IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 66,025

BRUCE WAXMAN,

Petitioner,

v.

JOSEPH TILLMAN, et al.,

Respondents.

BRIEF OF CROSS-PETITIONER TILLMAN ON JURISDICTION

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CITATIONS OF AUTHORITY

PREFACE

Plaintiff files this Cross-Petition to Invoke this Court's discretionary jurisdiction to review the Fourth District's ruling reversing an award of attorney's fees to Plaintiff under §768.56. The Fourth District's ruling in this regard directly and expressly conflicts with other Florida appellate decisions.

STATEMENT OF THE CASE AND FACTS

Plaintiff filed his original complaint against Howmedica, Inc. and St. Mary's Hospital on February 29, 1980 (A1-4). Thereafter, §768.56 F.S. was enacted which provided attorney's fees to the prevailing party in medical malpractice cases but which did not apply to any "action filed before July 1, 1980". Subsequently, on December 2, 1980, an Amended Complaint was filed which joined Dr. Waxman as a party defendant (A5-10). Plaintiff prevailed against Dr. Waxman and was awarded attorney's fees by the trial court. The Fourth District reversed the attorney's fee award, relying upon its prior decision in THEODOROU v. BURLING, 438 So.2d 400 (Fla. 4th DCA 1983) (A11-22).

QUESTION PRESENTED

THE FOURTH DISTRICT'S DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH OTHER FLORIDA APPELLATE DECISIONS FINDING THE RELATION BACK RULE INAPPLICABLE WHERE A NEW PARTY IS BROUGHT INTO THE LAWSUIT.

ARGUMENT

§768.56 F.S. provides for an award of attorney's fees in medical malpractice cases. §768.56 F.S. states "This section

shall not apply to any action filed before July 1, 1980." The Fourth District relied upon THEODOROU v. BURLING, supra, where the Fourth District previously held that the word "action" was to be equated to "case" and thus the filing of the amended complaint adding Dr. Waxman as an additional defendant related back to the filing of the original complaint, which was prior to the enactment of §768.56 F.S, and therefore the statute was not applicable.

It is submitted that the Fourth District's decision directly conflicts with other Florida appellate decisions pertaining to the relation back rule. While an action is commenced against the original defendant when the original complaint is filed, the limitations statute is only tolled as to the particular defendant named in the original complaint. LOUIS v. SOUTH BROWARD HOSPITAL DISTRICT, 353 So.2d 562 (Fla. 4th DCA 1977), cert. dismissed 359 So.2d 1217 (Fla. 1978). The relation back rule is inapplicable where the effect is to bring new parties into the law suit. GALUPPI v. VIELE, 232 So.2d 408 (Fla. 4th DCA 1970), cert. den. 238 So.2d 109 (Fla. 1970) as applied to this case.

The effect of the Amended Complaint was to bring into the lawsuit a totally new party, Dr. Waxman, and therefore the relation back rule is inapplicable.

The Fourth District's decision directly conflicts with CLICK v. PARDOLL, 359 So.2d 537 (Fla. 3d DCA 1978), rehearing. den. In that case, the plaintiff initially filed a complaint against a hospital and "Dr. Joe Doe" for alleged malpractice. The action was filed the day before the effective date of the Medical

Liability Mediation Act which required that all claims be submitted to a panel. Thereafter, the plaintiff amended the complaint adding "Dr. Peter Pardoll". The plaintiff was required to submit the claim against Dr. Pardoll to the mediation panel since the court held as follows:

> We hold that in this case the amending of the Complaint by adding Dr. Pardoll's name as a Defendant under these circumstances constitutes a new action filed as to the Doctor so that the Amended Complaint does not "relate back" to the date the original complaint was filed.

Conflict is also demonstrated with DOYLE v. SHAND'S TEACHING HOSPITAL AND CLINIC, 369 So.2d 1020 (Fla. 1st DCA 1979). The case is once again a malpractice case and contains the language:

> If the amended pleading introduces a new defendant, it does not relate back to the filing of the original pleading for purposes of tolling the Statute of Limitations as to that defendant.

The pleading setting forth Plaintiff's claim for medical malpractice against Dr. Waxman was the Amended Complaint filed on December 2, 1980. Accordingly, the "action" against Dr. Waxman was not commenced until such time. The "action" filed by Plaintiff against Howmedica, Inc. and St. Mary's Hospital on February 29, 1980 was distinct and separate from the "action" filed against Dr. Waxman on December 2, 1980. Claims for malpractice against different defendants are separate and distinct and are only tried together for the convenience of the parties and judicial economy. Dr. Waxman was not an indispensable party in the action filed by Plaintiff against Howmedica, Inc. and St. Mary's Hospital and vice versa.

Plaintiff could have filed these actions separately. Florida Standard Jury Instruction 2.4, which is applicable to cases involving numerous parties, instructs the jury that even though claims are tried together each is separate and each party is entitled to have the jury separately consider each claim as it affects that party. That instruction was given in this case.

