IN THE SUPREME COURT OF FLORIDA

CASE NUBMERS: 65,736, 65,997, 65,998
and 66,025

BRUCE WAXMAN,

Petitioner,

vs.

JOSEPH TILLMAN, et al.

Respondents.

FILED
SID J. WHITE
OCT 31 1984
CLERK, SUPREME COURT
By
Chief Deputy Clerk

BRIEF OF PETITIONER
BRUCE WAXMAN, M.D. ON JURISDICTION

STEPHENS, LYNN, CHERNAY & KLEIN
One Biscayne Tower, Suite 2400
Miami, Florida 33131
(305) 358-2000

BY: ROBERT M. KLEIN, ESQ.

TABLE OF CONTENTS

Statement of the Case and Statement of Fact------------------1

Points on Appeal---5

Argument---5

Conclusion--10

Certificate of Service------------------------------------10

Appendix

TABLE OF CITATIONS

CITY OF MIAMI v. BROOKS
70 So.2d 306 (Fla. 1954)---------------------------5,7,8,9

GOODING v. UNIVERSITY HOSPITAL BLDG., INC.
445 So.2d 1015 (Fla. 1984)-------------------------5,7

GREENE v. FLEWELLING
366 So.2d 777 (Fla. 2nd DCA 1978)-----------------5,7

HOWARD v. MINNESOTA MUSKIES
420 So.2d 653 (Fla. 3rd DCA 1982)------------------5,8,9

KELLERMEYER v. MILLER
427 so.2d 343 (Fla. 1st DCA 1983)------------------5,8,9

WILHELM v. TRAYNOR
434 So.2d 1011 (Fla. 5th DCA 1983)-----------------5,8

95.11(4)(b), Florida Statutes--------------------------------6

STATEMENT OF THE CASE AND STATEMENT OF FACT

Respondent filed this medical malpractice action against Petitioner BRUCE WAXMAN, M.D., ST. MARY'S HOSPITAL and others based upon MR. TILLMAN'S claim that the Defendants were responsible for the negligent implantation of a two-element prosthesis into his knee. The surgery to implant the prosthesis was performed by DR. WAXMAN after MR. TILLMAN developed knee problems. The prosthetic device contains both a tibial and a fibular component. These components are manufactured in two sizes. The prosthesis which was inserted into MR. TILLMAN'S knee contained mismatched components.

Shortly after the surgical procedure, DR. WAXMAN advised MR. TILLMAN that the prosthesis included mismatched tibial and fibular components. There is no question about the fact that MR. TILLMAN encountered difficulty with the knee "almost immediately," and TILLMAN admitted that he never improved after the operation. Ultimately, further corrective surgery was performed, and MR. TILLMAN'S knee was fused.

The original surgery was performed by DR. WAXMAN at ST. MARY'S HOSPITAL on April 12th, 1978, and the testimony indicated that MR. TILLMAN was informed about the mismatched components within several days after that date. MR. TILLMAN'S original lawsuit was not filed until February 29th, 1980, and his Amended Complaint adding DR. WAXMAN as a Defendant was not filed until December 2nd, 1980.

DR. WAXMAN'S counsel moved for a summary judgment during the course of the litigation, based upon DR. WAXMAN'S contention

that the statute of limitations had clearly run with regard to MR. TILLMAN'S claim against him where MR. TILLMAN did not bring DR. WAXMAN into the lawsuit within two years from the date that he had actually been told by DR. WAXMAN that mismatched components had been implanted. The Motion for Summary Judgment was denied, based predominantly upon MR. TILLMAN'S claim that he did not actually discover the "incident giving rise to the cause of action" until he was told by another surgeon that he would need additional surgery. According to MR. TILLMAN, this occurred in February of 1979, almost a year after MR. TILLMAN was told about the mismatched components.

The case was tried before a jury. During the trial, MR. TILLMAN testified about a number of problems which he had with his knee after DR. WAXMAN'S surgery. Among other things, MR. TILLMAN testified that his knee kept locking after the surgery, and that it in fact was worse after the surgery than it was before the surgery. Based upon this testimony, Petitioner WAXMAN'S counsel moved for a directed verdict on the statute of limitations issue. The motion was denied.

