IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 65,736, 65,997, 65,998 & 66,025

FILED
SID J. WHITE
DEC 26 1984
CLERK, SUPREME COURT
By Chief Deputy Clerk

BRUCE WAXMAN,

Petitioner,

vs.

JOSEPH TILLMAN, et al.,

Respondents.

BRIEF OF CROSS-RESPONDENT
BRUCE WAXMAN, M.D., ON JURISDICTION

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

BY: ROBERT M. KLEIN, ESQ.

TABLE OF CONTENTS

Introduction--1

Statement of the Case and Statement of Fact-----------------2

Jurisdictional Question--------------------------------------2

Argument

THE FOURTH DISTRICT'S DECISION IN THIS MATTER DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH OTHER FLORIDA APPELLATE DECISIONS WHICH HAVE RULED THAT THE SO-CALLED RELATION BACK DOCTRINE DOES NOT APPLY WHERE A PARTY AMENDS HIS COMPLAINT TO BRING A NEW DEFENDANT INTO THE LAWSUIT.--------2

Conclusion---8

Certificate of Service---------------------------------------9

TABLE OF CITATIONS

DODI PUBLISHING COMPANY v. EDITORIAL AMERICA, S.A.
385 so.2d 1369 (Fla. 1980)--------------------------2

GIBSON v. MALONEY
231 So.2d 823 (Fla. 1970)--------------------------3

JENKINS v. STATE
385 So.2d 1356 (Fla. 1980)------------------------2,3

KYLE v. KYLE
139 So.2d 885 (Fla. 1962)-------------------------3,4

MEDEL v. VALENTINE
376 So.2d 1154 (Fla. 1979)------------------------4,5,6

NIELSEN v. CITY OF SARASOTA
117 So.2d 731, 734 (Fla. 1960)---------------------3

PENA v. TAMPA FEDERAL SAVINGS & LOAN ASSOCIATION
358 So.2d 1370 (Fla. 1980)-------------------------2

SANCHEZ v. WIMPEY
409 So.2d 20 (Fla. 1980)---------------------------2

THEODOROU v. BURLING
438 So.2d 400 (Fla. 4th DCA 1983)-----------------4,5

Section 768.56, Florida Statutes----------------------------4,6

INTRODUCTION

BRUCE WAXMAN, M.D., was a Defendant in this trial court action based upon allegations of medical malpractice. JOSEPH TILLMAN was the Plaintiff in that action.

MR. TILLMAN was favored by a jury verdict, which was entered against DR. WAXMAN, ST. MARY'S HOSPITAL and the FLORIDA PATIENT'S COMPENSATION FUND. Those Defendants have all petitioned separately for application of this Court's discretionary conflict jurisdiction. All of the pending cases have been consolidated. MR. TILLMAN has cross-petitioned based upon his contention that the trial court should have awarded attorney's fees pursuant to the provisions of Section 768.56, Florida Statutes (1980).

In this brief, the parties will be referred to as Cross-Petitioner/Plaintiff and Cross-Respondent/Defendant, as well as by name.

The following symbols will be used for reference purposes:

"R" for references to the record on appeal; and

"A" for references to the appendix that is attached to the Cross-Petitioner's brief.

Cross-Petitioner's appendix contains true and correct copies of the original Complaint that was filed in this matter, the Amended Complaint that was filed naming DR. WAXMAN, and the Fourth District's opinion.

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

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The only facts which are relevant to the Cross-Petition are set forth accurately in Cross-Petitioner's statement of case and facts. Accordingly, DR. WAXMAN will adopt the statement of case and facts which is contained in Cross-Petitioner's brief for the purposes of argument on the jurisdictional merits of the Cross-Petition.

JURISDICTIONAL QUESTION

WHETHER THE FOURTH DISTRICT'S DECISION IN THIS MATTER EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER FLORIDA APPELLATE DECISIONS WHICH HAVE RULED THAT THE SO-CALLED RELATION BACK DOCTRINE DOES NOT APPLY WHERE A PARTY AMENDS HIS COMPLAINT TO BRING A NEW DEFENDANT INTO THE LAWSUIT.

ARGUMENT

THE FOURTH DISTRICT'S DECISION IN THIS MATTER DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH OTHER FLORIDA APPELLATE DECISIONS WHICH HAVE RULED THAT THE SO-CALLED RELATION BACK DOCTRINE DOES NOT APPLY WHERE A PARTY AMENDS HIS COMPLAINT TO BRING A NEW DEFENDANT INTO THE LAWSUIT.

