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IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 66,025

4th DCA CASE NO: 82-1527

BRUCE WAXMAN, M.D.

Petitioner,

vs.

JOSEPH TILLMAN, et al.,

Respondent.

REPLY BRIEF OF PETITIONER BRUCE WAXMAN, M.D.

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF AUTHORITIES

INTRODUCTION

Petitioner BRUCE WAXMAN, M.D., was one of the Defendants in this trial court action for damages allegedly arising from an act of medical malpractice. Respondent JOSEPH TILLMAN was the Plaintiff in that action. In this brief the parties will be referred to as Petitioner/Defendant and Respondent/Plaintiff as well as by name.

The following symbols will be used for reference purposes:

"R" for references to the record on appeal;

"DT" for references to the deposition testimony of JOSEPH TILLMAN;

"A" for references to the appendix that was attached to the Petitioner's original brief.

All emphasis has been supplied by counsel, unless indicated to the contrary.

STATEMENT OF THE CASE AND STATEMENT OF FACT

Petitioner will adopt and incorporate by reference the statement of the case and statement of facts which was contained in his main brief. To the extent that further recitations of fact are necessary in order to supplement the arguments that have been raised in this Reply Brief, or to respond to factual statements which were raised by the other parties, Petitioner will reserve the right to relate additional facts as necessary in the argument portion of this brief.

POINTS ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN DENYING DR. WAXMAN'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR A DIRECTED VERDICT, WHERE THE PLAINTIFF'S CLAIM WAS BARRED BY THE TWO YEAR MALPRACTICE STATUTE OF LIMITATIONS.

II. WHETHER THE TRIAL COURT ERRED IN DENYING DR. WAXMAN'S REQUEST FOR A NEW TRIAL, WHERE BOTH THE JURY VERDICT FORM AND THE JURY INSTRUCTIONS WERE IMPROPERLY PRESENTED TO THE JURY.

III. WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN RULING THAT DR. WAXMAN WOULD BE ASSESSED WITH THE FULL MEASURE OF DAMAGES THAT WERE AWARDED BY THE JURY, NOTWITHSTANDING THE JURY'S FINDING OF COMPARATIVE NEGLIGENCE ON BEHALF OF MR. TILLMAN, SIMPLY BECAUSE DR. WAXMAN CHOSE NOT TO ARGUE THE COMPARATIVE NEGLIGENCE ISSUE TO THE JURY.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DR. WAXMAN'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR A DIRECTED VERDICT, WHERE THE PLAINTIFF'S CLAIM WAS BARRED BY THE TWO YEAR MEDICAL MALPRACTICE STATUTE OF LIMITATIONS.

MR. TILLMAN appears to arguing that he should not have been required to file his claim against DR. WAXMAN within two years from the date that he was first advised that Petitioner had implanted mismatched components largely because DR. WAXMAN continued to treat the problem conservatively, and otherwise hoped that the implantation would prove successful. Yet, MR. TILLMAN does not deny for one moment that he was told about the implantation of the mismatched components in April of 1978.

Petitioner would respectfully submit that all of MR. TILLMAN's discussions of DR. WAXMAN's "wait and see" attitude should be to no avail, given MR. TILLMAN's own testimony in this case. While DR. WAXMAN does not feel that it would be appropriate at this stage to relate the considerable portions of MR. TILLMAN's testimony which were related in the statement of facts in his main brief, there is one small portion of MR. TILLMAN's testimony that does bear repetition:

> Q. Did [DR. WAXMAN] ever talk to you again about the operation?
>
> A. Yes. I asked him how I was doing. He said, you're doing fine. I was hurtin' the same way right on.
>
> Q. Just hurt just the same as you did before the operation?
>
> A. Sure. Worser in a way, because I hung up.
>
> Q. What do you mean by that?
>
> A. I couldn't straighten my leg out at all. It was too big, leg hung up in there. (R 1310)
>
> * * *
>
> Q. So you knew in spite of whatever Dr. Waxman said about you being better and doing fine, you knew it was worse, you knew you were not getting any better?
>
> A. That's the truth. (R 1312)

Given that testimony, it is difficult to understand how MR. TILLMAN's counsel can continue to suggest that he was not aware of either the incident in question or the fact that he had suffered injury.