Ultimately, the jury returned a verdict finding the total amount of damages to be $150,000. MR. TILLMAN was determined to be 12% negligent, ST. MARY'S HOSPITAL was determined to be 8% negligent, and DR. WAXMAN was determined to be 80% negligent. The trial court entered a judgment on May 7th, 1983, awarding MR. TILLMAN $132,000, after reducing the damages by 12%, to account for MR. TILLMAN'S comparative negligence.

The case was appealed to the Fourth District Court of

Appeal. Petitioner WAXMAN'S appeal centered upon the statute of limitations issue, although other issues were raised, including a challenge to the jury instructions which were utilized on the statute of limitations issue, and the nature of the verdict form which was used to present that issue to the jury.

Several other appeals were filed. Among other things, Petitioner WAXMAN sought review of the attorney's fee judgment that was entered in favor of the Plaintiff. ST. MARY'S HOSPITAL and the FLORIDA PATIENTS COMPENSATION FUND filed appeals seeking review of the final judgment and/or rulings on statute of limitations issues. And MR. TILLMAN sought review of the order reducing the judgment against DR. WAXMAN by the amount of MR. TILLMAN'S comparative negligence, based upon MR. TILLMAN'S contention that DR. WAXMAN had waived the comparative negligence defense at the jury charge conference.

On July 13th, 1984, the Fourth District Court of Appeal entered an order affirming the jury verdict. The Fourth District rejected all of Petitioner's grounds for appeal, with the exception of his challenge to the attorney's fee award in favor of MR. TILLMAN'S attorney. The attorney's fee judgment was reversed. In addition, the Fourth District ruled that DR. WAXMAN was not entitled to the 12% reduction of the judgment, given the fact that DR. WAXMAN had withdrawn his comparative negligence defense, notwithstanding the fact that the comparative negligence issue went to the jury. [1]

1/ The HOSPITAL did not withdraw its comparative negligence defense during the charge conference. Accordingly, the comparative negligence issue was submitted to the jury.

In its opinion, the Fourth District ruled that the trial court had properly denied DR. WAXMAN'S Motions for Summary Judgment and Directed Verdict, notwithstanding the fact that MR. TILLMAN had been told about the mismatched components within several days after the surgery, because of the "very real possibility that TILLMAN never was in a position to recognize that an incident had occurred...." (A 5) In addition, however, the Fourth District ruled that the statute of limitations would only have begun to run in April of 1979 "if the subsequent damage was caused by the mismatched components." Apparently, this finding was based upon the Fourth District's citation to testimony which indicated that MR. TILLMAN'S post-operative problems might have been caused by "two or three possibilities." (A 5)

As was noted above, the Fourth District also ruled that DR. WAXMAN could not take advantage of the jury's finding of comparative negligence on behalf of MR. TILLMAN. The Fourth District acknowledged DR. WAXMAN'S argument to the effect that "the comparative negligence defense was common to both himself and ST. MARY'S," and that he would be liable to pay "more than his pro rata share" of the judgment pursuant to Section 768.31(3)(a), Florida Statutes, if he is liable for the full $150,000 judgment. Nevertheless, the Fourth District ordered a reduction in the final judgment for Defendant ST. MARY'S but no similar reduction for DR. WAXMAN. As a result, final judgment will ultimately be rendered in this matter for $150,000 against DR. WAXMAN, and for $132,000 against ST. MARY'S HOSPITAL.

POINTS ON APPEAL

I. WHETHER THE FOURTH DISTRICT'S OPINION IN THIS MATTER EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN GOODING v. UNIVERSITY HOSPITAL BUILDING, INC., 445 So.2d 1015 (Fla. 1984) AND THE SECOND DISTRICT'S OPINION IN GREENE v. FLEWELLING, 366 So.2d 777 (Fla. 2nd DCA 1978).

