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IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 66,025

4th DCA CASE NO: 82-1527

BRUCE WAXMAN, M.D.

Cross-Respondent/Defendant,

vs.

JOSEPH TILLMAN, et al.,

Cross-Petitioner/Plaintiff.

BRIEF OF CROSS-RESPONDENT BRUCE WAXMAN, M.D. IN RESPONSE TO BRIEF OF CROSS-PETITIONER JOSEPH TILLMAN

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TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

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

DR. WAXMAN has already filed his brief on the merits as the principle appealing party in this matter. MR. TILLMAN has cross-petitioned, challenging the District Court's reversal of an award attorney's fees as part of the trial court judgment in favor of MR. TILLMAN. This brief is in response to MR. TILLMAN's brief on the attorney's fee issue.

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 which was attached to Cross-Respondent's original brief on the merits.

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

STATEMENT OF THE CASE AND STATEMENT OF FACT

DR. WAXMAN will concur with the statement of the case and facts which is contained in Cross-Petitioner TILLMAN's brief. As that statement notes, the original lawsuit in this matter was filed on February 29th, 1980. An amended complaint was filed on December 2nd, 1980. Although the Plaintiff prevailed against several Defendants in this lawsuit, attorney's fees were only awarded against DR. WAXMAN, based upon the fact that the complaint was amended to join DR. WAXMAN after the effective date of §768.56, Florida Statutes, which went into effect on July 1st, 1980.

DR. WAXMAN would point out that all of the operative allegations of malpractice involved conduct which occurred on or about April 12th, 1978, when DR. WAXMAN performed an operation on MR. TILLMAN at St. Mary's Hospital, to implant an artificial knee. The next day, DR. WAXMAN learned that he had inserted a small-sized femoral component and a standard-sized tibial component into MR. TILLMAN's leg. Essentially, mismatched components had been used. (R 606; R 1791-1797). At various times during the appeal before the Fourth District of Appeal and again in his brief as Respondent in this matter, MR. TILLMAN has also claimed that his problems may have been caused by the removal of too much bone from his knee during preparations for implantation of the prosthetic device. This would also have occurred during the surgery which was performed on April 12th, 1978.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal correctly ruled that attorney's fees should not have been awarded in favor of the Plaintiff and against the Defendant, where the original lawsuit was filed prior to the effective date of §768.56. The fact that DR. WAXMAN was joined as a Defendant in the lawsuit only after the Plaintiff filed an amended complaint in December of 1980 should not alter that result.

This Court's decision in YOUNG v. ALTENHAUS, consolidated case numbers 64,504 and 64,589, opinion decided May 2nd, 1985, is controlling. In the YOUNG case the Court ruled that §768.56 cannot be "constitutionally applied" to causes of action which accrued prior to July 1st, 1980.

Should this Court decide for some reason that YOUNG is not controlling, the Court should reject MR. TILLMAN's analogy to statute of limitations cases. While it is entirely appropriate to hold that a new party who is named in a lawsuit has the right to assert the running of a statute of limitations where he is named in an amended complaint after the statute has run, despite the fact that the original complaint was filed prior to the running of the statute of limitations, it is equally inappropriate to allow application of a statute providing for an award of attorney's fees to only one defendant in a multi-party case, simply because that defendant has been added to the cause after the effective date of the attorney's fee statute.

POINT ON APPEAL

WHETHER THE FOURTH DISTRICT COURT OF APPEAL PROPERLY RULED THAT DR. WAXMAN SHOULD NOT HAVE BEEN SUBJECTED TO AN AWARD OF ATTORNEY'S FEES IN THIS MATTER.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL PROPERLY RULED THAT DR. WAXMAN SHOULD NOT HAVE BEEN SUBJECTED TO AN AWARD OF ATTORNEY'S FEES IN THIS MATTER.

Several weeks ago, this Court held that §768.56 may not properly be applied to a cause of action which accrued prior to July 1st, 1980. YOUNG v. ALTENHAUS, consolidated case numbers 64,504, and 64, 589, opinion decided May 2nd, 1985 (10 FLW 252). In YOUNG, this Court ruled that the attorney's fee statute could not be "constitutionally applied" where a cause of action accrued prior to the effective date of the statute.

The YOUNG opinion involved two consolidated cases. In the first, YOUNG v. ALTENHAUS, the Court noted that the "malpractice incident" occurred in 1979, which was prior to the effective date of §768.56. This Court quashed that portion of the Third District's opinion which had held that attorney's fees could be awarded to the prevailing parties in the YOUNG matter, under the circumstances.

In the companion case, MATHEWS v. POHLMAN, the opinion noted that the cause of action accrued against the various respondent physicians in 1978 and 1979. As was the case with YOUNG, the Court quashed that portion of the First District's opinion which had endorsed application of the attorney's fee statute, and remanded the case with directions to enter a judgment in favor of the Plaintiff in the malpractice action, who had lost his suit against the Defen-

fendant physicians.