Under the circumstances, although MR. TILLMAN may not have known the full extent of his problem until some later date, the statute of limitations clearly began to run during the spring of 1978. See NARDONE v. REYNOLDS, 333 So.2d 25 (Fla. 1976). As this Court noted in CITY OF MIAMI v. BROOKS, 70 So.2d 306, 308 (Fla. 1954), the statute of limitations begins to run where there is an injury "although slight," and it is "not material that all the damages resulting from the act shall have been sustained at that time." The running of a statute of limitations is not postponed by the fact that "the actual or substantial damages do not occur until a later date."

In footnote 1 in his brief, MR. TILLMAN states that DR. WAXMAN "relied heavily" before the Fourth District Court of Appeal on KELLY v. SCHOOL BOARD OF SEMINOLE COUNTY, 435 So.2d 804 (Fla. 1983). To the contrary, the District Court decision in the SEMINOLE COUNTY case, THE SCHOOL BOARD OF SEMINOLE COUNTY v. GAF CORPORATION, 413 So.2d 1208 (Fla. 5th DCA 1982), was initially relied upon by MR. TILLMAN in his answer brief before the Fourth District Court of Appeal, apparently in support of his contention that the statute of limitations was tolled in this matter due to DR. WAXMAN's "continuous treatment."

As it happened, before Petitioner submitted his reply brief before the Court of Appeal, this Court reversed the Fifth District's decision in the KELLY case, and rejected the so-called continuous treatment" doctrine. In KELLY,

this Court reinstated a summary judgment which had been entered in favor of an architect where the School Board of Seminole County was aware of the fact that roofs on several school buildings which had been designed by the defendant architect began leaking almost immediately after completion of construction, but had deferred filing suit because of the architect's continuing efforts to resolve that problem.

MR. TILLMAN attempts to distinguish KELLY by contending that he "was not aware of any injury or damages until January 19th, 1979." (Tillman's brief at pg.13, footnote 1.) In that regard, Petitioner can only respond by again noting that such statements in MR. TILLMAN'S brief simply ignore his own sworn testimony in the cause, which clearly indicates that he was well aware of the fact that he was not only having problems with his leg after the surgery, but that the leg was actually worse than it had been prior to the operation.

In KELLY, this Court cited to K/F DEVELOPMENT & INVESTMENT CORP. v. WILLIAMSON, CRANE & DOZER CORP., 367 So.2d 1078 (Fla.3d DCA 1978), and HAVATAMPA CORP. v. McELVY, GENNEWEIN, STEPHANY & HOWARD, ARCHITECTS/PLANTERS, INC., 417 So.2d 703 (Fla. 2nd DCA 1982). Both cases rejected the suggestion that a statute of limitations does not begin to run while a defendant is taking steps to correct those problems which were allegedly caused by that defendant's negligence.

The balance of the cases which are cited by MR. TILLMAN in support of his contention that the statute of limitations issue in this matter was properly presented for consideration by the jury do not in fact support that contention. Two of those cases, JOHNSON v. MULLEE, 385 So.2d 1038 (Fla. 1st DCA 1980) and BROOKS v. SERRATO, 355 So.2d 119 (Fla. 4th DCA 1978) involved earlier versions of the medical malpractice statute of limitations. Both are therefore distinguishable in this case and cannot be properly applied given the factual situation which is before this Court.

Whereas the Court in JOHNSON was solely concerned with a determination as to when the plaintiff first discovered her cause of action pursuant to §95.11(4)(a), Florida Statutes (1975), and BROOKS determined when the plaintiff discovered or should have discovered the injury pursuant to §95.11(6) the key here is the incident.