II. WHETHER THE FOURTH DISTRICT'S DECISION IN THIS MATTER EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN CITY OF MIAMI v. BROOKS, 70 So.2d 306 (Fla. 1954), AND WITH THE DECISIONS OF THE FIRST, THIRD AND FIFTH DISTRICT COURTS OF APPEAL IN 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. 3rd DCA 1982).

ARGUMENT

I. THE FOURTH DISTRICT'S OPINION CONFLICTS WITH THE DECISION OF THIS COURT IN GOODING v. UNIVERSITY HOSPITAL BUILDING, INC., 445 So.2d 1015 (Fla. 1984) AND THE SECOND DISTRICT'S DECISION IN GREENE v. FLEWELLING, 366 So.2d 777 (Fla. 2nd DCA 1978).

This basis for jurisdiction is asserted in the jurisdictional brief that has been submitted on behalf of ST. MARY'S HOSPITAL. Given that fact, Petitioner will not belabor the point, but will adopt and incorporate by reference herein the argument that was submitted by ST. MARY'S on this issue.

Petitioner does feel constrained to elaborate briefly upon the argument in the ST. MARY'S brief, to the extent that there are other facts within the Fourth District's opinion which would suggest to a trial court judge that the mere possibility of causation is sufficient to submit an issue to the jury. More precisely, in the context of this appeal, the Fourth District's opinion inappropriately suggests that a case may not be taken

from the jury, i.e, the Court may not rule that the statute of limitations has run as a matter of law, simply because a plaintiff's injuries may possibly have been caused by some other "incident" which is unknown to the plaintiff.

According to Section 95.11(4)(b), Florida Statutes, an action for medical malpractice shall be commenced:

> Within two years from the time the incident giving rise to the action occurred or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence....

After citing to the statute, the Fourth District thereafter conceded that MR. TILLMAN knew of the implantation of mismatched components (the incident upon which the Plaintiff brought suit) more than two years prior to the date that he filed his Amended Complaint against DR. WAXMAN. However, the Court then decided that the issue of MR. TILLMAN'S notice of the incident presented a jury question given the "very real possibility that TILLMAN was never in a position to recognize that an incident had occurred...."

The Fourth District's finding in this regard is premised upon two recitations of fact. The first involves DR. WAXMAN'S comments to MR. TILLMAN to the effect that he "thought that it [the prosthesis] would work but [he] wasn't sure." (A 4) Thus, according to the Fourth District, MR. TILLMAN didn't know "for sure" that he would need another operation until he was informed of that fact by Dr. Ennis in February of 1979, almost a year later, notwithstanding the problems which he had had for the preceding ten months.

In addition to this state of mind factor, the Fourth

District also cited to testimony by two physicians concerning two or three possible causes for the instability of the right knee. This testimony came from Drs. Petty and Volz, who suggested that the instability of the knee might have been caused by the removal of excess bone. However, both physicians testified that this was a mere possibility, and a close review of the testimony recited by the Fourth District clearly indicates that both physicians believed that this factor could only be considered as a possible cause of the instability given the size of the components which were implanted--which were admittedly wrong.

Given these citations of fact in the Fourth District opinion, Petitioner would respectfully submit that the Fourth District's decision expressly and directly conflicts with the decisions in GOODING and GREENE, to the extent that the statute of limitations issue was committed to the jury based upon the mere possibility of some other cause for MR. TILLMAN'S injury--some other "incident." Petitioner would submit that these possibilities could not have been sufficient to commit this case to the jury on the liability issue, pursuant to the standards that are set forth in GOODING and GREENE. Given that fact, they could hardly be sufficient to provide a basis for allowing a jury to determine that MR. TILLMAN did not know of the true "cause" of the problems with his knee, i.e., the true "incident," where these other "causes" were expressed as a mere possibility.

II. THE FOURTH DISTRICT'S DECISION IN THIS MATTER EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN CITY OF MIAMI v. BROOKS, 70 So.2d 306 (Fla. 1954), AND WITH THE DECISIONS OF THE FIRST, THIRD AND FIFTH

DISTRICT COURTS OF APPEAL IN 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. 3rd DCA 1982).

