IN THE SUPREME COURT

OF FLORIDA

CASE NO.: 66,784

HOWARD FOLTA and JOANNE FOLTA, his wife,

Plaintiffs/Appellants, Cross-Appellees,

vs.

JOSEPH BOLTON, M.D., et al.,

Defendants/Appellees,

vs.

TARPON SPRINGS GENERAL HOSPITAL, INC. a Florida corporation,

Defendant/Appellee, Cross-Appellant.

PRINCIPAL BRIEF OF APPELLEE AND CROSS-APPELLANT, TARPON SPRINGS GENERAL HOSPITAL

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QUESTIONS RAISED

1. When a Plaintiff in a medical malpractice suit recovers a judgment against a Defendant based on but one of five separate and distinct claims brought against that Defendant, which of the two parties is considered the "prevailing party" for purposes of awarding attorney's fees pursuant to Section 768.56.

2. Does a Trial Court have jurisdiction to award attorney's fees pursuant to Section 768.56 when the Final Judgment entered in the case fails to expressly reserve jurisdiction to make such an award.

STATEMENT OF CASE AND FACTS

This is an Appeal by Plaintiffs, Howard and Joanne Folta, and a Cross-Appeal by the Defendant, Tarpon Springs General Hospital, from an Order of the Trial Court denying the Plaintiffs and this Defendants' Motion to Tax Attorney's Fees which were requested by these parties, pursuant to Florida Statute §768.56.

This Appellee/Cross-Appellant would submit that the facts which are applicable in this case are recited by the Eleventh Circuit Court of Appeals in their certificate to this Court. Specifically, the Eleventh Circuit Court of Appeals determined that Appellant had elected to present five different and distinct claims against this Appellee/Cross-Appellant(hereinafter referred to as the Hospital) thus, the Eleventh Circuit has determined that the five claims brought against the Hospital were separate and distinct claims and that the Hospital prevailed on at least three and possibly four of the said claims.

SUMMARY OF THE ARGUMENT ON APPEAL AND CROSS-APPEAL

This was a medical malpractice action in which the Plaintiffs originally sued four doctors and Tarpon Springs General Hospital for different injuries allegedly resulting from the medical malpractice of the Defendants. The Plaintiffs' claims against the Hospital were brought on five completely different theories. The Hospital was attempted to be held vicariously liable for the conduct of five different people, committing different acts and resulting in three different injuries. Each of these claims was a distinct and severable claim from the rest. However, the Plaintiff brought them all together in one action. The Plaintiffs eventually obtained a money Judgment against the Hospital which was based on the conduct of one person, the physical therapist, and which resulted in one injury. The Hospital prevailed as to the other injuries.

Pursuant to the attorney's fees Statute under Florida law, Chapter 768.56, Florida Statutes, the Trial Judge correctly determined that the Plaintiffs and Defendants were both prevailing parties on these several and distinct claims. The Trial Court therefore denied motions for attorney's fees filed by the Plaintiffs and the Hospital below. Under the rational of the dictates of the Statute, requiring that the Trial Judge use principles of

equity in awarding attorney's fees, the Court reasoned that since each of the parties were prevailing parties under severable and distinct claims, then the attorney's fees should be offset from each other.

The Hospital takes the position that the Trial Court was correct in its ruling. However, should this Court determine that the Trial Judge was incorrect in denying attorney's fees to the Appellants, Plaintiffs below, then this Defendant has filed its cross-appeal requesting that it be allowed an award of attorney's fees as the prevailing party of a majority of the claims presented against it in the lower Court.

In regard to the jurisdiction of the Trial Court to award attorney's fees in this case, when the Final Judgment failed to expressly reserve jurisdiction to make such an award, it is the Hospital's position that the Trial Court lacked the subject matter jurisdiction to make this award. The Hospital recognizes that there is a conflict among the District Courts of Appeal of the State of Florida concerning whether jurisdiction must be expressly reserved in order to make such an award of attorney's fees and it is the Hospital's position that this Court should adopt the position taken by the Fifth District Court of Appeals in this regard and should thereby require that the Court must reserve jurisdiction over this matter in order to retain the same. It is therefore, the Hospital's position that the Trial Court lacked jurisdiction in the instant case to enter the Order concerning attorney's fees in this matter.

