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 THE MERITS

IN RESPONSE TO BRIEF OF DR. WAXMAN

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STATEMENT OF THE CASE

On February 29, 1980, Plaintiff brought a medical malpractice action against St. Mary's Hospital, where Plaintiff was operated upon, and against Howmedica, Inc., (the manufacturer of the prosthesis inserted in Plaintiff's knee). It was alleged that St. Mary's and Howmedica were negligent in supplying mismatched parts of the prothesis.

On December 2, 1980, Dr. Waxman, the orthopedic surgeon who had performed the surgery, was joined as a defendant for his negligence in implanting a prosthetic knee with mismatched parts and for negligence in his operative procedure and subsequent care and treatment (R2320-25).

The jury found all parties negligent, with the negligence apportioned as follows: Dr. Waxman, 80%; St. Mary's 8%; and Plaintiff 12% (R3588-89). Plaintiff's damages were found to be $150,000 (R3588-89).

STATEMENT OF THE FACTS

On April 12, 1978, Plaintiff had a total knee replacement in his right leg. Dr. Waxman performed the surgery 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".

Within a matter of days of the operation, it was determined that Plaintiff had a severe subluxation or complete dislocation of the right knee (R950). Ultimately, Plaintiff was operated on

by Dr. Petty, an orthopedic surgeon, at Shands Teaching Hospital in Gainesville, in July 1979, and he found it necessary to remove the prosthesis and perform a fusion (R2324).

In regard to the Statute of Limitations defense, the evidence revealed as follows: The operation was performed by Dr. Waxman on April 12, 1978. Dr. Waxman realized the day after the operation that the wrong size component had been implanted. He called the manufacturer and spoke with the manufacturer's engineer, whom he claimed told him that the total knee would work fine with the mismatched parts (R865). The engineer thought there would be a slight impingement on the tibial spines, but that this would be resolved by cold flow (R865,911). Cold flow is a substance like high-density polyethylene that will move and reshape over time (R615). Dr. Waxman also felt that cold flow would correct the problem (R866). By April 15, 1978, Dr. Waxman made the decision that the total knee replacement would probably work. He decided to leave the prosthesis in Plaintiff's leg to see whether it would work (R889,193). Dr. Waxman testified that it was not entirely clear to him that the total knee would not work, even with the mismatch. He felt it best to give it a chance (R965), and therefore he put off an operation to remove the prosthesis, which carried a high risk of complication (R966). Dr. Waxman reiterated that he decided to leave the total knee in place to see if it would work after Plaintiff rehabilitated himself and restored his leg muscles and started getting about (R966). He also wanted to see if the cold flow would resolve any problem with regard to impingement (R966).

Dr. Waxman informed Plaintiffs that he had implanted mismatched components on April 18, 1978 (R890). He admitted that he did not think Plaintiff, a 71 year old black man with a fourth grade education, quite understood what he was trying to tell him (R903,1067). Dr. Waxman told Plaintiff that the total knee would probably work well with the mismatched components, but that if not, it could always be fixed later (R903).

Post-operatively, Plaintiff developed complications, pulmonary emboli and phlebitis (R819). Dr. Waxman admitted that once a problem like that developed, he would not reoperate unless absolutely mandatory (R967). For all of these reasons Dr. Waxman decided not to remove the prosthesis until he was absolutely sure that the prosthesis was not going to work and that Plaintiff needed surgery (R967).

Dr. Waxman saw Plaintiff on three occasions after the surgery, June 23, 1978, September 22, 1978 and January 11, 1979 (R972). He testified that at no time did he feel Plaintiff needed to have the total knee removed (R967,1003). During that time period, he could not say that the prosthesis was a failure (R831). He did not feel Plaintiff was doing as well as normal, but he felt Plaintiff was gradually improving (R831). Dr. Waxman hoped that the total knee would continue to improve and admitted that on each of the occasions he had seen Plaintiff post-surgery, he had told Plaintiff that he was improving (R831,907).

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 alright regardless (R1077). Whenever

Plaintiff mentioned to Dr. Waxman that he thought he was getting worse, the doctor told Plaintiff that the total knee was going to work and that he was doing fine (R1077,1083-84).

Plaintiff testified that Dr. Waxman continually assured him that he was gradually improving, although more slowly than he had expected (R1306); that he was doing fine (R1311); that he did not think they should reoperate; that he thought that the total knee was going to work although he was not entirely sure (R1306); and that they should continue to try to increase his strength so that they could determine for sure whether the prosthesis was going to work (R1306).