In JENKINS V. STATE, 385 So.2d 1356 (Fla. 1980), this Court attempted to give definition to the constitutional constraints which had been placed upon discretionary conflict jurisdiction by the people of Florida as a result of the constitutional amendment which went into effect in April of 1980. According to the decision in JENKINS, the language of amended section 3(b)(3) leaves no doubt that a district court decision must clearly demonstrate conflict <u>on its face</u> before this Court will exercise its discretionary jurisdiction. See also PENA V. TAMPA FEDERAL SAVINGS & LOAN ASSOCIATION, 385 So.2d 1370 (Fla. 1980); DODI PUBLISHING COMPANY V. EDITORIAL AMERICA, S.A., 385 So.2d 1369 (Fla. 1980); cf. SANCHEZ V. WIMPEY,

409 So.2d 20 (Fla. 1980).

In his decision in JENKINS, supra, Justice Sundberg noted that it is a conflict of decisions, not a conflict of opinions or reasons which supplies jurisdiction for review by certiorari. JENKINS, supra at 1359. This has been a prevailing principle under both the present and predecessor jurisdictional amendments. See, e.g., GIBSON V. MALONEY, 231 So.2d 823 (Fla. 1970). Thus, this Court has stated:

> [T]he principle situations justifying the invocation of our jurisdiction to review decisions of Courts of Appeal because of alleged conflicts are, (1) the announcement of a <u>rule of law</u> which conflicts with a rule previously announced by this Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court. NIELSEN V. CITY OF SARASOTA, 117 So.2d 731, 734 (Fla. 1960). (Emphasis in original.)

Even within these stringent guidelines, conflict jurisdiction will only be asserted if this Court finds a "real, live and vital conflict...." NIELSEN, supra at 734-735.

In KYLE V. KYLE, 139 So.2d 885 (Fla. 1962), this Court elaborated upon the standards which it had expressed in the NIELSON case. According to the opinion in KYLE, conflict jurisdiction requires a preliminary determination as to whether a district court's opinion on a particular point of law would be out of harmony with prior decisions <u>on the same point</u> if it were permitted to stand, thereby generating confusion and instability.

> We have said that conflict must be such that if the later decision and the earlier decision were rendered by the same court, the former would have the effect of overruling the latter....<u>If the two cases are distinguishable</u>

> in controlling factual elements, or if the points of law settled by the two cases are not the same, then no conflict can arise. KYLE, supra at 887 (citations ommitted.)

Given these guidelines, Cross-Respondent would respectfully submit that MR. TILLMAN has been unable to establish that the Fourth District's decision in this matter either expressly or directly conflicts with any of the cases cited in Cross-Petitioner's brief.

As MR. TILLMAN noted in his jurisdictional brief, the Fourth District's decision on the attorney's fee issue in this matter was predicated largely upon its own decision earlier the same year in THEODOROU V. BURLING, 438 So.2d 400 (Fla. 4th DCA 1983). In the THEODOROU case, the Fourth District agreed that the defendant physicians in a medical malpractice action were not entitled to an award of attorney's fees as prevailing parties under Section 768.56, where the original complaint was filed prior to the effective date of the statute, notwithstanding the fact that the defendant physicians were not brought into the lawsuit until an amended complaint was filed subsequent to July 1st, 1980.

In her jurisdictional brief, Cross-Petitioner's counsel argues that the Fourth District's decisions in this matter and in THEODOROU failed to apply "analagous" decisions pertaining to the so-called "relation back" doctrine and statute of limitations cases. Counsel also attempts to distinguish this Court's decision in MEDEL V. VALENTINE, 376 So.2d 1154 (Fla. 1979). In that regard, Cross-Respondent feels constrained to point out that the THEODOROU case was argued by MR. TILLMAN'S appellate counsel who--in that instance--suggested that the "statute of limitations analogy is inappropriate," while simultaneously urging application of this Court's decision

in MEDEL. In fact, it appears that the Fourth District quoted at length from counsel's brief in determining that the plaintiff would not be required to pay attorney's fees to the prevailing defendants in the malpractice suit. However, now that the shoe is on the proverbial other foot, Cross-Petitioner's counsel apparently is urging a different result.