ARGUMENT

I. WHEN A PLAINTIFF IN A MEDICAL MALPRACTICE SUIT RECOVERS A JUDGMENT AGAINST A DEFENDANT BASED ON BUT ONE OF FIVE SEPARATE AND DISTINCT CLAIMS BROUGHT AGAINST THAT DEFENDANT WHICH OF THE TWO PARTIES IS CONSIDERED THE "PREVAILING" PARTY FOR PURPOSES OF AWARDING ATTORNEY'S FEES PURSUANT TO FLORIDA STATUTE 768.56?

This Court has jurisdiction over the instant case by virtue of Florida Rules of Appellate Procedure 9.150 which deals with certified questions from the Federal Courts. This rule specifically provides that questions of law may be certified from the Federal Courts when there is no controlling Florida precedent and when the question will be dispositive of a case. Id. This rule further requires that the Federal Court transmit a certificate to this Court which specifies among other things, the "facts showing the nature of the cause." Fla. R. App. P. 9.150(b). Pursuant to the above noted rule, the Eleventh Circuit Court of Appeals transmitted its Certificate in this case and included in this certificate a statement of the facts of the instant case.

The Hospital respectfully submits that the facts, as related in the Eleventh Circuit's Certificate, are controlling for purposes of this Court's decision and in fact are the law of this case. Specifically, the Hospital submits that the Eleventh Circuit has held that:

> Upon the conclusion of the presentation of the evidence, the appellants elected to present five different, distinct and severable claims against the Hospital to the jury. These claims were in addition

> to those brought against the individual staff members. Each of these claims involved different persons, allegedly the agent or servant of the Hospital, different times of occurrence, different acts or conduct allegedly described as malpractice, with resulting different injuries. Each of these distinct claims form the basis of a lawsuit in and of itself.
>
> Of the five different and distinct claims brought against the Hospital, the jury sided with the plaintiffs on only one. Specifically, the jury determined that the Hospital's physical therapist was 15% negligent in regard to additional damage to plaintiff's neck injury. Consequently, we can conclude that the hospital prevailed on at least three, and possibly four, of the five charges brought against it but the plaintiff prevailed in the sense of obtaining a judgment against the Hospital.

Thus, the Hospital contends that all arguments made by Appellants concerning the distinctness and severability of the claims against the Hospital are inappropriately before this Court. Instead, these issues have already been decided by the Federal Court. Consequently, the Hospital contends that the issue properly before this Court is who is the prevailing party in terms of Florida Statute §768.56 when the Defendant has prevailed on four of five separate and distinct claims and the Plaintiff has prevailed on only one such claim.

Should this Court find, however, that the Eleventh Circuit's opinion was not conclusive in this regard the Hospital nonetheless submits that it was the prevailing party on three of the five separate and distinct claims presented against it by Appellant. The five different

claims brought against the Hospital are as follows:

1. Claim against emergency room physician - The Hospital was attempted to be held vicariously responsible for the alleged negligence of Hugh Rutledge, M. D., even though he was dismissed prior to trial.

2. Claim against physical therapist - The Hospital was attempted to be held vicariously responsible for the alleged negligence of the physical therapist in failing to inform the attending physicians of neck complaints.

3. Claim against x-ray technologist - The Hospital was attempted to be held vicariously responsible for the alleged negligence of the x-ray technologist.

4. Claim against radiologist - The Hospital was attempted to be held vicariously responsible for the medical malpractice and negligence of Albert Berje, M.D., whom the Plaintiffs claimed was an agent or employee of the hospital.

5. Claim against nurses - The Hospital was attempted to be held responsible for the alleged negligence of the nursing staff of the Hospital in allowing an injury to occur on the heel of Mr. Folta's foot while he was hospitalized at Tarpon Springs General Hospital.

Each of the claims against the Hospital was premised upon conduct of the different persons alleged to be an employee or agent of the Hospital. Each of the said claims involves a different person, a different time of occurrence, a different set of facts, a different level of

expertise for the alleged employee or agent and further involve three separate and distinct injuries. Likewise,since each claim involved a separate health care provider and/or separate set of circumstances, each claim involved a separate standard of care as is required by Florida Statute Section 768.45. For instance, the claim against the emergency room physician and the physical therapist were that they did not act within the standard of care expected of them individually, which resulted in the attending physician's failure to obtain x-rays of the neck. This in turn allegedly resulted in the misdiagnosis of the fractured neck. The jury ultimately determined that the emergency room physician was not negligent but that the physical therapist was 15% negligent resulting in the misdiagnosis of the neck fracture. The Hospital was forced to defend against the allegations of negligence against the emergency room physician as well as the agency claim attempting to relate that physician to the Hospital. Additionally, the standard of care to which the emergency room physician was held was different than that to which a physical therapist was held and the Hospital was therefore forced to defend against two wholly different claims against two wholly different individuals.