Plaintiff finally saw another doctor, Dr. Ennis, in January or February of 1979. It was not until then that he realized he would have to have the implant removed (R1088-89).

Plaintiff testified that in spite of Dr. Waxman's reassurances, he felt his knee was not getting better. Nonetheless, 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 (R1313).
>
> 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 (R1323).

The testimony of Plaintiff's physical therapist corroborated Plaintiff's testimony that Dr. Waxman had reassured Plaintiff that he was doing well, that things were looking good and that his continual problems were "just weakness" (R642,652). He testified that Dr. Waxman's reassurances seemed to "soothe"

Plaintiff (R652). He further testified that Dr. Waxman had told Plaintiff that his total knee replacement was the most difficult he had ever done, and "that is why it is taking so long" to heal (R673).

Dr. Waxman states in his brief that Dr. Whelton examined Plaintiff in May 1978 at which time Plaintiff told him that the surgery was a complete screwup, that nobody knew what was happening, and that he was damaged for life. Dr. Whelton saw Plaintiff a number of times prior to and subsequent to his surgery (R804). He saw him as late as May, 1981 (R796,810). While Dr. Whelton did state that Plaintiff had made those statements to him, he never stated that he statements were made to him in May of 1978. He never specified when the statements were made, and they could have been made at any time, possibly as late as May 1981.

QUESTIONS PRESENTED

POINT I

PLAINTIFF'S CLAIM AGAINST DR. WAXMAN WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

POINT II

THE JURY VERDICT FORM AND THE JURY INSTRUCTIONS WERE PROPER.

POINT III

DR. WAXMAN WITHDREW HIS DEFENSE OF COMPARATIVE NEGLIGENCE AT TRIAL AND THEREFORE CANNOT BENEFIT FROM THE JURY FINDING THAT PLAINTIFF WAS 12% NEGLIGENT.

SUMMARY OF ARGUMENT

Plaintiff's claim was not barred by the Statute of Limitations where he was continuously assured by Dr. Waxman that the prosthesis would work with time after his leg muscles strengthened. He was unaware that he had sustained any damage until this "wait and see" period had ended and it was determined that the prosthesis would have to be removed after all.

Dr. Waxman did not raise any objection to the jury instructions except that there was insufficient evidence on concealment and misrepresentation to instruct on that issue. Clearly the evidence was sufficient to raise a jury issue in that regard. The verdict form was correct in allowing the jury to determine the Statute of Limitations issue.

Since Dr. Waxman withdrew and/or waived his comparative negligence defense, he is not entitled to reduce the Plaintiff's damages by Plaintiff's comparative negligence.

ARGUMENT

POINT I

THE PLAINTIFF'S CLAIM AGAINST DR. WAXMAN WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

Plaintiff's experts testified that Dr. Waxman had been negligent in using a prosthesis with mismatched components, which had made Plaintiff's leg more unstable and more likely to dislocate; and because he removed too much bone when he put in the prosthesis. Both were contributing factors to Plaintiff's subsequent problem of a complete subluxation or dislocation of his knee, which never ultimately corrected itself as Dr. Waxman assured Plaintiff it would. Plaintiff was finally told by another Doctor, Dr. Ennis that the prosthesis must be removed and a fusion performed. That was in January or February 1979, well within two years of suing Dr. Waxman in December 1980.

Dr. Waxman argued to the trial court that he was entitled to a directed verdict because he had informed Plaintiff five days after the operation that the prosthesis he had used had mismatched components. However, Plaintiff was not at all aware at that time, or any time thereafter until January or February 1979 that the mismatched components had caused him any damage. The evidence showed that Dr. Waxman repeatedly assured Plaintiff that the total knee replacement would probably work, even with the mismatched components, and that they should leave it in and see (R889,913). He admitted that he did not know for sure if it was going to work but that the best thing to do was allow

Plaintiff to rehabilitate himself and restore the strength to his leg muscles and see whether the implant would work (R966). Dr. Waxman treated Plaintiff following the surgery up until January 11, 1979 (R972). He acknowledged that at no time during that period did he feel Plaintiff needed to have the total knee removed (R967,1003). During that time period, he felt that the Plaintiff was gradually improving (R831). He had hoped that Plaintiff would continue to improve in the future so that the implant would not be considered a failure (R831). Since he last saw the Plaintiff in Janaury 1979, Dr. Waxman testified, he understood that Plaintiff's leg had gotten worse (R832).