In the instant case, the applicable version of §95.11(4)(b), Florida Statutes, requires a party to commence an action for medical malpractice 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." It is undisputed from the record in this case that MR. TILLMAN knew of the incident upon which he brought suit as early as April of 1978.

MR. TILLMAN finally attempts to obscure the limitations issue by arguing that his injury may have been caused by

several different acts of negligence during the same surgical procedure, i.e., the implantation of mismatched components and the removal of "too much bone" in preparation for the implantation of the prosthetic device. In that regard, Petitioner can only reiterate his belief that this position amounts to an inappropriate attempt to avoid the clear meaning of the existing statute of limitations.

There is only one "incident" that is involved in this case, i.e., a surgical procedure which was performed ineffectively and which ultimately caused more problems for MR. TILLMAN--according to his own admissions--than he was experiencing prior to the surgery. Whether those problems were caused by the implantation of mismatched components or the removal of excess amounts of bone in preparation for the implantation of the prosthetic device--or both--should be irrelevant in this instance, since MR. TILLMAN admits that he knew that the surgery had caused injury.

In his response to the hospital's brief and DR. WAXMAN's arguments on the "more likely than not" and proximate cause issues in this matter, MR. TILLMAN regularly attempts to obscure the testimony that was given by his two experts concerning the cause of MR. TILLMAN's post-operative problems. Ultimately, MR. TILLMAN concludes that the evidence in this cause "was that the mismatched

parts had caused some of the plaintiff's knee instability."[1] (Brief of Respondent Tillman on the merits at pg. 16). Given this concession, one thing is perfectly clear-MR. TILLMAN is not going to attempt to claim before this Court that the implantation of mismatched components had nothing whatsoever to do with his injury.

Under the circumstances, since MR. TILLMAN knew about the mistake within a week after the surgery, and where he admitted that he was having increased problems with his leg from that point forward, the trial court should have ruled as a matter of law that the statute of limitations began to run in this case on the potential claim against DR. WAXMAN in the spring of 1978. Since MR. TILLMAN did not file his amended complaint adding DR. WAXMAN as a defendant until December of 1980, the Court should have ruled as a matter of law that MR. TILLMAN's lawsuit was barred by the applicable statute of limitations.

II. THE TRIAL COURT ERRED IN DENYING DR. WAXMAN'S REQUEST FOR A NEW TRIAL, WHERE BOTH THE JURY VERDICT FORM AND THE JURY INSTRUCTIONS WERE IMPROPERLY PRESENTED TO THE JURY.

A. The jury instruction on the statute of limitations issue was inappropriate, misleading and confusing.

DR. WAXMAN will rely primarily on the argument presented in his main brief on this point. However, it would be

1/Undoubtedly, this is the conclusion which MR. TILLMAN expected the jury to draw, since this was the focus of his case from the onset. The testimony concerning removal of too much bone was an afterthought and something that was only developed in MR. TILLMAN's brief, when he was confronted with the statute of limitations issue.

appropriate to respond briefly to the single case which is cited by MR. TILLMAN in opposition to DR. WAXMAN's arguments concerning the jury instructions that were utilized in this matter.

In his original brief, DR. WAXMAN pointed out that the Plaintiff had never pled fraudulent concealment in response to DR. WAXMAN's assertion of the statute of limitations as an affirmative defense. Given that fact, DR. WAXMAN argued that it was entirely inappropriate to allow that issue to go to the jury, based upon this Court's decision in DOBER V. WORRELL, 401 So.2d 1322 (Fla. 1981). In DOBER, this Court specifically ruled that a Plaintiff waives the right to argue fraudulent concealment in response to a statute of limitations affirmative defense, where fraudulent concealment is not pled by the Plaintiff.

