IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 66,025

BRUCE WAXMAN,

Petitioner,

v.

JOSEPH TILLMAN, et al.,

Respondents.

BRIEF OF RESPONDENT TILLMAN ON JURISDICTION

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CITATIONS OF AUTHORITY

PREFACE

Dr. Waxman has filed a Petition to Invoke this Court's discretionary jurisdiction alleging an express and direct conflict between the Fourth District's decision and other Florida appellate decisions. The parties will be referred to by their proper names. The following symbols 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 jury found all parties negligent with the negligence apportioned as follows: Dr. Waxman, 80%; St. Mary's 8%; and Plaintiff 12% (A3). Plaintiff's damages were found to be $150,000 (A3).

Dr. Waxman appealed to the Fourth District contending that the trial court should have granted his Motion for Summary Judgment and Motion for Directed Verdict based upon the Statute of Limitations (A3). The Fourth District affirmed not only because Plaintiff had been unaware of any damage

from the mismatched components until within two years of suing Dr. Waxman, but also because there was evidence that Dr. Waxman had removed too much bone in inserting the prosthesis or used to small a prosthesis (A5-7). As to the latter there was no way Plaintiff would have known of this until after his knee was reoperated upon and the prosthesis was removed (A7). Even Dr. Waxman's counsel conceded that Plaintiff would not have known that too much bone was removed (A7).

Dr. Waxman seeks review of the Fourth District's decision claiming that it directly conflicts with other Florida appellate decisions.

STATEMENT OF THE FACTS

FACTS RELEVANT TO POINT I

Dr. Volz testified that after insertion of the mismatched components, Plaintiff's knee was very wobbly, the ligaments were not tight (AA11); 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); and that had a correctly matched prosthesis been used there would have been added stability with a lessened chance of dislocation (RA16).

Dr. Petty testified that the femoral component was too small (RA17); that too 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).

FACTS RELEVANT TO POINT II

On April 12, 1978, Plaintiff had a total knee replacement in his right leg. Dr. Waxman performed the surgery at St. Mary's Hospital. The day after the operation Dr. Waxman discovered that he had used a prosthesis with mismatched parts. The femoral component (upper part) was a size "small". The tibial component (lower part) was a size "standard".

Dr. Waxman spoke with the manufacturer's engineer, whom he claimed told him that the total knee would work fine with the mismatched parts (RA24). The engineer thought there would be a slight impingement on the tibial spines, but that this would be resolved by cold flow, a substance like high-density polyethylene that would move and reshape over time (RA24-26). Dr. Waxman also felt that the cold flow would correct the problem (RA27). By April 15, 1978, Dr. Waxman made the decision that the total knee replacement would probably work. He decided to leave it in and see what happened (RA28-29). Dr. Waxman testified that it was not clear to him that the prosthesis would not work, even with the mismatch. He felt it was best to give the prosthesis a chance (RA30), and therefore he put off an operation to remove the prosthesis. He wanted to see if the total knee would work once Plaintiff rehabilitated himself and restored his leg muscles and started getting about (RA31). He also wanted to see if the cold flow would resolve any problem with regard to impingement (RA31). Dr. Waxman decided not to remove the prosthesis until he was absolutely sure that Plaintiff needed surgery (RA35).

Dr. Waxman informed Plaintiff that he had implanted mismatched parts on April 18, 1979 (RA32). He admitted that he did not think Plaintiff, who had a

forth grade education, quite understood what he was trying to tell him (RA33). Dr. Waxman admitted that he told Plaintiff that the total knee would probably work well but that if it did not it could always be fixed later (RA33).

Dr. Waxman saw Plaintiff on three occasions after the surgery, June 23, 1978, September 22, 1978 and January 11, 1979 (RA36). He testified that at those times he did not feel Plaintiff needed to have the total knee removed (RA35,37), and could not say that the prosthesis was a failure (RA38). He did not feel Plaintiff was doing as well as normal, but felt that he was still gradually improving (RA38). Dr. Waxman hoped that the total knee would continue to improve (RA38). Dr. Waxman admitted that on each of the occasions he saw Plaintiff post-surgery, he told Plaintiff that he was improving (RA39).

Plaintiff admitted that Dr. Waxman had told him about the mismatched parts, but Dr. Waxman had also told him he thought the implant was going to be allright (RA40). Whenever Plaintiff mentioned to Dr. Waxman that he thought he was getting worse, the doctor would tell him that the total knee was going to work and that he was doing fine (RA40).

Dr. Waxman continually assured Plaintiff that he was gradually improving (RA41); that he was doing fine (RA42); that he did not think they should reoperate; that the total knee would work (RA41); and that they should continue to try to increase his strength so that they would know over time whether the knee was going to work (RA41).

Plaintiff finally saw another doctor, Dr. Ennis, in January or February of 1979. It was not until then that he realized he was going to need the implant removed (RA43-44).

Plaintiff testified that although he felt like his knee was not getting better, because of Dr. Waxman's reassurances, he had followed Dr. Waxman's "wait and see" approach:

> I had to go by what he said. . .I got to take him by his words, I am not a medical doctor or something. (RA45).
>
> Had to go by what he said. He told me he believed they gave him the wrong thing to put in my knee, but he hoped that time would work (RA46).

The testimony of Plaintiff's physical therapist reaffirmed how Dr. Waxman had reassured Plaintiff he was doing well, that things were looking good and that his continual problems were "just weaknesses" (RA47-48). He verified that Dr. Waxman had also told Plaintiff that his knee was the most difficult he had ever done, and "that is why it is taking so long" (RA49).

POINT I

> THE FOURTH DISTRICT'S DECISION DOES NOT DIRECTLY CONFLICT WITH GOODING v. UNIVERSITY HOSPITAL BUILDING, INC., 445 So.2d 1015 (Fla. 1984), OR GREENE v. FLEWELLING, 366 So.2d 777 (Fla. 2d DCA 1978).

