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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

FILED

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DEC 24 1990

CLERK, SUPREME COURT

By  Deputy Clerk

WILLIAM D. ROE,
Petitioner,

vs.

CASE NO. 76,702

CITY INVESTING/GENERAL
DEVELOPMENT CORP. and HOME
INSURANCE COMPANY,
Respondents.

BRIEF OF RESPONDENTS

ON PETITION FOR REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF THE STATE OF FLORIDA

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STATEMENT OF THE FACTS

Respondents, City Investing/General Development Corp. and Home Insurance Company, who were the Employer/Carrier at the trial level and Appellees before the First District Court of Appeal, object to the Statement of the Facts contained in the Petitioner's brief. The Petitioner presents voluminous, trivial facts, and omits the undisputed facts which form the basis of the controversy regarding the applicability of Section 440.19(1)(b), Florida Statutes (1987). The Respondents present the following Statement of the Facts which provides the Court with those facts which are relevant to these proceedings.

The Claimant has lower back problems arising out of industrial accidents which occurred in 1982 and 1984. (R 2). A left lumbar laminectomy was performed in June, 1984. (R 105). The Claimant was urged to return to work in August, 1984, and he reached MMI in January, 1985. (R 106). The carrier last paid for medical treatment on January 16, 1985. (R 4). Counsel stipulated that more than two years passed after that date, within which the Employer/Carrier paid no benefits whatsoever for either accident. (R 4). There was no question that the statute of limitations had run on any claim unless the exception provided in Section 440.19(1)(b), Florida Statutes (1987), was applicable. The claim was for remedial medical care for insertion of Steffe plates in the spine in order to obtain a fusion, and for

temporary disability benefits. (R 149). The primary question considered by the Deputy Commissioner was whether the insertion of "Steffe plates" was the insertion or attachment of a prosthetic device. (R 149). The Deputy Commissioner held:

I find as a matter of law, the reconstruction of the claimant's spine by the insertion of Steffe plates is the insertion or attachment of a prosthesis device for the purposes of the exemption. The testimony is quite clear the plates and related surgery will serve to place missing bone and cartilage material and will replace the function of those natural bodily elements in supporting and stabilizing the spine. The surgery reasonably and necessarily contemplates changes to the architecture of the spine so as to accommodate and enhance the function of the artificial bodily parts. I take notice of the standard dictionary, and medical dictionary definitions of prosthesis. Prosthesis is simply an artificial replacement to a missing bodily part. The usual analogies are glass eyes, artificial limbs, dentures and so forth. Such replacements may be both cosmetic and functional in their character. Thus the insertion of permanent metal parts would fall within this loss definition.

(R 150).

The Deputy Commissioner awarded remedial medical care and denied the claim for indemnity benefits. (R 150).

Dr. Kaler, the Claimant's orthopedic surgeon, explained the proposed procedure. According to his testimony, the CT scan shows a buckling of the annulus at the site of the 1984 laminectomy. (R 109). He testified that this buckling is secondary to the degenerative disk disease which is related to the surgery of 1984. (R 110). The annulus sometimes

buckles after this type of surgery, but usually there is some time for other structures in the area to accommodate the buckling so that there are no symptoms. (R 123).

Dr. Kaler proposes to reconstitute the disk height, using some type of interbody fusion. (R 111). He proposes to use Steffe plates in the surgery because of the statistical difficulty of getting a satisfactorily solid fusion at the L5-S1 level. (R 111). The plates will maintain the position in which the spine is placed after the fusion. (R 111).

Dr. Kaler testified that a prosthetic device is something that is used to replace anatomy that either is not present or does not function properly. (R 111). He stated that it was his opinion that the Steffe plates were a prosthetic device from the standpoint that they will replace normal, functioning facet joints that will be removed at the surgery. (R 112). The Steffe plates will not be removed unless a problem arises. (R 112).