Dr. Waxman admitted that on each of the occasions he had seen Plaintiff post-surgery, he told Plaintiff he was improving (R907). Plaintiff testified that Dr. Waxman assured him that everything was going to be alright (R1077), that the implant was going to work and that he was doing fine (R1077). Dr. Waxman told Plaintiff that they should continue to try to increase his strength so that they would know for sure whether the total knee was going to work (R1306). Even Plaintiff's physical therapist testified that Dr. Waxman had reassured Plaintiff that things were going good and it was only because of his weakness that his recovery was taking so long (R642,652).

Under these facts, 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 a physician in a medical malpractice case. The court held that where the patient testified that the doctor had

continued to treat him for one year after the patient became incontinent, after surgery, and that the doctor assured him that the condition was temporary and would clear up, there was a question of fact as to the date when the patient discovered or should have discovered his condition so as to start the running of the Statute of Limitations.

As in SWAGEL, in the present case when Plaintiff should have discovered his injury was a question of fact. Dr. Waxman's approach was a "wait and see approach". He did not know whether the total knee was going to work, but he thought so. He told Plaintiff that in time it would work (R1323). It was only through the passage of time that Plaintiff discerned that the 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 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.

This case is 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. When the cancer was diagnosed, she had a radical mastectomy which would have been required even if the doctor had diagnosed the breast cancer timely. The issue was whether the delay in diagnosis had allowed the cancer to metastisize into

other areas of her body. At the time the radical mastectomy was performed, there was no showing of any metastasis of cancer in other parts of her body. No evidence of further metastasis was found in her body until approximately two years later when the cancer showed up on a bone scan, and it was determined that the cancer had spread through the ribs and skull. Thereafter, the patient died from the spread of metastasis breast cancer. The trial court ruled that as a matter of law the plaintiff's cause of action against the doctor accrued when the correct diagnosis was made even though she did not have knowledge of whether the cancer had spread to other parts of her body. The First District reversed 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 February of 1975, 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, or through the use of reasonable care should have 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 so that it was apparent that the total knee was not going to work. Even Dr. Waxman admitted that when he last saw Plaintiff in January of 1979, he did not feel the total knee needed to be removed at that time, and felt that Plaintiff was still gradually improving (R831,967,1003). He admitted that it was since January of 1979, so he understood, that Plaintiff's knee got worse (R831).

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 the plaintiff attributed 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 summary judgment based upon the Statute of Limitations. This 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 a result of an injury rather than a temporary post-operative symptom.

As in BROOKS v. CERRATO, in the present case Plaintiff was led to believe that the instability of his knee was a temporary condition that would resolve itself in time, rather than a result of the mismatched components. Therefore, it was for the jury to

determine when Plaintiff should have discovered he had a cause of action against Dr. Waxman.

Dr. Waxman relies upon the fact that Plaintiff testified that Dr. Waxman told him that he did not know whether he would ever walk again. The point is Dr. Waxman did not know. However, all the while Dr. Waxman was assuring Plaintiff that he was doing fine and that the total knee was going to work. It was for the jury to determine whether Plaintiff should have been able to discern whether the implant was or was not going to work, particularly when not even Dr. Waxman knew the answer to that question.

Plaintiff brought his lawsuit when the "wait and see" approach resulted in the 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 the injury will subsequently manifest itself. The policy of this state is to discourage such lawsuits, not to encourage them.

CITY OF MIAMI v. BROOKS, 70 So.2d 306 (Fla. 1954) is inapplicable. In that case the court stated that a plaintiff's cause of action begins when he is aware of an injury but not the full extent of his damages. In the present case, Plaintiff was

not aware, until after the "wait and see" period, that he had sustained any damages at all.