Without belaboring the obvious, DR. WAXMAN would submit that he agrees with the position which was urged by Cross-Petitioner's counsel in the THEODOROU case, i.e., analogies to statute of limitations cases are simply inappropriate in this instance. As is repeatedly noted in those cases that deal with the relation back question in the context of a statute of limitations action, it is simply unfair to allow a party to avoid the running of a statute of limitations where that party has failed to sue a particular defendant within the time allowed by law, solely based upon the fact that some form of action was filed before the statute ran. Those cases recognize an individual defendant's right to assert his statutory defenses.

The "relation back" series of cases are based upon entirely different principles of law. In this instance, we are dealing with a simple matter of statutory construction. The considerations are virtually identical to those considerations which were before this Court in the MEDEL case, and the Fourth District's ruling is consistent with the decision in MEDEL. Under the circumstances, and given the factual and legal distinctions between this case and those cases which are relied upon to support Cross-Petitioner's suggestion of conflict, DR. WAXMAN would respectfully submit that there is no

express and direct conflict.

Cross-Respondent would finally address MR. TILLMAN'S suggestion that the Fourth District's interpretation of Section 768.56 in this instance would thwart the very statutory intent which the statute was designed to promote. Cross-Respondent does not believe that the Fourth District's interpretation of Section 768.56 deviates from the statutory intent in any way, shape or form, to the extent that it construed an otherwise clear statute to mean precisely what it says, i.e., that the attorney's fee statute does not apply to actions which were filed before July 1st, 1980.

A contrary interpretation in this instance could cause serious inequities, to the extent that certain defendants in a medical malpractice action might be subjected to awards of attorney's fees, while others would not. Given that prospect, were this Court to accept Cross-Petitioner's current interpretation of the statute, Cross-Respondent would submit that MEDEL would be most appropriate for application herein, given MR. TILLMAN'S suggestion that the decision in MEDEL was primarily based upon "equal protection" grounds. The Court in MEDEL opted to avoid an interpretation of the mediation statute which would have promoted disparate treatment between defendants. The Fourth District achieved the same result in this case by relying upon MEDEL.

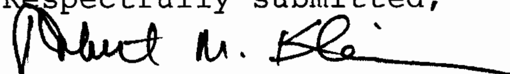
Statute of limitations cases are not analogous. Statutory construction cases are. The Fourth District properly construed Section 768.56, based upon a decision from this Court construing a similar statute in a similar context. MEDEL, supra. There can be no express and direct conflict with cases which were resolved

in an entirely different context, given entirely different facts and controlling principles of law. For this reason, this Court should not exercise its discretionary jurisdiction over the Cross-Petition by MR. TILLMAN.

CONCLUSION

For all of the above-cited reasons, Cross-Respondent WAXMAN would respectfully submit that MR. TILLMAN has failed to demonstrate that the Fourth District's decision in this matter expressly and directly conflicts with prior case precedent. The cases which were cited in Cross-Petitioner's brief deal with entirely different principles of law, applied in a factually distinguishable context. Accordingly, the Court should not exercise its discretionary conflict jurisdiction over the Cross-Petition by MR. TILLMAN.

Respectfully submitted,

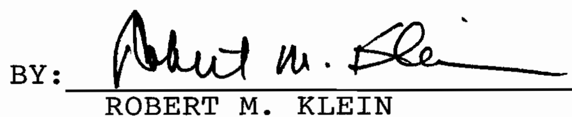


ROBERT M. KLEIN

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 21st day of December, 1984, to the attached list of addressees.

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

BY: 
ROBERT M. KLEIN

TILLMAN V. WAXMAN

SERVICE LIST

Edna Caruso, Esq.
Barrister's Bldg., Suite 4-B
1615 Forum Place
W.P.B., FL 33401
Attorneys for PLAINTIFF

L.Martin Flanigan, Esq.
Jones & Foster
P.O. Drawer "E"
W.P.B., FL 33402
Attorneys for HOWMEDICA,
INC.

David Crow, Esq.
Paxton, Crow, Taplin
& Bragg
Suite 600
1655 Palm Beach Lakes Blvd.
W.P.B., FL 33401
Attorneys
for ST. MARY'S HOSPITAL

Michael Davis, Esq.
Walton, Lantaff, etc.
1675 Palm Beach Lakes Blvd.
Suite 500
W.P.B., FL 33401
Attorneys for FLORIDA PATIENT'S COMPENSATION FUND

Fred Hazouri, Esq.
Cone, Wagner, et al.,
P.O. Box 3466
W.P.B., FL 33402
Attorneys for BRUCE WAXMAN