In this case, there is absolutely no question about the fact that the Plaintiff's cause of action accrued prior to the effective date of the statute. The surgery occurred in April of 1978. Further, even going by the Plaintiff's own admissions in his various briefs before this Court and the Fourth District Court of Appeal, he was fully aware of his cause of action for medical malpractice by January of 1979, when he learned that further surgery was necessary.

While DR. WAXMAN believes that MR. TILLMAN was aware of his potential cause of action long before that time, there can be no question about the fact that his cause of action accrued prior to the effective date of the attorney's fee statute. Under the circumstances, and in accordance with this Court's ruling in the YOUNG matter, DR. WAXMAN would submit that the Fourth District properly ruled that attorney's fees were inappropriate in this instance. See also FLORIDA PATIENT'S COMPENSATION FUND v. ROWE, Supreme Court of Florida, Case number 64,459, opinion cited May 2nd, 1985 (10 FLW 249).

MR. TILLMAN's brief does not address this Court's several rulings on the retroactive application of §768.56. Presumably, this is due to the fact that MR. TILLMAN's brief was prepared and filed prior to the time that Cross-Petitioner's counsel became aware of the Court's rulings in YOUNG and ROWE, supra. Thus, instead of addressing those two cases, MR. TILLMAN's brief concentrates

upon the basis which was cited by the Fourth District of Appeal in support of its reversal of the attorney's fee award that was allowed by the trial court in this instance.

As it is noted above, DR. WAXMAN believes that this Court's decision in YOUNG is binding, and that YOUNG mandates affirmance of the Fourth District's decision reversing the award of attorney's fees. Nevertheless, Cross-Respondent will briefly address those arguments that were raised by MR. TILLMAN on the attorney's fee issue, lest there be any question whatsoever concerning the propriety of the Fourth District's ruling.

In his brief, MR. TILLMAN takes the position that §768.56 is applicable to his claim against DR. WAXMAN, since his amended complaint joining DR. WAXMAN as a party to the case was filed <u>after</u> the effective date of the statute. In support of this argument, MR. TILLMAN analogizes to those statute of limitations cases which have held that the filing of an amended complaint against a completely new party will not "relate back" to the date of filing of the original complaint in the matter, so as to avoid the running of an otherwise applicable statute of limitations. See, e.g., DOYLE v. SHAND'S TEACHING HOSPITAL & CLINIC, 369 So.2d 1020 (Fla. 1st DCA 1969).

TILLMAN uses such cases and Florida Standard Jury Instruction 2.4 to bolster his suggestion that the claim against DR. WAXMAN was separate and distinct from those allegations that were brought against the remaining Defendants

in the lawsuit. Thus, according to MR. TILLMAN's reasoning, while he was clearly not entitled to attorney's fees against the other Defendants, since the original complaint against them was filed prior to the effective date of the statute, he is entitled to an award of fees against DR. WAXMAN, simply because DR. WAXMAN was named in an amended complaint that was filed subsequent to the effective date of §768.56. DR. WAXMAN would submit that the Fourth District Court of Appeal quite properly rejected this argument.

In overturning the award of attorney's fees that had been entered in favor of MR. TILLMAN and against DR. WAXMAN, the Fourth District relied upon its earlier ruling in THEODOROU v. BURLING, 438 So.2d 400 (Fla. 4th DCA 1983). The opinion in that case had considered arguments which were similar to those that are raised by MR. TILLMAN in his brief. In its decision in THEODOROU, the Fourth District expressly rejected analogies to statute of limitations cases dealing with the "relation back rule".[1]

Rather than accepting the analogy to statute of limitations cases, the Fourth District Court of Appeal in THEODOROU relied upon this Court's decision in MEDEL v. VALENTINE, 376 So.2d 1154 (Fla. 1979), a case which was relied upon by DR. WAXMAN before the Fourth District. In

1/ DR. WAXMAN would note in passing that the arguments in the THEODOROU case were advanced by the same appellate attorney who is handling MR. TILLMAN's appeal in this matter. Thus, the similarity of argument.

MEDEL, this Court had to determine whether the Medical Mediation Act applied in a case which had been filed prior to the effective date of the Act, where one of the Defendants was joined in the cause after the effective date of the Medical Mediation Statute.