HOWARD v. MINNESOTA MUSKIES, 420 So.2d 652 (Fla. 3d DCA 1982), cited by Dr. Waxman, is also inappicable. The HOWARD case holds that a client's active or alleged malpractice by his attorney who withdrew without the client's knowledge or consent accrued when the client learned of a prior judgment entered against him. That holding has no bearing upon this case whatsoever.[1]

Plaintiff, being an uneducated layman, was entitled to rely upon Dr. Waxman's assurances that he was improving and that his leg was going to be fine. Otherwise, a doctor could simply give a patient assurances over a two year period, while letting the Statute of Limitations run, and then claim his patient is barred from suing him. As this Court has stated in MACK v. GARCIA, 433 So.2d 17 (Fla. 4th DCA 1983):

> Public policy dictates, and other jurisdictions have held, that a patient does not have an obligation or duty to determine whether an injury is being properly treated by a physician. Any other rule would offend common sense by requiring the patient to be

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1/ Dr. Waxman relied heavily before the Fourth District on KELLY v. SCHOOL BOARD OF SEMINOLE COUNTY, 435 So.2d 804 (Fla. 1983), but has chosen not to cite the case in its main brief. That case is totally distinguishable. In KELLY, the school board had knowledge of the fact that the roofs were leaking and therefore that had it had sustained damage. Unlike in KELLY, Plaintiff was not aware of any injury or damages until January 1979. Prior to that time he was always led to believe that the mismatched components were going to be alright, and while Plaintiff did not feel that he was improving, he was repeatedly assured that he was. In addition, there was ample evidence that Dr. Waxman was not only negligent in mismatching components, but that he removed too much bone. Certainly there was no way Plaintiff would have been aware of this until he was reoperated upon in July of 1979.

> the judge of a physician's professional competence.

A patient is also not responsible for discerning whether his physician's treatment is good or bad, but has the right to rely upon his physician's reassurances and opinions. At the time of trial Plaintiff was 71 years of age (R1066). He is a black man with a fourth grade education (R1067). Although he felt that his leg was not getting any better, he specifically testified:

> I got to by what he said. . .I got to take him by his words, I am not a medical doctor or something (R1313).
> Had to go by what he said. He told me he believed they gave him the wrong thing to put in my leg, but he hoped that time would work (R1323).

Yet another reason the Statute of Limitations defense was for the jury is that Plaintiff was never aware, until after his reoperation in July 1979, that part of the instability problem resulted from Dr. Waxman's negligence in removing too much bone from his knee. There was no way Plaintiff would have, or could have, had any knowledge of this prior to that time.

Dr. Waxman argues that Dr. Petty's opinion that removal of too much bone was based upon statistical evidence rather than upon examination of the knee itself. Dr. Petty was the doctor who reoperated on Plaintiff, removed the prosthesis and performed the fusion. It was his opinion, from what he saw, and his experience with other patients, that too much bone was removed. Therefore, it is wrong to state that Dr. Petty could not state with any degree of probability that removal of too much bone was contributing to Plaintiff's problem. Dr. Petty testified:

> Q. Now, Doctor, you indicated that you felt in this particular case the instability

was more likely due to either excessive bone being removed, or too small prosthetic device in place as opposed to there being too great a prior instability in the right knee, is that correct, sir?

A. Yes. (R728).

* * * * *

Q. You said the second part, you thought he may have removed too much bone?

A. Or used too small a prosthesis, a combination of the two. I also said based upon the reasons already given, and by that I meant when he discussed that in my opinion having seen the patient's x-rays, and knowing other patients with this condition that I would not expect him to have a pre-existing ligamentous instability. (R745).

Dr. Waxman next argues that the testimony of Dr. Petty and Dr. Volz was inadequate under GOODING v. UNIVERSITY HOSPITAL BUILDING, INC., 445 So.2d 1015 (Fla. 1984) and GREENE v. FLEWELLING, 366 So.2d 777 (Fla. 2d DCA 1978), to demonstrate that anything he did caused injury to Plaintiff "more likely than not". 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, which is the condition that occurred after the mismatched parts were placed in Plaintiff's knee (Volz Dep. p.35). He also testified that a surgeon is ultimately responsible for the implant he inserts because of the harm to the patient resulting from using an incorrect size (Volz Depo. p.60). 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 either 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" (R719). However, he was sure that these factors were "more likely than not" the causes of Plaintiff's knee instability (R729).

It is evident that the evidence in this cause 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. Accordingly, there was ample evidence that Dr. Waxman's negligence caused damage to Plaintiff "more likely than not".

POINT II

THE JURY VERDICT FORM AND THE JURY INSTRUCTIONS WERE PROPER.

A) The Jury Instructions Were Entirely Proper

Dr. Waxman argues that the jury instructions on the Statute of Limitations were improper. It should be noted that Dr. Waxman failed to submit any of his own jury instructions on this issue. He should not now be heard to complain.

