

O/A 11-5-85

IN THE SUPREME COURT OF FLORIDA  
OF FLORIDA

FILED  
C. J. WHITE  
JUL 22 1985

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CASE NO. 66,784

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CLERK, SUPREME COURT  
By *pb*  
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HOWARD FOLTA, et ux,  
Petitioners,

vs.

JOSEPH BOLTON, et al.,  
Respondents.

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PETITIONERS' REPLY BRIEF ON  
CERTIFIED QUESTION

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CONSOLIDATED REPLY TO  
STATEMENT OF THE CASE AND FACTS

Petitioners, Howard Folta and Joanne Folta, will respond to both Tarpon Springs Hospital's and Dr. Berje's briefs on certified questions in this reply brief. Because this case was fully briefed and argued in the Eleventh Circuit, most of respondent's arguments were anticipated and answered in our main brief. However, a few arguments merit some discussion.

A. Dr. Berjes' Statement:

Dr. Berje commences his brief by adopting the Folta's statement of the facts, with the exception of the representation that the trial judge taxed the costs against Drs. Bolton, Atkinson and Berje. Dr. Berje states that the record reflects that costs were not taxed fully against the defendants. An examination of the Court's order reveals that out of 14 items of allowable costs each physician paid 1/3 of the costs for 12 items.

Thereafter, the Foltas were separately awarded against each doctor, the cost of his own deposition and the service of process fee. (R.801-803). Based upon the foregoing, Dr. Berje's argument totally lacks merit.

The remainder of Dr. Berje's statement simply concedes that he was held 100% liable for the negligent care and treatment of Mr. Folta's hip injury but asserts that a directed verdict was entered in his favor with respect to the neck injury. The directed verdict was entered because Mr. Folta's expert was held to be unqualified to testify about Dr. Berje's negligence as to the

neck injury. (T.377-390). It is significant to point out that of the \$106,807 paid to satisfy the judgment, Dr. Berje paid \$59,119.50.

B. Tarpon Springs Hospital's Statement

Tarpon Springs does not disagree with or in any way criticize the Folta's statement of the case and facts. Tarpon Springs simply adopts the facts recited by the Eleventh Circuit, which we have demonstrated in our main brief is inaccurate in a few material respects.

ARGUMENT

REPLY TO POINT I

A. Dr. Berje's Argument

Dr. Berje argues that he prevailed upon a separate distinct injury (i.e. the neck) and is therefore not liable for attorneys' fees even though he paid a majority of the judgment for the malpractice he committed against Mr. Folta. Dr. Berje also cites a portion of certain colloquy between counsel and the judge for the proposition that the Folta's admitted Dr. Berje was the prevailing party as to the neck injury. Dr. Berje's argument lacks merit.

In our main brief, we responded at length to the "separate and distinct" aspect of Dr. Berje's argument. However, even assuming that the injuries were distinct and severable (which we deny), the fact remains that Mr. Folta was involved in one course of treatment in the hospital and when viewed from his perspective, he was awarded a money judgment against Dr. Berje for mal-

practice. This entitles him to attorneys' fees. The fact that two suits may or may not have been brought is essentially irrelevant. One suit was brought and Dr. Berje was the affirmative winner when the dust settled.

As to the portion of the colloquy between counsel and the court, counsel for the Folta's agreed that Dr. Berje prevailed on the neck injury but only based upon the separation of the damages "...which I don't agree to..." (Tr. 1/4/84, 22-23).

In support of his argument that he was a prevailing party, Dr. Berje cites this court's decision in Marianna Manufacturing Co. v. Boone, 45 So. 754 (Fla. 1908), wherein it was held that where the defendant won on one of two counts, costs should be taxed in his favor as the statute directs. However, in the recent decision of Hendry Tractor Co. v. Fernandez, 432 So.2d 1315 (Fla. 1983), this court stated as follows:

"The Court in Marianna Mfg. applied section 1736, long before Florida adopted the modern rules of pleading which permit alternative pleading of causes of action arising, or which could arise, out of the same transaction. In addition Marianna Mfg. was decided prior to Florida's adoption of strict liability. West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976) These factors, when considered together render the 1908 interpretation of the cost statute outdated."

Thus, Marianna Mfg. is no longer valid in Florida and the basis for Dr. Berje's argument has been rejected by this court.

Dr. Berje's reliance on Prospect v. Neily, 10 FLW 808 (Fla. 4th DCA Mar 27, 1983) is also misplaced. There, a wife was awarded a judgment in a medical malpractice action, while her husband was unable to prove his loss of consortium claim. The court affirmed an award of fees against the husband (2-1) because the husband,

"...does not automatically prevail on the issue of liability simply because his spouse prevailed on her claims and he does not contend he presented the requisite evidence."

Thus, the court simply held that fees are appropriate against a husband who fails to prove any claim in a medical malpractice action. This is completely consistent with the theory that the defendant prevailed as to the husband's claim and thus, the defendant may recover fees. The husband won nothing so he could not be deemed the prevailing party when the dust settled.