In his brief, MR. TILLMAN blithely ignores the DOBER decision. Instead, he cites to the Second District's decision in COURTLANDT CORP. v. WHITMAR, 121 So.2d 57 (Fla. 2nd DCA 1960) as standing for the proposition that a plaintiff need not affirmatively plead in response to a statute of limitations defense.

It is difficult to see how the COURTLANDT case can be cited as authority in this instance. In the first place, it is factually distinguishable, since it dealt with the Plaintiff's right to present proof which would rebut those facts which a defendant necessarily had to prove in order to justify application of a foreign statute of limitations.

Thus, the plaintiff in COURTLANDT was not attempting to avoid the statute of limitations; he was simply rebutting proof which the defendant had to provide in order to justify application of the foreign statute, as an affirmative defense to the plaintiff's claim.

In addition, however, one of the principles of law which was cited by the Second District in this 1960 case has clearly been overruled by this Court's subsequent pronouncements on that same issue. In COURTLANDT, the Second District essentially ruled that a plaintiff was entitled to present facts that would demonstrate that the defendant's absence from the country (France) would have interrupted the running of the French statute of limitations, despite the fact that the plaintiff had not replied to the defendant's statute of limitations affirmative defense. That is clearly not the law according to this Court. As this Court noted in DOBER, supra, "a party seeking to toll the statute of limitations has the burden of <u>proving and pleading</u> the circumstances that in fact toll the statute." DOBER, supra at 1324, citing to LANDERS v. MILTON, 370 So.2d 368 (Fla. 1979). Given these two decisions by this Court, Petitioner would respectfully submit that the Second District's decision in COURTLANDT is simply insufficient to overcome the fact that the Plaintiff had never seriously attempted to raise fraudulent concealment in order to avoid DR. WAXMAN's limitations defense. This issue was not pled. It should not have been put before the jury.

B. **The verdict form used by the jury with regard to the statute of limitation issue was both inappropriate and prejudicial.**

MR. TILLMAN points out that DR. WAXMAN has not cited to any Florida cases which have specifically held that a jury should not be simply asked to determine on a verdict form whether or not a statute of limitations has run. Obviously, this is because there are simply no Florida cases on point. On the other hand, MR. TILLMAN has been unable to provide an appropriate response, either through case law or argument, to those cases and points which were raised by DR. WAXMAN in support of his contention that the verdict form in this instance was prejudicial and inappropriate.

MR. TILLMAN does cite to a number of cases which basically hold that the trial court should generally inform the jury of those issues which are raised by the pleadings. DR. WAXMAN would initially note that irony of that statement by MR. TILLMAN's attorney, given the fact that the fraudulent concealment issue was never raised by his attorneys in their pleadings, and yet <u>that</u> issue went to the jury. In addition, however, DR. WAXMAN would also suggest that none of these general citations have any real bearing on the precise issue that has been raised in this appeal.

While this issue appears to be a matter of first impression in Florida, there is language in various Florida appellate decisions to indicate that a jury is <u>not</u> to

determine if a statute of limitations has run. Rather, a jury is only to decide when the statute of limitations began to run. Thus, in this instance, the jury should only have been asked to decide when MR. TILLMAN knew or should have known of the incident which gave rise to his cause of action. In the alternative, the jury might have been asked to decide simply whether MR. TILLMAN knew or should have known of the incident prior to December of 1978.

Notwithstanding Respondent's arguments to the contrary, DR. WAXMAN would submit that the application of a statute of limitations at trial is quite different from the application of a statute which governs the manner in which an automobile is to be operated on a highway. A statute of limitations is procedural; a statute governing the operation of an automobile provides substantive standards.

Where a jury is called upon to determine whether a defendant was negligent, to the extent that he has violated a speeding statute, the jury's function is no different than it would be where the juror is called upon to determine whether a doctor had negligently violated the standard of care which is applicable in the community. In both situations, the jury is called upon to determine the negligence of the defendant, a duty which is thoroughly explained to the jury. Thus, the jurors understand that they are required to determine whether the defendant did something wrong in light of the instructions which are given by the trial court.