Dr. Kaler admitted that a fusion could be accomplished without implanting the Steffe plates. (R 124). He recognized that the procedure is regularly done without the implant, and that it depends on the person to whom you are speaking as to which procedure is more commonly used. (R 124). According to Dr. Kaler, each of the procedures has its merits and its potential problems. (R 124). The Steffe plates add immediate stability so that bone grafts do not

migrate. (R 124). With the alternative procedure, the physician must use some type of cast immobilization. (R 125). The end result of the alternative procedure would be as satisfactory as far as alleviation of symptoms and stabilization of the spine. (R 125). Dr. Kaler testified that he has done both procedures, and that internal fixation is not something that is very often seen. (R 125). In this particular case, Dr. Kaler felt that the internal fixation procedure was preferable because statistically at this level of the spine, it is difficult to get a solid fusion otherwise. (R 127).

Dr. Kaler testified that any number of physicians would suggest any number of different procedures under the circumstances. (R 128). The suggested procedure would depend on the experience of the physician and his or her preferences as to treating a particular problem. (R 128). The procedure which does not require internal fixation is a good procedure, but some people felt that there were problems with it because of the loosening of the grafts. (R 128). With the advent of the plates, a physician can control where the grafts stay. (R 128). In any event, other physicians would suggest a different approach. (R 129). Some physicians would suggest an implant for internal fixation, while others would not. (R 129). Some physicians might use a device other than the Steffe plates. (R 129).

SUMMARY OF ARGUMENT

The Deputy Commissioner determined that the Steffe plates were prosthetic devices, and based upon this determination, he ruled that the statute of limitations would not bar the claim for remedial treatment. This interpretation of the statute impermissibly expands the definition of prosthetic device beyond the limits intended by the legislature. Steffe plates are no more prosthetic devices than are knee braces or eyeglasses. The Steffe plates simply assist existing body parts to function; they do not replace missing body parts.

If the Steffe plates are indeed prosthetic devices, the statutory exclusion would still be inapplicable. The legislature intended the exemption for prosthetic devices to apply only to true prosthetic devices which were inserted or attached prior to the expiration of the statute of limitations. Any other interpretation of the statute would render the statutory exclusion unconstitutional. The interpretation or construction advanced by the Claimant arbitrarily singles out for special treatment those claimants whose medical conditions require some type of brace at some time after the industrial accident. The running or the tolling of the statute of limitations would depend strictly upon the whims of the Claimant's physician. A claimant who has back problems which are treated without Steffe plates would be barred from remedial treatment after

two years. If the physician of that same claimant happened to believe that the assertion and attachment of Steffe plates or metal rods is appropriate, the statute of limitations would be wiped out. According to the Claimant's argument, if he had gone to a physician who prefers not to use internal plates in this type of situation, the statute of limitations would have barred the claim in this case. This interpretation of the statute would result in an arbitrary and irrational classification which would deny equal protection to those claimants who are excluded by the classification.

The legislature has for many years drawn a distinction between the statute of limitations for compensation benefits and the statute of limitations for remedial treatment. When the statutes are examined in light of the substantial case law, it is apparent that the legislature never intended to waive all statutes of limitation where prosthetic devices are involved. The statutory waiver is limited by its terms to remedial treatment, and it should be given the interpretation intended by the legislature.

ARGUMENT

IS THE STATUTE OF LIMITATIONS FOR COMPENSATION BENEFITS (AS OPPOSED TO MEDICAL BENEFITS) EXTENDED INDEFINITELY UNDER SECTION 440.19(1)(b), WHERE THE CLAIMANT'S INJURY RESULTS IN THE NEED FOR THE USE OF A PROSTHETIC DEVICE AT SOME DATE IN THE FUTURE WHEN THE STATUTE OF LIMITATIONS HAS OTHERWISE EXPIRED?

Section 440.19(1)(b), Florida Statutes (1989), provides that no statute of limitations shall apply to remedial attention relating to the insertion or attachment of a prosthetic device to any part of the body. In the instant case, the Deputy Commissioner determined that the Steffe plates were prosthetic devices, and based upon this determination, he ruled that the statute of limitations would not bar the claim for remedial treatment.