Dr. Waxman contends that the court should not have read that portion of §95.11(4)(b) allowing seven years to bring a claim where a physician's concealment or misrepresentation is concerned. He first argues that Plaintiff did not plead concealment or misrepresentation. However, it is submitted that these matters did not have to be pled. Dr. Waxman raised the Statute of Limitations as an affirmative defense. When the Statute of Limitations is pled as an affirmative defense it requires no responsive pleading and any facts that tend to defeat the affirmative defense are available to the plaintiff at trial. COURTLANDT CORPORATION v. WHITMER, 121 So.2d 57 (Fla. 2d DCA 1960). Moreover, concealment and misrepresentation were clearly issues tried by the parties based upon the evidence presented. While Dr. Waxman argued that Plintiff had presented insufficient evidence to allow the issues of concealment and misrepresentation to go to the jury, surely the evidence was sufficient to create a jury issue in this regard.

Todd Vogel, products manager for the manufacturer, testified that she received a call from Dr. Waxman regarding the

implantation of the mismatched components (R291). She told Dr. Waxman that in order to have the prosthesis function effectively the component would need to be matched (R293-94). Their engineer told Dr. Waxman that the prosthesis was to be used as designed (i.e.), with matched components (R315). He told Dr. Waxman of the potential problems of the mismatched parts(R315), and that surgery to replace the mismatched prosthesis should be considered at that time (R293-94). Dr. Waxman denied that he had ever been told any of this by the manufacturer, and claimed that he was told that the total knee would function properly with the mismatched parts. Thus, there was a question of fact for the jury to determine as to whether Dr. Waxman had actually concealed information that a reoperation needed to be performed at that time, and had instead assured Plaintiff that everything was fine. There clearly was sufficient evidence for the jury to consider the concealment or misrepresentation issue.

Moreover, since Dr. Waxman claims there was no evidence of concealment and misrepresentation, the giving of an instruction on that portion of the statute was harmless error.

Dr. Waxman next argues that even if he made misrepresentations to Plaintiff, those misrepresentations did not prevent Plaintiff from "discovering the injury". That is not so. According to the manufacturer's representative, Dr. Waxman was told that a reoperation should be done at that time. Yet, Dr. Waxman told Plaintiff that he thought everything was fine, that things looked good, that he was doing well, that the prosthesis was going to work, once he was rehabilitated and his leg muscles

became stronger, and that he did not think they should reoperate. These statements led Plaintiff to believe that the prosthesis would work with the mismatched parts, and that he had, therefore, not sustained any damages.

Dr. Waxman next argues that the instruction on the Statute of Limitations was misleading and confusing. Dr. Waxman never voiced that objection in the trial court and therefore cannot raise this argument for the first time on appeal (R1341).

Dr. Waxman's next argument is that the second sentence of the Statute of Limitations jury instruction dealing with the four year outer limit should not have been given. Dr. Waxman also never argued to the trial court that this second sentence should not be given, and cannot raise that argument for the first time on appeal (R1341).

Dr. Waxman last argues that the evidence reflects that Plaintiff was aware of his injury. As demonstrated above, Dr. Waxman led Plaintiff to believe that he had sustained no injury or damage because with time and with rehabilitation of his leg muscles, the prosthesis was going to work just fine. But this would take time, and they would have to just "wait and see". It was not until much later, when it became apparent that even with time and rehabilitation the prosthesis was not going to work, that Plaintiff became aware that he had sustained any damage.

B) The Verdict Form Was Proper

Dr. Waxman argues that the jury should not have been instructed on the Statute of Limitations at all. It is Dr.

Waxman's argument that he was prejudiced by the fact that the jury was informed of the consequences of their decision on the Statute of Limitations (R1244). In other words, he did not want the jury to know that if they found against the Plaintiff on the Statute of Limitations issue, Plaintiff would not be able to recover damages. Dr. Waxman merely wanted the jury to decide when, by simply indicating a date, the Plaintiff should have discovered his cause of action, but "they don't have to know what it's going to be for" (R1249). Dr. Waxman would have the jury decide factual issues in this case in a vacuum, not knowing why they were deciding them, what relevance they had to the case, or the effect thereof.

The trial court ruled that it was going to submit the issue of the Statute of Limitations to the jury and was going to allow discussions of the Statute of Limitations defense during closing argument, and would further allow the parties to explain to the jury the significance of that defense (R1250).