This was not the case with the statute of limitations issue which was presented to the jury.

Procedural statutes of limitation are:

> [p]redicated upon public policy, and are designed to prevent the assertion of stale claims after the lapse of along period of time. Statutes of limitation are intended to encourage promptness of parties holding valid claims by fixing arbitrary periods within which the right to enforce such claims must be asserted; to set a time limit within which a suit should be brought so that the parties will be on notice within the time specified; and to protect defendants against unusually long delays in the filing of lawsuit.
>
> 35 Fla.Jur. 2d, Limitations and Laches, Section 3, pgs.8-9.

This reasoning was never explained to the jurors during the trial of this case. Therefore, after finding DR. WAXMAN negligent, the jurors were faced with the dilemma of having to decide whether DR. WAXMAN should be absolved of his negligence due to a legal technicality, without any guidance as to the "whys and wherefores" of statutes of limitations. Further, the statute was never explained and, as was noted above, portions of the statute were read to the jury which did not even apply in this instance. Given all of these circumstances, it was clearly error to simply allow the jury to decide whether the statute had run, as opposed to the date when it began to run.

The next question of law and fact presented by this novel statute of limitations issue is quite similar to the legal and factual controversy which governs the admissibility of a confession in a criminal case. "When the admission of a confession is an issue because of factual

controversy as to its voluntariness, it is the responsibility of the trial judge to first find that it was voluntary before submitting it to the jury." PETERSON v. STATE, 382 So.2d 701 (Fla.1980). This rule of procedure is of course based upon the fact that it is patently unfair to the jurors and highly prejudicial to the defendant to inform the jurors that the defendant confessed to a crime, while simultaneously asking the jury to apply legal principles which might allow the defendant to be set free based upon a legal technicality.

Similarly, in this instance, DR. WAXMAN was severely prejudiced to the extent that the jurors were given the responsibility of determining whether he should be absolved of liability due to a legal technicality, notwithstanding the fact that they had previously determined that DR. WAXMAN was guilty of negligence. The jury should not have had to confront this burden, and it was patently prejudicial to DR. WAXMAN to put the jurors in that position.

III. THE FOURTH DISTRICT COURT OF APPEAL ERRED IN RULING THAT DR. WAXMAN WOULD BE ASSESSED WITH THE FULL MEASURE OF DAMAGES THAT WERE AWARDED BY THE JURY, NOTWITHSTANDING THE JURY'S FINDING OF COMPARATIVE NEGLIGENCE ON BEHALF OF MR. TILLMAN, SIMPLY BECAUSE DR. WAXMAN CHOSE NOT TO ARGUE THE COMPARATIVE NEGLIGENCE ISSUE TO THE JURY.

Petitioner will rely principally upon his main brief with regard to this point.

CONCLUSION

Petitioner BRUCE WAXMAN, M.D., would respectfully suggest that the Fourth District's opinion should be

reversed, and the cause remanded with directions for the entry of a judgment in favor of DR. WAXMAN. It is clear from all of the testimony in this matter that the statute of limitations had run on MR. TILLMAN's claim prior to the filing of his amended complaint against DR. WAXMAN in December of 1980.

At the very least, Petitioner believes that he is entitled to a new trial on all issues, given the improper jury instructions which were read on the statute of limitations issue, and the inappropriate special verdict interrogatory which was given to the jury.

Petitioner would finally submit that the Fourth District's holding to the effect that DR. WAXMAN could not take advantage of the jury's finding of comparative negligence should be quashed, given the fact that this issue was presented to the jury, which determined that MR. TILLMAN's own misconduct was a proximate cause of the damages that he claimed in his lawsuit. Any other holding will effectively negate a portion of the jury verdict, and will otherwise render Florida's Contribution Statute inoperative in this instance.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the attached list of addresses on this 14th day of June, 1985.

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