT COURT OF APPEAL OF FLORIDA,  
FOURTH DISTRICT

PETITIONER'S INITIAL BRIEF ON JURISDICTION

PAXTON, CROW, BRAGG & AUSTIN, P.A.  
1615 Forum Place  
Barristers Bldg, Suite 500  
Post Office Drawer 1189  
West Palm Beach, FL 33402  
(305) 684-2121

DAVID F. CROW  
Attorney for Petitioner, ST. MARY'S  
HOSPITAL

TABLE OF CONTENTS

	<u>PAGE</u>
Statement of Case and Facts	1
Argument:	
THE DISTRICT COURT'S OPINION IS IN DIRECT AND EXPRESS CONFLICT WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.	4
Conclusion	8
Certificate of Service	9

ROBERTA BOND  
SOUTH BETH CO. U.S.A.  
20% COTTON FIBER

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Dawson v. Weemes,</u> 352 So. 2d 1200 (4th DCA Fla. 1978)	5
<u>Florida Medical Center, Inc. v.</u> <u>Von Stetina,</u> 436 So. 2d 1022, 1028 (Fla. 4th D.C.A. 1983)	7
<u>Gooding v. University Hosp. Bldg., Inc.</u> 445 So. 2d 1015 (Fla. 1984)	4
<u>Greene v. Flewelling,</u> 366 So. 2d 777 (2d DCA Fla. 1978)	4

RACERASE BOND

SOUTHWORTH CO. U.S.A.

25% COTTON FIBER

STATEMENT OF CASE AND FACTS

This matter arises out of a petition by St. Mary's Hospital to Invoke Discretionary Jurisdiction in order to review the direct and express conflict between the decision of the Fourth District Court of Appeal below and decisions of this Court and other District Courts of Appeal that have addressed the same issue. [Case Number 65,997] ST. MARY'S also has filed Notices of Appeal [Case Number 65,998] seeking a review of the decision of the District Court of Appeal Fourth District declaring invalid a State Statute. By Order of this Court dated October 12, 1984, the above entitled cases were consolidated for all appellate purposes.

The Plaintiff, JOSEPH TILLMAN, brought a medical malpractice action against ST. MARY'S HOSPITAL and BRUCE WAXMAN, M.D., an orthopedic surgeon. The allegation relative to ST. MARY'S HOSPITAL was that it was negligent in supplying the Plaintiff with the wrong size femoral component than as requested by the physician. (App.8) As a result, it was 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]. (App. 5-9). It was further alleged that as a result of the improper

femoral component the Plaintiff was required to undergo additional knee surgery at Shands Teaching Hospital where the prosthesis was removed and a right knee compression arthrodesis was performed. (App. 2, 5).

In support of its position the Plaintiff called as an expert witness Doctor William Petty, the orthopedic surgeon performing the removal of the knee prosthesis at Shands Teaching Hospital. (App. 5). Dr. Petty felt that the Plaintiff had a failed knee replacement most likely due to instability. (App. 5). As to the causes of the instability, Dr. Petty testified that either during surgery excessive bone was removed or that too small a prosthesis (tibial and femoral) was put in place, or a combination of the two. Although Dr. Petty felt that the prosthesis (both tibial and femoral) was too small, he did not testify that there was a mismatch. (i.e., small femoral and standard tibial) causing instability. (App. 5-6). 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. (App. 5-6).

The Plaintiff also called, by video tape deposition, Dr. Volz. Dr. Volz's opinion was that either too much bone was removed or not thick enough plastic

(tibial) component was inserted. (App. 6). Although Dr. Volz did testify that a mismatch between a femoral and tibial component would not provide as much stability as using a standard tibial and standard femoral component, he stated that the issue of mismatching would not have been a problem had a wider piece of plastic (tibial) been used by the physician. (App. 6).

GA. HERRING & CO. INC.  
SOUTH BEND, IN. U.S.A.  
100% COTTON FIBRE

ARGUMENT

POINT ON APPEAL

THE DISTRICT COURT'S OPINION IS IN DIRECT AND EXPRESS CONFLICT WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

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 of 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 err in denying ST. MARY'S motion for directive verdict." [Emphasis Supplied]

The District Court of Appeal opinion is in direct and express conflict with this Court's decision in Gooding v. University Hosp. Bldg., Inc., 445 So. 2d 1015 (Fla. 1984). It is also in direct and express conflict with the District Court of Appeal of Florida, Second District in Greene v. Flewelling, 366 So. 2d 777 (2d DCA Fla. 1978).