Dr. Waxman cites no Florida law to support his position that the jury should not have been instructed on the Statute of Limitations defense. He cites one out-of-state case that does not hold that it was error to allow the jury to decide the Statute of Limitations question as phrased in the present case. It is traditional that the jury is instructed on the law and then is allowed to apply the law to the facts of the case. It does not operate as a fact finding body without being fully informed as to the applicable law.

Case law holds that the trial court must inform the jury of the issues made by the pleadings, FLORIDA POWER & LIGHT v. BRIDGEMAN, 182 So. 911 (Fla. 1938), and must instruct the jury on the law pertaining to the case. FARNSWORTH v. TAMPA ELECTRIC COMPANY, 57 So. 233 (Fla. 1912). The trial court should not allow a jury to consider issues without instructions regarding the legal principles applicable to the jury's function and the issues involved. MIAMI COCA COLA BOTTLING COMPANY v. MAHLO, 45 So.2d 119 (Fla. 1950). Each party has the right to have the jury instructed as to the law applicable to the facts and the evidence introduced under the issues made by the pleadings. WYNNE v. ADSIDE, 163 So.2d 760 (Fla. 1st DCA 1964). A jury is to be advised of the applicable and controlling statutory law. The jury in this case applied the Statute of Limitations, §95.11(4)(b) to the facts of this case and made the factual determination that the statute had not run. That is no different from the jury being instructed in automobile accident cases regarding statutes dealing with speeding, passing, pulling out onto roadways, right-of-ways and so forth and allowing the jury to apply those statutes to the facts and determine whether a defendant was negligent or a plaintiff comparatively negligent. Juries apply law to the facts in every case and in doing so determine factual issues. The instruction on the Statute of Limitations was entirely proper.

POINT III

DR. WAXMAN WITHDREW HIS DEFENSE OF COMPARATIVE NEGLIGENCE AT TRIAL AND THEREFORE CANNOT BENEFIT FROM THE JURY FINDING THAT PLAINTIFF WAS 12% NEGLIGENT.

St. Mary's and Dr. Waxman both answered Plaintiff's Complaint by raising Plaintiff's negligence as an affirmative defense (R2338,2545). However, Dr. Waxman withdrew this defense during the charge conference and asked that his name be stricken from the charge on comparative negligence (R1348-50). During closing argument counsel for Dr. Waxman advised the jury that Dr. Waxman was not pursing a claim that Plaintiff was comparatively negligent (R1380):

> Mr. CHERNAY: Excuse me, your Honor, I do not mean to interrupt, but Dr. Waxman does not have a claim for comparative negligence against Mr. Tillman.

The jury was instructed that comparative negligence was "the defense raised by St. Mary's Hospital" only (R1470). The jury was instructed to apportion St. Mary's and Plaintiff's negligence if it found both negligent (R1470). The jury subsequently found Plaintiff 12% negligent. It was Plaintiff's position that since Dr. Waxman withdrew his defense of comparative negligence, he was not allowed to take advantage of the jury's finding. The Fourth District agreed stating ". . . having withdrawn his defense of comparative negligence and so informing the jury, Dr. Waxman will not be permitted to take advantage of the defense simply because it is now to his benefit to do so". Accordingly, the Fourth District ruled that Dr. Waxman should not be reduced by Plaintiff's negligence.

Comparative negligence is an affirmative defense which, if not pled by a defendant, is waived by that defendant. Comparative Negligence and Contribution in Florida, Second Edition, CLE provides:

> §1.5
> Comparative negligence . .. is an affirmative defense under Fla. R. Civ. P. 1.110(d) and therefore must be raised in the answer or by motion if it appears on the face of a prior pleading. An affirmative defense that is not pled is waived. Rule 1.190(b) and FINK v. POWSNER, 108 So.2d 324 (Fla. 3d DCA 1959) cert denied 114 So.2d 6. See also §4.11 of this manual.
>
> * * * * * *
>
> §4.11
> If a defendant simply denies or asserts a lack of knowledge of the allegations of the complaint, comparative negligence will not become an issue in the case. Comparative negligence, just like contributory negligence, must be treated as an affirmative defense.

A defendant may not avail himself of an affirmative defense which he fails to properly present. SEARCY v. GODWIN, 201 S.E.2d 670 (Ga. App. 1973). In SEARCY, the defendant never raised the statute of limitations and therefore the court held that the defendant could not "avail himself of an affirmative defense which he failed to properly present".