Dr. Berje also claims that Florida Compensation Fund v. Black, 460 So.2d 381 (Fla. 2nd DCA 1984) does not apply because of the "unique status occupied by the Fund". While the Fund undoubtedly occupies a unique status in accordance with the statutes, such status had nothing whatsoever to do with the holding that the appropriate way to view the outcome of a medical malpractice action is from the standpoint of the plaintiff and the "[f]ailure to win on all aspects of a lawsuit does not mean that plaintiff did not prevail."

An examination of each of the other case relied upon in our main brief reveals that Dr. Berje's analysis of them is similarly incorrect.



B. Tarpon Springs Argument

Tarpon Springs commences its argument by asserting that this Court is bound by the facts recited by the Eleventh Circuit. This argument is totally misplaced since footnote 6 of the Eleventh Circuit's opinion gives this Court full latitude to reconsider all of the issues.

On page 5 of the Hospital's brief, it quotes from the Eleventh Circuit's opinion which states that the plaintiffs prevailed on one out of five claims. However, even the Hospital claims that it won only "three out of five" claims and it does not deny that the final judgment inadvertently failed to recite its liability for Dr. Berje.

In any event, we contend that, when viewed from the plaintiffs' perspective, the Hospital only prevailed as to one of Mr. Folta's 3 injuries, i.e., the ulcer on his foot. It did not prevail as to the hip and neck injuries. Thus, the corporation was found liable for two out of the three injuries suffered by Mr. Folta due to acts of its employees. The fact that certain employees were found not negligent does not eliminate this finding of malpractice as to the majority of the injuries suffered by Mr. Folta.

The Hospital's remaining arguments have been answered fully in our main brief and in our reply to Dr. Berje's argument.

REPLY TO POINT II

Both Dr. Berje and the Hospital contend that this Court should adopt the rationale of North Broward Hospital District v. Finkelstein, 456 So.2d 498 (Fla. 4th DCA 1984), and hold that there must be a reservation of jurisdiction in the final judgment as a condition to an award of attorney's fees after final judgment.

As noted in our main brief, the threshold issue is to determine whether a reservation of jurisdiction is substantive or procedural under Florida law. If the issue is procedural, then the Foltas should prevail on at least two grounds.

The first is that federal courts are not "... bound by the procedural direction ..." of state rules or laws. Lumbermens Mutual Casualty Co. v. Renuart-Bailey-Cheely Lumber & Supply Co., 392 F.2d 556 (5th Cir. 1968) (involving Florida's insurance attorney's fees statute). Thus, if the issue is procedural, the Eleventh Circuit should decide the question as a matter of Federal Civil Procedure. Under the rules adopted by the United States Supreme Court in all cases where attorneys' fees are authorized by statute, an express reservation of jurisdiction is not required. See White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982). The rationale in White, supra, has been used by the Eleventh Circuit in allowing a motion for attorneys' fees (sought under a Georgia Statute) to be filed after the notice of appeal. Rothenberg v. Security Management Co. Inc., 677 F.2d 64 (11th Cir. 1982).

The second ramification of a determination that the time for filing a motion for fees is procedural is that it would not be jurisdictional. Thus, this Court's rules would govern when a motion for attorney's fees should or must be filed. This is far more desirable than having numerous statutes and court rules mandating the times when fees must be sought.

As noted in the Eleventh Circuit's decision in Lumbermens Mutual supra, it determined that the requirement in Florida Statute §627.0127 that the appellate court must adjudge an appellate fee on appeal is a "procedural direction." Matters of procedure are purely within the province of this Court and any attempt by the legislature to dictate procedure is unconstitutional.

In any event, assuming arguendo that the issue of when a motion for attorney's fees must be filed in Florida is deemed substantive, the Foltas contend that no reservation of jurisdiction is necessary pursuant to Florida Statute §768.56. This subject has been fully discussed on pages 25-30 of our main brief.

The last issue raised by Dr. Berje is that since the final judgment was fully satisfied, it cannot subsequently be amended to include an award of attorney's fees.

The first observation we must make is that this issue is improperly being raised for the first time before this Court.

The second observation is that the Folta's are not seeking to amend a satisfied judgment. Rather, they are attempting to have a new judgment entered for attorney's fees.

In any event, in support of his contention, Dr. Berje cites Dock Marine Construction Co. v. Parrine, 211 So.2d 57 (Fla. 3rd DCA 1968). This case simply held that costs were improperly granted after satisfaction of the final judgment where the cost statute expressly provided that costs "... shall be included in the judgment." The medical malpractice statute which is involved herein has no such provision. Thus Dock is totally inapplicable in cases where the statute does not require inclusion of fees or costs in the judgment. See B & L Motors, Inc. v. Bignotti, 427 So.2d 1070 (Fla. 2nd DCA 1983); Jeffcoat v. Heinicka, 436 So.2d 1042 (Fla. 2nd DCA 1983).

#### CONCLUSION

Based upon the foregoing, it is respectfully submitted that both questions be answered as urged by the Foltas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 17th day of July, 1985 to: ALAN W. COHN, ESQ., 3705 Biscayne Boulevard, Miami, Florida 33131, THOMAS SAIIEVA, ESQ., P.O. Box 1601, Tampa, Florida 33601, Jeffrey Fulford, Esq., 333 North Ferncreek Avenue, Orlando, Florida 32803, and MICHAEL L. KINNEY, Esq., Sun Bank Building, 315 Madison, Suite 711, Tampa, Florida 33602.



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