The plaintiff has the right to initially select the parties defendant. DAVIS v. LEWIS, 331 So.2d 320 (Fla. 1st DCA 1976). In the present case, Plaintiff could have joined Dr. Waxman in his original complaint if he had so wished, but did not. Since his claim against Dr. Waxman is a separate and distinct action from the action against Howmedica, Inc. and St. Mary's Hospital, Plaintiff could have brought his claims against the separate Defendants in separate lawsuits. If he had done so, clearly Plaintiff would have been entitled to attorney's fees from Dr. Waxman under §768.56. The fact that Dr. Waxman was added as a defendant in this lawsuit is a distinction without a difference.

Before the Fourth District Dr. Waxman relied heavily upon MEDEL v. VALENTINE, 376 So.2d 1154 (Fla. 1979). A careful reading of MEDEL, however, reveals that the specific facts of that case, involving Florida's efforts to administer medical mediation panels, necessitated the court's finding of a relation back of an amended complaint under the Medical Mediation Act.

In MEDEL, the plaintiffs filed a medical malpractice action in April of 1975 against an obstetrician, Dr. Valentine. The suit arose when the Medel's son was born with permanent brain damage following a cesarean delivery. On July 1, 1975, the

Medical Mediation Act, Fla. Stat. 768.133 became effective. In December of 1975, the Medels joined Dr. Cohen, the anesthesiologist during the cesarean, as a co-defendant in the malpractice suit. Pursuant to the Medical Mediation Act, Dr. Cohen was granted a hearing before the mediation panel. The proceeding resulted in a finding of no actionable negligence on the part of Dr. Cohen, and this was introduced into evidence at the subsequent trial. The jury responded by awarding the plaintiffs one million dollars in their case against Dr. Valentine and finding no liability as to Dr. Cohen.

In ruling that the Medical Mediation Act should not apply to any portion of this case, the Florida Supreme Court demonstrated a great concern for the inequities involved in a single trial in which the jury had been informed of a finding of no liability by the mediation panel as to one defendant, thus making the other defendant appear negligent. Though purportedly resting on statutory grounds, Justice Sunberg stated:

> The error occasioned by application of the Medical Mediation Act thus entitles Appellants a new trial against Dr. Cohen, for the panel's finding of no actionable negligence prejudiced the Medels to the extent of making their case against Dr. Cohen more difficult to prove. Concomitantly, Dr. Valentine is deserving of a new trial because the cloak of innocence bestowed upon Dr. Cohen by the mediation panel necessarily implicated dr. Valentine as a negligent party.

Thus, it appears that the court's primary concern was that substantial prejudice would inhere in any trial in which one party was afforded the opportunity to present his case to the medical mediation panel and subsequently present these findings

at trial while his co-defendant was afforded no such opportunity. This reasoning, upon which the court relied, becomes unnecessary and irrelevant when applied to the facts of the case sub judice.

Subsequent interpretations of MEDEL bolster the contention that the above enunciated equal protection concern was in fact the reason for that decision. In HICKOX v. UNIVERSITY COMMUNITY HOSPITAL, INC., 384 So.2d 160 (Fla. 2d DCA 1980), the court followed MEDEL, relying on the fact that "the Supreme Court held that a new trial was required for both doctors because the application of the Medical Mediation Act denied the obstetrician equal protection". Again, it appears that equal protection rather than the specific statutory language required the Medel court to rule that the amended complaint related back to the time of the filing of the initial complaint.

In MEDEL, this concern for equal protection vis-a-vis prejudice at trial, an issue that is not raised by a subsequent award of attorney's fees, thus necessitated a unique interpretation of Florida Statute 768.133(10) F.S. However, the specific language of that statutory section is sufficiently disparate from the Statute involved in this case, 768.56(2) F.S. to permit this Court to follow the traditionally accepted interpretations of "action" and "relation back" without opposing or overruling the holding in MEDEL. The statute in question in MEDEL (§768.133(10) F.S.) reads as follows: "The provisions of subsections (1) through (9) shall be applicable to any case in which formal suit has been instituted prior to the effective date of these subsections, which shall be July 1, 1975". In contrast,

the statute in question in the case at bar stated: "This section shall not apply to any action filed before July 1, 1980" (§768.56(2) F.S).

The statutory intent is clear. The Legislature enacted §768.56 to reduce the number of malpractice suits filed by making plaintiffs think twice before suing a particular health care provider. The Fourth District's interpretation of the statute in an attempt to relate back the action against him to the previously filed actions against other health care providers thwarts this very intent and directly conflicts with other Florida appellate decisions cited, supra.

CONCLUSION

The Fourth District's decision that the Amended Complaint adding Dr. Waxman as a defendant related back to the filing of the original complaint directly and expressly conflicts with other Florida appellate decisions. Therefore, this Court has jurisdiction to hear this Cross-Petition on the merits.

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 26th day of NOVEMBER, 1984.

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