Dr. Kaler testified that a prosthetic device is something to replace a part of the anatomy that either is not present or does not function properly. (R 111). In Ballantine's Law Dictionary (3d ed. 1969), prosthetic appliance is defined in the following manner:

A replacement of a missing limb or other part of the body.

Ballantine's Law Dictionary 1014 (3d ed. 1969).

In the context of Customs Service classifications, the United States Court of Appeal for the Federal Circuit agreed that a prosthesis is an artificial substitute that replaces a missing body part. *Daw Industries v. United States*, 714 F.2d 1140 (Fed. Cir. 1983).

The Employer/Carrier suggests that the Florida Legislature was relying on this type of definition of prosthesis or prosthetic device in enacting the exclusion from the operation of the statute of limitations found in Section 440.19(1)(b). Steffe plates are no more prosthetic devices than are knee braces or eyeglasses. The plates, a knee brace and eyeglasses all assist existing body parts to function, and none of them replace missing body parts. Thus, it has been the position of the Employer/Carrier that the exclusion from the statute of limitations does not apply in the instant case because no true prosthetic device is involved.

In describing the contemplated surgical procedure, Dr. Kaler testified that the Steffe plates would function as a prosthetic device only from the standpoint that they were going to occupy the space which had been occupied by the normal, functioning joints which would be removed at the time of surgery. (R 112). The surgery would entail the removal of the facet joints. (R 112). However, this description of the surgical procedure makes it clear that the facet joints that are being removed are normal, functioning joints. (R 112). The facet joints are removed in order to enable the surgeon to implant the plates. Although the plates will replace the facet joints in the sense that they will occupy the space that the facet joints formerly occupied, they clearly will not replace the facet

joints as far as the function performed by facet joints. According to Dr. Kaler, the sole reason the Steffe plates are inserted is to keep the bone grafts from moving while the bone tissue is fusing. There was no testimony that the Steffe plates serve any other purpose whatsoever. The plates in essence are an internal version of a cast. Since they have been implanted inside the patient's body, and since they will not interfere with the patient's use of his body, they are simply left in place after their purpose has been served.

There is no question that the surgical procedure could be accomplished without implanting the Steffe plates. Dr. Kaler admitted that the procedure is regularly done without the plates, and that it depends on the person to whom you are speaking as to which procedure is more commonly used. Each of the procedures has its merits and its potential problems. If the plates are not used, the physician must use some type of cast immobilization. The end result of the alternative procedure would be as satisfactory as far as alleviation of symptoms and stabilization of the spine. Dr. Kaler admitted that there would be a substantial dispute among physicians as to which of any number of different procedures should be used under the circumstances. The procedure used by a particular physician would depend on the experience of that physician and his or her preferences as to treating a particular problem. Some physicians would

suggest using the Steffe plates or some other type of internal immobilization, while other physicians would disagree.

The testimony at the hearing established that Steffe plates do not replace missing or improperly functioning parts of a patient's anatomy. The Steffe plates do not perform an anatomical function. They perform the function of immobilizing a portion of the anatomy while bone grafts have an opportunity to fuse. The same result can be achieved without the Steffe plates by external immobilization by means of a cast. If the Steffe plates are prosthetic devices, then casts are also prosthetic devices.

If this Court agrees that the Steffe plates are indeed prosthetic devices, the statutory exclusion would still be inapplicable. It is the position of the Claimant that any subsequent medical attention which involves the use of something called a prosthetic device by a physician is exempt from the operation of the statute of limitations. It is the position of the Employer/Carrier that the Claimant's interpretation is untenable. The Legislature intended the exclusion to apply only to true prosthetic devices which were inserted or attached prior to the expiration of the statute of limitations. Any other interpretation of the statute would render the statutory exclusion unconstitutional.