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 too 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" (RA21-22). 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.

Dr. Waxman's entire argument is based upon an incorrect statement of the evidence at trial. Dr. Petty and Dr. Volz clearly did not testify that the removal of too much bone and using too small a prosthesis, in addition to mismatched components, were mere possibilities of Plaintiff's damages.

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.

POINT II

THE FOURTH DISTRICT'S DECISION DOES NOT DIRECTLY CONFLICT WITH CITY OF MIAMI v. BROOKS, 70 So.2d 306 (Fla. 1954); KELLERMEYER v. MILLER, 427 So.2d 343 (Fla. 1st DCA 1983); WILHELM v. TRAYNOR, 434 So.2d 1011 (Fla. 5th DCA 1983) and HOWARD v. MINNESOTA MUSKIES, 420 So.2d 653 (Fla. 3d DCA 1982).

Dr. Waxman argues that since Plaintiff had difficulty with his knee after the surgery he was on notice of his cause of action, although he was not aware of the full extent of his injury. To the contrary, the evidence showed that Plaintiff did not know whether he had been damaged or not. While Plaintiff did encounter difficulty after the operation, Dr. Waxman told Plaintiff that his continual problem was just weakness (RA47-48); that the only reason his recovery was taking so long was because this knee operation was the most difficult one he had ever done (RA49); that he was doing well; that his knee was improving, and was going to work (RA39-40); that he was doing fine (RA40),

that the implant was going to be allright (RA40); and that the total knee would work (RA41).

Dr. Waxman also advised Plaintiff that they should not reoperate but should adopt a "wait and see" approach in order to finally determine whether the total knee was going to work (RA41,46).

The statute of limitations issue was clearly for the jury. In SWAGEL v. GOLDMAN, 393 So.2d 65 (Fla. 3d DCA 1981) the district court reversed a summary judgment in favor of the physician in a medical malpractice case. The court held that where the patient testified that his doctor had continued to treat him for one year after the patient became incontinent after surgery, and that the doctor led him to believe that the condition was temporary and would clear up, there was a question of fact as to the date the patient discovered or should have discovered that his condition was permanent and was the result of the doctor's negligence so as to start the running of the statute of limitations.

Dr. Waxman's approach was a "wait and see" approach. He told Plaintiff that in time his knee would work (RA46). It was only through the passage of time that Plaintiff discerned that his condition was not a temporary condition from which he was going to recover, but was a permanent condition. Therefore, Plaintiff really did not know he had sustained an injury until it became apparent that the total knee was not going to work, and that he was going to have to have it removed. This was at the earliest in January 1979, when he last saw Dr. Waxman and began seeing Dr. Ennis. Dr. Waxman was joined as a defendant in this case well within two years of that date.

Another case holding that no cause of action arises until the plaintiff has knowledge that he has sustained a permanent injury is BROOKS v. CERRATO, 355 So.2d 119 (Fla. 4th DCA 1978). In that case during an operation a portion

of the deltoid nerve in the plaintiff's neck was damaged. As a result, she sustained paralysis of the right arm, which was attributed by her doctor to an unexpected weakness after surgery. Sometime later, she was told by another doctor that she could not use her arm because of the damaged nerve. The plaintiff sued her doctor more than two years after the operation and the trial court granted a summary judgment based upon the statute of limitations. The appellate court reversed finding that although the plaintiff had known that her arm was paralyzed, the defendants had not conclusively shown that she discovered, or should have discovered, prior to being told by another doctor, that her condition was other than a temporary post-operative symptom.

The present case is also akin to JOHNSON v. MULLEE, 385 So.2d 1038 (Fla. 1st DCA 1980). In that case the plaintiff brought a medical malpractice action against a doctor for failure to diagnose breast cancer. The First District reversed a summary judgment in favor of the doctor finding that at the time the radical mastectomy was performed, the plaintiff had no cause of action against the doctor because there was no evidence that his alleged negligence had resulted in any harm to her. Had the doctor discovered the cancer when he had examined her, she would have been required to undergo the same radical mastectomy. It was only in a number of years later, when the cancer appeared in other parts of her body "that she discovered her cause of action". It was only then that she could have known that she had been harmed by the alleged negligent diagnosis. Accordingly, the court held that the decedent's cause of action would not have accrued until she discovered the injury.

In the present case, because of Dr. Waxman's "wait and see" approach to Plaintiff's condition, and his assurances that everything would be fine with time, Plaintiff did not discover that he had sustained an injury until enough

time had passed that it became apparent that the total knee was not going to work. Even Dr. Waxman admitted that when he last saw Plaintiff in January of 179, he did not feel the total knee needed to be removed and felt that Plaintiff was still improving (RA38,35,37). He admitted that it was since January of 1979 that he understood things had gotten worse (RA38).

The present case is controlled by the above cases. The Fourth District's decision clearly does not directly conflict with the decisions relied upon by Dr. Waxman. Plaintiff brought this lawsuit when Dr. Waxman's "wait and see" approach resulted in the ultimate conclusion that the implant was not going to work and must be removed. It was only then that Plaintiff discovered that he had been injured. A lawsuit prior to that time would have been premature. There are public policy reasons why the statute of limitations should not be held to run until there is a clear indication that damages have been sustained. Such a holding would require the bringing of protective actions in every case in which a supposed medical misadventure may have occurred, on the off chance that an injury will subsequently manifest itself. The policy of this state is to discourage such lawsuits, not to encourage them.

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.

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; and to FRED HAZOURI, P. O. Box 3466, WPB, FL 33402, this 26th day of NOVEMBER, 1984.

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