IN THE SUPREME COURT OF FLORIDA

CASE NOS: 65,998
65,997

ST. MARY'S HOSPITAL,

Petitioner,

v.

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

Respondents.

BRIEF OF RESPONDENT/TILLMAN

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INDEX

	PAGE
CITATIONS OF AUTHORITY	i
PREFACE	1
STATEMENT OF THE CASE	1-2
STATEMENT OF THE FACTS	2-3
ARGUMENT	3-5
THE DISTRICT COURT'S OPINION IS NOT IN DIRECT AND EXPRESS CONFLICT WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.	
CONCLUSION	5
CERTIFICATE OF SERVICE	6

CITATIONS OF AUTHORITY

FLORIDA MEDICAL CENTER, INC. v. VON STETINA 436 So.2d 1022 (Fla. 4th DCA 1983)	4
§768.54(2)(b) F.S.	5

PREFACE

St. Mary's Hospital has filed both an appeal and a Notice to Invoke Discretionary Jurisdiction based upon an alleged express and direct conflict between the Fourth District's decision and other Florida Appellate decisions. The parties will be referred to by their proper name. The following symbol will be used:

(A) Petitioner's Appendix

(RA) Respondent's Appendix

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."

Tillman brought a medical malpractice action against both St. Mary's Hospital and Dr. Waxman. It was alleged that St. Mary's was negligent in supplying the wrong prosthetic knee; and that Dr. Waxman was negligent in implanting the wrong prosthetic knee, and was also negligent in the operative procedure and subsequent care and treatment of Tillman.

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).

At trial the Hospital moved for a directed verdict solely on the basis that Tillman presented no expert testimony that St. Mary's had breached the accepted standard of care (RA5-10). There was no argument raised that Tillman had failed to prove proximate cause. 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 (RA8-9), and further found that there was evidence that the Hospital's supplying of mismatched components had caused injury to Plaintiff.

The Hospital seeks review of the Fourth District's decision claiming that it directly conflicts with GOODING v. UNIVERSITY HOSPITAL BUILDING, INC., 445 So.2d 1015 (Fla. 1984) and GREENE v. FLEWELLING, 366 So.2d 777 (Fla. 2d DCA 1978).

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).

ARGUMENT

THE HOSPITAL'S PETITION TO INVOKE DISCRETIONARY JURISDICTION

THE DISTRICT COURT'S OPINION IS NOT IN DIRECT AND EXPRESS CONFLICT WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

The Fourth District's decision does not directly conflict with GOODING or GREENE. 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 (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 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.

There is no direct conflict between the Fourth District's decision and the GOODING and GREENE cases. The evidence in this case established "more likely than not" that the mismatched prosthesis contributed to Plaintiff's knee instability.

THE HOSPITAL'S APPEAL

The Hospital filed an appeal which was consolidated with the Petition to Invoke Discretionary Jurisdiction. The Fourth District rejected St. Mary's argument that its liability was limited to $100,000 under §768.54(2)(b) F.S., relying upon its prior decision in FLORIDA MEDICAL CENTER, INC. v. VON STETINA, 436 So.2d 1022 (Fla. 4th DCA 1983) that that section of the statute was unconstitutional. The VON STETINA case is pending before this Court and has previously been argued. One of the issues addressed in that case is the constitutionality of

§768.54(2)(b). The Court's ruling in that case will be controlling here.

CONCLUSION

There is no direct and express conflict between the Fourth District's decision and other Florida appellate decisions. Therefore, this Court does not have jurisdiction to hear the merits of this Petition. This Court's decision in VON STETINA on the constitutionality of §768.54(2)(b) will be controlling in this case. This Court should enter an order denying the Petition to Invoke Discretionary Jurisdiction and stay the appeal until resolution of the VON STETINA case.

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, 1615 Forum Place, WPB, FL 33401, this 13th day of NOVEMBER, 1984.

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