In HADDOCK v. SMITHSON, 226 S.E. 2d 411 (N.C. App. 1976), one of the defendants pled contributory negligence while the other defendant did not. The court found that because the defendants filed separate answers, the defendant who failed to raise contributory negligence in his answer could not take advantage of the other defendant's claim for contributory

negligence to support a summary judgment in favor of both defendants.

The present case is an even stronger case for not allowing Dr. Waxman to benefit from Plaintiff's comparative negligence. In both SEARCY and HADDOCK, the defendants failed to plead an affirmative defense; thus the court did not permit either of them to take advantage of the defense. In this case, Dr. Waxman initially pled the affirmative defense but then withdrew that defense during trial. That decision was a tactical decision made during trial. Apparently Dr. Waxman felt he would fare better with the jury if he did not attack the Plaintiff. He saw it in his best interest to withdraw his defense of comparative negligence. Having waived that defense, Dr. Waxman cannot now take advantage of the defense of comparative negligence pled by St. Mary's Hospital.

Dr. Waxman should not be allowed, after taking a look at the verdict, to recant his withdrawal and waiver indirectly by benefitting from St. Mary's defense. Waiver of a claim (or defense) exists where there is an intentional relinquishment of a known right. MASON v. STATE, 176 So.2d 76 (Fla. 1965). A party may waive any right to which he is legally entitled. BILMAN v. BUTZLOFF, 22 So.2d 263 (Fla. 1945). "Waiver" operates to estop one from asserting that which he might otherwise have relied upon. ENFINGER v. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, 156 So.2d 38 (Fla. 1st DCA 1963). If a party waives a right he cannot, without consent of his adversary, reclaim it. SENTRY INS. v. BROWN, 424 So.2d 780 (Fla. 1st DCA 1982).

As applied to the present case, Dr. Waxman clearly withdrew and waived his defense of comparative negligence. He cannot post-verdict attempt to reclaim reliance on a defense previously voluntarily and intentionally waived.

The following is in response to Dr. Waxman's argument in his brief. Dr. Waxman argues that Plaintiff's counsel never objected to the verdict nor brought to the court's attention any inconsistencies in the verdicts. The verdicts were not inconsistent. They added up to 100%. The issue is whether Dr. Waxman, who dropped his claim for comparative negligence, can take advantage of the jury's finding that the Plaintiff was 12% negligent as a result of the claim of comparative negligence raised by St. Mary's. This issue arises from the fact that Dr. Waxman dropped his claim for comparative negligence, and not from the fact that the verdicts were in any way inconsistent.

Dr. Waxman also argues that since an "inconsistency" in the verdict was never brought to the court's attention, the court had no opportunity to cure any error by resubmitting the case to the jury. It would not have cured anything to resubmit this issue to the jury. The issue involved in this appeal is a legal question that has nothing to do with an inconsistent verdict. The legal issue is whether Dr. Waxman can take advantage of a defense raised by a co-defendant, when Dr. Waxman initially raised that defense, but withdrew and waived that defense at trial (R1380).

Dr. Waxman contends that a co-defendant can benefit from any defense raised by another co-defendant. The fallacy of this argument is brought home when it is realized that although the

actions against the separate defendants are brought in one lawsuit for the purpose of convenience, Plaintiff has a separate action against St. Mary's and a separate action against Dr. Waxman. The jury was instructed that these claims were being tried together but should be considered separately. If Plaintiff had filed a separate lawsuit against Dr. Waxman, there is no question that he would be able to collect $150,000 against Dr. Waxman, since Dr. Waxman dropped his claim for comparative negligence. The result should be no different simply because the separate actions were tried in the same lawsuit.

Dr. Waxman argues that the jury intended Plaintiff to receive $132,000. We do not know that to be true. The jury was not told to reduce their award to Plaintiff based upon percentages of negligence. Rather, they were told simply to make findings of negligence and the total amount of damages sustained by Plaintiff.

Dr. Waxman argues that if he is required to pay $150,000, since he can only collect $12,000 from St. Mary's, he is having to pay $18,000 more than his pro-rata share. However, if Dr. Waxman intended to take advantage of any findings of the jury that Plaintiff was comparatively negligent, it was encumbent upon him to pursue that issue as an affirmative defense as to him, rather than waiving it.

CONCLUSION

The $150,000 Final Judgment entered against Dr. Waxman should be affirmed.

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 17th day of MAY, 1985.

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