With regard to the hip injury, the Plaintiff alleged and sought to prove that the x-ray technologists were negligent in the performance of their duties and management of Mr. Folta. The Hospital had to prepare and

defend against the alleged negligence of these x-ray technologists. The jury, however, ultimately found that they were not negligent in the care and treatment of Mr. Folta. The Plaintiff also claims that Dr. Berje was an agent of the Hospital. The jury did determine that he was an agent. However, the Final Judgment did not reflect or result in a Judgment against the Hospital based on this agency theory.

Finally, the Plaintiff elected to present evidence and submit to the jury a claim that the nurses were negligent in allowing a decubitus ulcer to form on the heel of Mr. Folta. Again, the Hospital had to defend against this negligence claim which was wholly separate and apart from the other claims involved in this case. The Jury ultimately determined that the nurses were not negligent in causing this injury to the foot of Mr. Folta.

As a consequence of the five different and distinct claims brought against the Hospital, a Final Judgment was rendered on only one claim. The Jury determined that the physical therapist was 15% negligent which played a proximate and legal cause of the neck injury. Although the Plaintiff prevailed on an agency theory of Dr. Berje, it did not result in the Final Judgment being entered against the Hospital for that injury or for those damages. Thus, as the Court can clearly see, there were five distinct claims brought against the Hospital, each which could have been brought in a separate lawsuit. Since the Jury verdict

clearly distinguished between the different claims and theories brought against the Hospital, as well as the different injuries received by Mr. Folta, then we are able to determine that the Hospital prevailed on at least three of the five different claims presented against it.

In the Appellants' Brief, they attempt to aruge that they did not in fact elect to pursue five separate claims against the Hospital. Instead, they argued that since the Hospital initially requested a more specific verdict form, that it in fact differentiated the various claims involved. Appellants' arguments ignore the facts of the instant case. These arguments ignore the fact that each of the five separate claims required different elements of proof in order to be allowable against the Hospital. Specifically, for each claim the Plaintiffs had the burden of showing that the different health care providers deviated or fell below the standard of care which is required of the same or similar health care providers in similar circumstances. As previously noted, these standards are different for different health care providers and are in fact, different under the numerous circumstances involved in the instant case. Indeed, this is clearly demonstrated by an examinationn of the verdict form itself since not all Defendants' names are listed under each section of this verdict form. Instead, only those Defendants against whom the Plaintiff had made out a prima facie case concerning that injury were included under

any given section of the verdict form.

Throughout the instant litigation and indeed at the conclusion of the presentation of the evidence in this case, the Appellants elected to present five different, distinct and severable claims against the Hospital to the jury. The verdict form is absolute and conclusive proof that the Hospital prevailed in three of the five claims presented against it by the Plaintiffs. Pursuant to Florida Attorney's Fees Statute, the Hospital was the prevailing party in three of the five distinct and different claims that the Plaintiff elected to pursue against the Hospital. The Hospital is therefore entitled to either an award of attorney's fees on those claims upon which it prevailed or is entitled to have an offset of its fees on the claims upon which it prevailed against the Plaintiffs' claim for fees.

If the purpose of the Medical Malpractice Attorney's Fees Statute is to discourage non-meritorious actions, as the Plaintiffs suggest, then Tarpon Springs General Hospital is obviously entitled to an award of attorney's fees as it was clearly the prevailing party on the various claims which the Plaintiffs elected to join in this action. Since it is obvious that extra discovery, depositions, hearings and judicial labor and effort were expended on each claim which the Plaintiff did not prevail on, then it is obvious that this Cross-Appellant should be entitled to its award of attorney's fees on those

particular claims. Only if such a result occurs, will the goal of the Medical Malpractice Attorney's Fees Statute be met since only under these circumstances would non-meritorious actions be discouraged.

There are no cases on point on this first issue which this Court faces. Indeed, all of the cases cited by Appellant concerns different questions of law and/or different statutes. None of the said cases deal with the factual situation as presented here. In the Sharpe vs. Ceco Corporation, 242 So.2d 464(Fla. 3rd DCA 1970) cert. denied, 247 So.2d 324(Fla. 1970), the decision stated that the Plaintiff was the prevailing party even though he did not get the entire dollar amount that he requested. In that case, as in most of the other cases cited by the Appellant, there was only one claim, the same parties were involved and only one set of facts, transaction or occurrence was the basis of the case. The same is true in Kendall East Estates, Inc. vs. Banks, 386 So.2d 1245(fla. 3rd DCA 1980) and Fernandez vs. Hendry Tractor, Co., 406 So.2d 1213(Fla. 3rd DCA 1981), affirmed 432 So.2d 1315(Fla. 1983). In Fernandez, the Plaintiff brought different theories on the same injury which resulted from the same set of facts and transactions involving the same parties. The Plaintiff prevailed on the negligence theory but did not prevail on the breach of warranty theory based upon the same set of facts. The Court held that Plaintiff was the prevailing party under the circumstances of that case.