In Gooding Plaintiff's expert witness testified that the inaction of the Emergency Room staff violated accepted medical standards. The Plaintiff's expert witness, however, failed to testify that immediate diagnosis and surgery more likely than not would have enabled Mr. Gooding to survive. Id. at 1017. In up-

holding the District Court's reversal of the trial court's denial of a motion for Direct Verdict; this Court held "The Plaintiff must show that the injury more likely than not resulted from the Defendant's negligence in order to establish a jury question on approximate cause." Id. at 1020. As indicated by this Court in Gooding, the mere possibility of such causation is not enough and when a 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. The Fourth District Court of Appeals is holding that the alleged action of this Defendant may have contributed to the ultimate failure of the Plaintiff's surgery is insufficient. In so holding the Fourth District Court of Appeal followed its decision in Dawson v. Weemes, 352 So. 2d 1200 (4th DCA Fla. 1978). The decision in Dawson, however, was expressly repudiated by this Court in Gooding. Id. at 1019.

The Fourth District Court's decision is also in direct and express conflict with the District Court of Appeal of Florida Second District in Greene v. Flewelling, 366 So. 2d 777 (2d DCA Fla. 1979). In Greene the Plaintiff claimed that he had lost his ability to smell and taste as a result of an automobile accident. In upholding the trial court's order setting aside a jury verdict for the Plaintiff

RACERASE BOARD

SOUTHWORTH 500 U.S.A.

25% COTTON FIBER



WORTH OILS & CHEMICALS  
20% COTTON FIBER

the Court found that the "evidence at best raises a mere possibility of legal causation and nothing more." Id. at 781. The possibility of causation was held by the Court insufficient to allow a claimant to recover. Id. Such is the case at bar. The District Court's opinion allows recovery for the "possibility" that the actions of the Defendant ST. MARY'S contributed to the ultimate failure of the knee replacement surgery.

The expert testimony presented concerning the negligence causing the injury to the Plaintiff was one or more 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 mis-match, there was no expert testimony that the negligence of ST. MARY'S more probably than not caused the injury to the Plaintiff. As such, the decision of the District Court of Appeal is in direct and express conflict with this Court's decision in Gooding v. University Hospital, etc., and the Second District Court of Appeal decision in Greene v. Flewelling.

It should be noted that in addition to the Petition for Discretionary Review, the Petitioner, ST. MARY'S, has also filed a Notice of Appeal in regard to the initial declaring of a State Statute invalid. Specifically,

RAUER & BOND

TRACERASE BOND

the Fourth District Court of Appeal in its opinion  
determined that Plaintiff was entitled to recover against  
ST. MARY'S without limitations. Florida Medical Center,  
Inc. v. Von Stetina, 436 So. 2d 1022, 1028 (Fla. 4th D.C.A.  
1983).

CONCLUSION

The Petitioner recognizes that in the majority of situations decisions of the District Courts of Appeal should be final. However, the decision of the Fourth District Court of Appeal in the present litigation is clearly contrary to and expressly in conflict with decisions of this Court on a similar issue. Therefore, the Supreme Court acting in its supervisory capacity should interject in this matter to preserve the uniformity of legal principle and decisions throughout the State of Florida.

PAXTON, CROW, BRAGG & AUSTIN, P.A.  
1615 Forum Place  
Barristers Bldg, Suite 500  
P. O. Drawer 1189  
West Palm Beach, FL 33402  
(305) 684-2121

BY: 

DAVID F. CROW

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Jurisdiction was furnished by mail this 19th day of October, 1984, to: STUART E. KOCHA, ESQUIRE, Post Office Box 1427, West Palm Beach, FL. 33402; EDNA CARUSO, ATTORNEY, 1615 Forum Place, Suite 4-B, West Palm Beach, Fl. 33401; ROBERT M. KLEIN, ESQUIRE, One Biscayne Tower, Suite 2400, Miami, FL 33131; FRED HAZOURI, ESQUIRE, Post Office Box 3466, West Palm Beach, FL 33402; MICHAEL DAVIS, ESQUIRE, Post Office Box 2966, West Palm Beach, FL 33402; L. MARTIN FLANIGAN, ESQUIRE, Post Office Drawer E, West Palm Beach, FL 33402; and RICHARD B. COLLINS, ESQUIRE, Post Office Drawer 5286, Tallahassee, FL 32314.

PAXTON, CROW, BRAGG & AUSTIN, P.A.  
1615 Forum Place  
Barristers Bldg, Suite 500  
Post Office Drawer 1189  
West Palm Beach, FL 33402  
(305) 684-2121

Attorney for Petitioner,  
ST. MARY'S HOSPITAL

BY

  
DAVID F. CROW, ESQUIRE