The MEDEL Court held that the Defendant who had been joined in the case after the effective date of the statute was exempt from the provisions of the act, since all elements of the controversy arose "from a single medical transaction or a series of related medical transactions," and the original suit had been filed prior to the effective date of the act. MEDEL, 376 So.2d 1156; See also HICKOX v. UNIVERSITY COMMUNITY HOSPITAL, INC., 384 So.2d 160 (Fla. 2nd DCA 1980). Confer MOUNT SINAI OF GREATER MIAMI, INC. v. MORA, 342 So.2d 1063 (Fla. 3d DCA 1977). Thus, the filing of a complaint against the original Defendant served to exempt the entire controversy from medical mediation, notwithstanding the joinder of an additional Defendant subsequent to the effective date of the Mediation Act.

MR. TILLMAN attempts to distinguish the MEDEL case by suggesting that it was principally concerned with equal protection considerations and the "inequities" that would arise from application of the mediation process to a single defendant in a multi-defendant lawsuit. In support of this attempted distinction, MR. TILLMAN cites to the First District's decision in HICKOX v. UNIVERSITY COMMUNITY HOSPITAL, supra.

In that regard, DR. WAXMAN would initially note that he does not agree with this attempted distinction or MR. TILLMAN's contention that MEDEL was based principally upon equal protection grounds. The Fourth District also rejected this argument in THEODOROU, when it disagreed with the Second District's characterization of the MEDEL result as "based upon the constitutional grounds of equal protection." THEODOROU, supra at 403. Nevertheless, DR. WAXMAN would emphasize his belief that MR. TILLMAN has attempted to effect a "distinction without a difference," since the equal protection rationale which purportedly underlies the MEDEL decision is equally applicable in this instance.

There is an obvious reason why all defendants should be governed by statutes in effect at the time that an "action" is filed, i.e., to maintain uniformity in the lawsuit and to provide equal treatment for all defendants. Thus, the equal protection argument which is set forth in MR. TILLMAN's brief should be applicable to all defendants in this lawsuit, since the defendants would otherwise be subjected to possibly diverse application of the medical malpractice attorney's fee statute.

Application of §768.56 solely to defendants who are joined in a pending lawsuit after the effective date of the statute would put a great burden on those defendants. The attorney's fee statute does not address proration of fees in this type of situation. It is therefore conceivable that a defendant who is joined in a lawsuit after the effective

date of the attorney's fee statute could be required to pay virtually all of the attorney's fees which have been incurred by the plaintiff's attorney in the prosecution of a multi-defendant medical malpractice action, notwithstanding the fact that the other defendants may be found to be predominantly at fault. Yet this precise situation is possible given MR. TILLMAN's interpretation of the statute, i.e., where primarily negligent defendants have been named in a lawsuit prior to the enactment of the attorney's fee statute, while a marginally negligent defendant has only been joined after July 1st, 1980. Under the circumstances, and based upon the same rationale which was utilized by this Court in MEDEL, DR. WAXMAN would submit that he should not have been the only defendant in the case who could have been subjected to an award of attorney's fees.

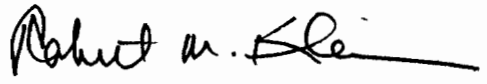
Petitioner finally attempts to distinguish MEDEL by noting that the language of the mediation statute was somewhat different from the language that is used in §768.56. Most notably, MR. TILLMAN points out that §768.133(10), Florida Statutes (The Mediation Statute) applied to "any case in which formal suit [had] been instituted" prior to the effective date of that statute. In contrast, TILLMAN notes that the attorney's fee statute specifically states that it is not to be applied in "any action" filed before July 1st, 1980.

The fact that the Medical Mediation Statute stated that it would not apply to any "case" instituted prior to the effective date of that statute, while the attorney's fee statute does not apply to any "action" filed before its effective date, is yet another distinction without a difference. As the Fourth District noted in THEODOROU, while citing to the Third District's opinion in MOUNT SINAI HOSPITAL OF GREATER MIAMI v. MORA, supra, the word "action" denotes the "entire controversy." See MORA, supra at 1064, and cases cited therein. As the Fourth District pointed out in THEODOROU, this Court "placed its imprimatur upon the logic and holding of the MOUNT SINAI case, reaching the same conclusion." THEODOROU, supra at 403. DR. WAXMAN would therefore respectfully suggest that MR. TILLMAN has not been able to successfully distinguish prior case precedent which has thoroughly rejected those arguments that are presently being advanced before this Court.

CONCLUSION

For all of the reasons cited above, Cross-Respondent BRUCE WAXMAN, M.D., would respectfully submit that the Fourth District of Appeal properly reversed the award of attorney's fees in favor of MR. TILLMAN and against DR. WAXMAN. The attorney's fees should not have been awarded where the cause of action accrued prior to the effective date of §768.56. In addition, attorney's fees should not have been awarded where the original lawsuit was filed prior to the effective date of that statute, even though DR. WAXMAN was added via an amended complaint in December of 1980. For this reason, that portion of the Fourth District's decision which quashed the award of attorney's fees should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 13th day of June, 1985, to the attached list of addresses.

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