Finally, Kirou vs. Oceanside Plaza Condominium Association, Inc., 425 So.2d 650(Fla. 3rd DCA 1983), the Court held that Defendant won on an issue that they construed to be an affirmative defense. Thus, the Third District Court of Appeals reversed the Trial Court's ruling that the plaintiff and the defendant were both entitled to an award of attorney's fees since they won on different claims. The fact that the Defendant had raised a separable claim, so they contended, that was an effect of an affirmative defense was the basis for the Court holding that if there were not two prevailing parties in that particular case.

As previously noted, Tarpon Springs General Hospital was a prevailing party as to separable and distinct claims involving different injuries, parties and conduct. Had any of these claims been tried separately from the one which the Plaintiffs did prevail upon, then the Judgment would have been entered on behalf of the Hospital and it would have obviously been entitled to an award of attorney's fees. Simply because the Plaintiff has elected to join more claims which require extra discovery, attorney and judicial labor and costs and expenses, should not mean that he is entitled to escape his obligations under the attorney's fees statute by winning only one of several and distinct claims. Indeed, allowing such an event to occur would undermine the very purpose of the attorney's fees statute which is to discourage

non-meritorious action.

In addition to the foregoing argument, the Hospital wishes to take issue with the Appellants' argument that there can be only one prevailing party in a negligence claim. While the Hospital would agree that if there is only one claim of negligence, there can be only one prevailing party, it would point out this is not the situation in the instant case. Instead, the Hospital contends that where, as here, the Plaintiff elects to pursue five different claims of negligence, then you can have more than one prevailing party. Indeed, in this light, the Court should note that a similar reasoning has been accepted by the Federal Courts in a line of patent cases. For instance, in Dixie Cup Co. vs. Paper Manufacturer, Co., 159 F.2d 645(7th Cir. 1948), the Court held that where two patents were involved, both Defendant and Plaintiff could be prevailing parties. Thus, the Court recognized that where there are separate and distinct claims, there can be more than on prevailing party. Id.

As the foregoing demonstrates, the Plaintiffs elected to pursue five separate and distinct claims against the Hospital in the instant case, but prevailed on only one of these claims. It is thus apparent that the Hospital prevailed on at least three of the claims which Plaintiff elected to bring against it. The Hospital therefore, respectfully submits, that it is a prevailing party pursuant to Florida Statute § 768.56 and therefore submits

that it is entitled to attorney's fees on a minimum of three of the five medical malpractice claims presented against it to the jury in the litigation below. The Hospital consequently, respectfully submits that this Court should answer the Eleventh Circuit Court of Appeal's first question by noting that the Hospital was the prevailing party in the instant litigation.

II. DOES A TRIAL COURT HAVE JURISDICTION TO AWARD ATTORNEY'S FEES PURSUANT TO SECTION 768.56 WHEN THE FINAL JUDGMENT ENTERED IN THE CASE FAILS TO EXPRESSLY RESERVE JURISDICTION TO MAKE SUCH AN AWARD?

This Appellee/Cross-Appellant maintains that the Trial Court lacked jurisdiction in the instant case to award attorney's fees since the Final Judgment failed to expressly reserve jurisdiction to make such an award. Instead, the Hospital submits that this Court should adopt the decision and reasoning of the Fourth District Court of Appeals as was evidenced in its decision in North Broward Hospital District v. Finkelstein, 456 So. 2d 498 (Fla. 4th D.C.A. 1984).

In the Finkelstein decision the Fourth District held that a Trial Court lacked jurisdiction to assess attorney's fees in a medical malpractice action absent a specific reservation of such jurisdiction in the final judgment. Id. at 498-99. In so holding, the Court noted that the basis for its decision was the long line of cases which hold that a final judgment considers and sets to rest all the claims involved in a case. Id. Thus, the Court held that final judgments are in fact final as to all claims unless they specifically note on their face that some jurisdiction has been reserved by the Trial Court. In other words, the Fourth District held that parties are entitled to reply on the finality of judgments unless they indicate on their face that they are not final as to all

claims.