In CITY OF MIAMI v. BROOKS, 70 So.2d 306 (Fla. 1954), this Court ennunciated a general rule concerning whether or not a party needs to know the full nature of his damages before a statute of limitations will attach to the claim.

> The general rule, of course, is that where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefore, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date. BROOKS, supra at 308.

The BROOKS case was cited with approval by the First District in KELLERMEYER v. MILLER, 427 So.2d 343 (Fla. 1st DCA 1983).

In this instance, the Fourth District's opinion clearly notes that MR. TILLMAN encountered difficulty with his knee "almost immediately" after surgery. The decision also notes that TILLMAN "never improved" after the surgery.[2] Yet the Fourth District ruled that a jury question was presented on the statute of limitations issue because MR. TILLMAN did not learn "for the first time that his leg needed another operation [until] x-rays were taken at Dr. Ennis' office in January or February of 1979." (A 5) When this citation from the opinion is coupled with the Fourth District's later statement to the effect that "[t]here was evidence upon which the jury could have concluded that...TILLMAN did not discover

2/ In fact, MR. TILLMAN testified that his knee was actually worse after the surgery, and actually was locking on occasion.

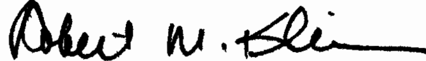
that the mismatched components were causing an injury until early 1979," there can be little doubt about the fact that the decision expressly and directly conflicts with those opinions which have held that the statute of limitations begins to run once a claimant has notice of an invasion of his rights, no matter how small.

In HOWARD v. MINNESOTA MUSKIES, the Third District Court of Appeal affirmed a summary judgment in a legal malpractice action where the plaintiff was on notice that a judgment had been entered against him, but took no action whatsoever against his attorneys until "serious collection efforts were made by the judgment creditor to collect on the judgment." This decision by the Third District is to the same import as BROOKS and KELLERMEYER, i.e., all three decisions essentially hold that a statute of limitations begins to run once a plaintiff is on notice of his potential cause of action, although the plaintiff may not yet be apprised of the full extent of his injuries. These opinions stand in sharp contrast to the Fourth District's decision in this matter, which unequivocally held that MR. TILLMAN'S cause of action arguably did not begin to run until he was actually told that he was going to require further surgery, notwithstanding undisputed testimony of other, less serious complications which were directly related by all parties concerned to the mismatched components. Given that fact, and the considerable number of cases which have cited to this Court's ruling in CITY OF MIAMI v. BROOKS, Petitioner would respectfully submit that this Court should entertain jurisdiction over this cause.

CONCLUSION

For all of the reasons cited above, Petitioner BRUCE WAXMAN would respectfully request this Court to enter an order assuming jurisdiction over this matter and otherwise directing the parties to file briefs on the merits.

Respectfully submitted,

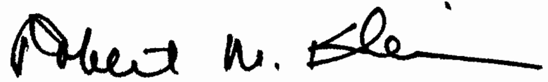


ROBERT M. KLEIN

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 30th day of October, 1984, to Stuart E. Kocha, Esq., P.O. Box 1427, West Palm Beach, Fl 33402; Edna Caruso, Esq., 1615 Forum Place, Suite 4-B, West Palm Beach, Fl 33401; Fred Hazouri, Esq., P.O. Box 3466, West Palm Beach, Fl 33402; Michael Davis, Esq., P.O. Box 2966, West Palm Beach, Fl 33402; L. Martin Flanigan, Esq., P.O. Drawer E, West Palm Beach, Fl 33402; Richard B. Collins, Esq., P.O. Drawer 5286, Tallahassee, Fl 32314 and David F. Crow, Esq., 1615 Forum Place, Suite 500, West Palm Beach, Fl 33401.

STEPHENS, LYNN, CHERNAY & KLEIN
Attorneys for Petitioner Waxman
One Biscayne Tower, Suite 2400
Miami, Florida 33131
(305) 358-2000

BY: 

ROBERT M. KLEIN