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IN THE SUPREME COURT OF FLORIDA

CASE NOS: 65,997
65,998

ST. MARY'S HOSPITAL,

Petitioner,

vs.

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

Respondents.

_____/

REPLY BRIEF OF ST. MARY'S HOSPITAL
ON THE MERITS TO BRIEF OF RESPONDENT TILLMAN

ROSEMARY COONEY
PAXTON CROW & BRAGG, P.A.
Barristers Building
1615 Forum Place, Suite 500
West Palm Beach, Florida 33401
(305) 684-2121
Attorneys for Petitioner

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POINT I

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

Section 768.54, Florida Statutes, which shifts the obligation to pay any judgment in excess of $100,000.00 from the health care provider to the Fund, is constitutional.

POINT II

ST. MARY'S RAISED IN THE TRIAL COURT THAT THERE WAS NO EVIDENCE OF A BREACH OF STANDARD OF CARE BY ST. MARY'S HOSPITAL WHICH CAUSED INJURY TO THE PLAINTIFF.

Since there was no testimony to show that ST. MARY'S HOSPITAL had breached the standard of care which "more likely than not" caused Plaintiff's injuries, the Fourth District Court's opinion should be reversed. ST. MARY'S HOSPITAL moved for a directed verdict based on the Plaintiff's failure to prove negligence on the part of ST. MARY'S HOSPITAL that caused Plaintiff's injuries. In upholding the judgment against ST. MARY'S HOSPITAL, the Fourth District Court of Appeal incorrectly failed to use the "more likely than not" standard.

ARGUMENT

POINT I

The Fourth District, in holding that Section 768.54 (2)(b) was unconstitutional and did not impose a limitation on Plaintiff's right to have judgment entered for the full amount, relied upon its prior decision in Florida Medical Center, Inc., v. Von Stetina, 436, So.2d 1022 (Fla. 4th DCA 1983). The Supreme Court recently reversed the Fourth District's opinion, and specifically upheld the constitutionality of this provision. See Florida Medical Center, Inc. v. Von Stetina, ___ So.2d ___ 10 FLW 286, opinion filed May 6, 1985 (Fla. 1985). Thus, the Fourth District's opinion should be reversed and the statutory limitation should be imposed on Plaintiff's judgment as to ST. MARY'S HOSPITAL.

POINT II

Plaintiff argues that ST. MARY'S HOSPITAL never raised in the trial Court Plaintiff's failure to prove the Hospital's negligence "more likely than not" caused injury to Plaintiff. ST. MARY'S HOSPITAL moved for a directed verdict based on Plaintiff's failure to present expert testimony as to the Hospital's negligence which led to Plaintiff's injuries. The Fourth District Court of Appeal, in upholding the judgment against ST. MARY'S HOSPITAL, considered the causation issue and found that the Hospital's obvious breach of duty "may have"

contributed to Plaintiff's damages.

Plaintiff argues numerous decisions recognizing certain exceptions to the proposition that a patient must produce expert testimony in order to create an issue for the jury in a medical negligence case. These exceptions are inapplicable to the facts of the instant case. The three purported bases for the instability of Plaintiff's knee, according to Plaintiff's own experts, do not relate to common knowledge nor negligent administration of an approved medical treatment. Thus, there was no testimony establishing negligence on ST. MARY'S HOSPITAL which caused Plaintiff's injuries.

Plaintiff agrees that his burden was to show that his injury "more likely than not" resulted from ST. MARY'S HOSPITAL'S negligence, but argues that the burden was met. While Dr. Volz testified that the alignment of the component parts was grossly unsatisfactory, Dr. Volz's opinion was that either too much bone was removed or not a thick enough plastic tibial component was inserted. He did not testify that the alleged mismatch "more likely than not" caused the surgical failure. (See Plaintiff's RA-11-16 and St. Mary's A-8-16). While Dr. Petty testified that the prosthesis was too small or that too much bone was removed, he did not testify that there was a mismatch that "more likely than not caused Plaintiff's instability. (See St. Mary's A1-7).

Moreover, both experts placed ultimate responsibility upon the operating surgeon. Since 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, Plaintiff failed to establish negligence on ST. MARY'S HOSPITAL which "more likely than not" caused Plaintiff's injuries.

CONCLUSION

The Fourth District's holding that Section 768.54, Florida Statutes is unconstitutional should be reversed in accord with the Supreme Court's recent decision in Florida Medical Center, Inc. v. Von Stetina, supra.

Since there is no evidence establishing negligence on the part of ST. MARY'S HOSPITAL which "more likely than not" resulted in Plaintiff's injury, the Fourth District Court of Appeal opinion should be reversed and judgment entered in favor of ST. MARY'S HOSPITAL.

Respectfully submitted,

Rosemary Cooney

ROSEMARY COONEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 11th day of June, 1985 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.A. Drawer E, West Palm Beach, FL 33402; FRED HAZOURI, P. O. Box 3466, West Palm Beach, FL 33402; MICHAEL DAVIS, 1655 Palm Beach Lakes Boulevard, West Palm Beach, FL 33401; KOCHA & HOUSTON, P.A., P. O. Box 1427, West Palm Beach, FL 33402 and EDNA L. CARUSO, 1615 Forum Place, Suite 4B, West Palm Beach, Fl 33401.

PAXTON CROW & BRAGG, P.A.
Barristers Building
1615 Forum Place, Suite 500
West Palm Beach, Florida 33401
(305) 684-2121

By Rosemary Cooney
ROSEMARY COONEY