The Hospital recognizes that the Third District Court of Appeal appears to have reached a different conclusion on this issue. See Young v. Altenhaus, 448 So. 2d 1039 (Fla. D.C.A. 1983), decision quashed 10 F.L.W. 252 (Fla. May 3, 1985). As the following will demonstrate the Hospital contends that Young case is distinguishable from the Finkelstein case. In the Young case a Motion requesting an award of attorneys fees was made before the final judgment was entered. Id. at 1041. It is thus clear that the final judgment did not properly dispose of all claims which were pending before the Court. Additionally, it should be noted that with the advent of this Court's recent decision prohibiting the retrospective application of Florida Statute § 768.56 in the Young case, the Third District's decision in this regard is at best dicta. See, Young v. Altenhaus, 10 F.L.W. 252 (Fla. May 3, 1985). For the foregoing reasons the Hospital respectfully submits that the Young decision is not applicable in the instant case but that instead the Finkelstein decision should be controlling.

In addition to placing emphasis on the finality of final judgments, the Finkelstein Court cited numerous Florida cases which specifically state that the Trial Court has no jurisdiction to award attorneys fees absent specific reservation of such jurisdiction. Id. at 498. While none of these cited cases deal specifically with Florida

Statutes §768.56 they nonetheless show that the policy in this state requires a specific reservation of jurisdiction before such an award of attorneys fees can be made after entry of a Final Judgment. See, Jackson v. Jackson, 390 So. 2d 787 (Fla. 1st D. C. A. 1980); Oyer v. Boyer, 383 So. 2d 717 (Fla. 4th D. C. A. 1980); Frumkes v. Frumkes, 328 So. 2nd 34 (Fla. 3rd D. C. A. 1976). Indeed, the strongest statement in this regard is made in the Oyer case where the Fourth District notes that even a stipulation by the attorneys cannot prolong the Court's jurisdiction and thereby give it jurisdiction over the attorneys fees question.

As the Oyer case thus aptly demonstrates, the Trial Court's ability to award attorney's fees after entry of a Final Judgment cannot be affected by the stipulations of parties. Id. Consequently, the Court has held that the jurisdiction cannot be confined on the Court in these cases by the actions of one or both parties. Id. Instead, the Oyer Court held that the parties' stipulation was insufficient to give the trial Court jurisdiction over the award of attorneys fees. Id. In light of the foregoing, it is clear that Appellant's waiver arguments are baseless. Indeed, Appellant is arguing that the Hospital could do by inaction what it could not do by stipulation, that is, give the Trial Court jurisidiction over attorney's fees. It is thus, clear that the Hospital has not and indeed could not consent to the Trial Court's jurisdiction over attorneys

fees.

In light of the foregoing, the Hospital respectfully submits that the Trial Court lacked jurisdiction in the instant case to address the award of attorneys fees absent a specific reservation of such jurisdiction. Consequently, the Hospital respectfully submits that the Eleventh Circuit's second question should be answered in the negative.

CONCLUSION

Based on the foregoing arguments, the Hospital respectfully submits, that this Court should answer the Eleventh Circuit Court of Appeals' first certified question by noting that the Hospital was the prevailing party on at least three of the five claims brought against it by Appellant and therefore is entitled to attorney's fees pursuant to Florida Statute §768.56.

Likewise, based on the foregoing arguments, the Hospital respectfully submits that the Trial Court lacked jurisdiction to decide the issues on attorney's fees since the Final Judgment did not specifically reserve jurisdiction to make such an award. The Hospital therefore respectfully submits that this Court should answer the Eleventh Circuit Court of Appeal's second certified question in the negative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail/hand delivery this 28th day of May, 1985, to THOMAS SAIEVA, ESQUIRE, Suite 102, 403 North Morgan Street, Tampa, Florida 33601; to ALAN W. COHN, ESQUIRE, 3705 Biscayne Blvd., Miami, Florida 33131; to JERRY L. NEWMAN, ESQUIRE, Post Office Box 2378, Tampa, Florida 33601; to MICHAEL L. KINNEY, ESQUIRE, 201 Bayshore Bldg., 2907 Bay to Bay Blvd., Tampa, Florida 33609; to MARK HICKS, ESQUIRE, 1414 duPont Bldg., 169 East Flagler Street, Miami, Florida 33131; and to DIXON, DIXON, HURST & NICKLAUS, Suite 1500 New World Tower, 100 North Biscayne Blvd., Miami, Florida 33132.

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