The interpretation or construction advanced by the Claimant arbitrarily singles out for special treatment those claimants whose medical conditions require some type of brace at some time after the industrial accident. Thus, the Claimant who has back problems which require a simple laminectomy, spinal fusion without Steffe plates or diskectomy more than two years after the last remedial attention is barred from medical benefits. Yet if the physician of the same claimant happens to believe that the insertion and attachment of Steffe plates or metal rods is appropriate, the statute of limitations simply does not apply. According to the Claimant's view, if he had gone to one of Dr. Kaler's colleagues who prefers not to use internal plates in this type of situation, the statute of limitations would have barred the claim in this case. This interpretation of the statute would result in an arbitrary and irrational classification which would deny equal protection to those claimants who are excluded by the classification.

Where a statute is fairly susceptible of two interpretations, one of which would render the statute unconstitutional, the courts should avoid the unconstitutional interpretation and adopt a construction that leaves the statute valid. *Durring v. Reynolds, Smith & Hills*, 471 So.2d 603, 606 (Fla. 1st DCA 1985). In fact, when the Constitution conflicts with the letter of a

statute, the statute must not literally be applied; it must yield to a construction which will harmonize with the Constitution. *Stansell v. Marlin*, 153 Fla. 421, 14 So.2d 892, 893 (1943). Where a literal interpretation of a statute would create an irrational classification which violates the constitutional guarantee of equal protection, the courts must adopt a construction that comports with the dictates of the Constitution. *Vildibill v. Johnson*, 492 So.2d 1047, 1050 (Fla. 1986). A statutory classification cannot be wholly arbitrary, and it cannot create a classification which is totally unrelated to any state interest. *Id.* The construction of the statute must give effect to the legislative intent, even though that construction may contradict the strict letter of the law. *Id.* at 1409.

A statute of limitations does not deny equal protection if it is based on a rational distinction among classes of persons. *Purk v. Federal Press Company*, 387 So.2d 354, 357 (Fla. 1980). See also, *State of Florida, Department of Health and Rehabilitative Services v. West*, 378 So.2d 1220 (Fla. 1979). The statute of limitations in the instant case would violate equal protection based upon its arbitrary classifications if it is construed according to the Claimant's position.

The statute of limitations is enacted to bar stale claims which have been dormant for a number of years and

which have not been enforced. *West, supra*, at 1227. In workers' compensation cases, the statute of limitations recognizes that a claim is stale when two years pass without remedial attention or rehabilitative services. If there were no statute of limitations on workers' compensation claims, claimants would tend to blame all subsequent physical problems on their industrial accidents. The Employer/Carrier suggests that the Legislature determined that if two years passed without remedial attention, problems of causation would become so difficult that their solution would become pure guesswork. This causation problem would apply equally to spinal problems which end up requiring Steffe plates or where a mere laminectomy is sufficient. There is no legitimate state purpose in singling out for special treatment those injuries which involve internal, artificial support devices. The classification urged by the Claimant would be arbitrary, and it would not be related to any legitimate state interest.

The current statute has parallel, but not identical, provisions regarding limitations for compensation and limitations for remedial treatment. The legislature has drawn a distinction through the years between the statute of limitations for compensation benefits and the statute of limitations for remedial treatment. In *Miller v. Brewer Company of Florida, Inc.*, 122 So.2d 565 (Fla. 1960), this Court considered the predecessor to the current statute of

limitations regarding remedial treatment. The old statute provided that the right to remedial treatment would be barred unless the claim was filed within two years after the date of the last remedial treatment or the last payment of compensation. The fact that the carrier had voluntarily complied with a request for remedial treatment after the two year period expired did not operate to revive the claim under the statute. Voluntary payments were held not to be a waiver of the right of the employer/carrier to assert the statute of limitations as a defense. *Hodges v. State Road Department*, 171 So.2d 523 (Fla. 1965). The fact that the legislature has considered compensation and remedial treatment as entirely separate subjects for purposes of statutes of limitations was emphasized in *Iowa National Mutual Insurance Co. v. Webb*, 174 So.2d 21 (Fla. 1965).

In *Watson v. Delta Airlines, Inc.*, 288 So.2d 193 (Fla. 1973), this Court held that the *Miller* decision was no longer viable because of a change in the statute of limitations for remedial treatment. The amendment to the statute provided for a two year extension of the statute of limitations from any voluntary payment of remedial treatment or compensation. The amendment to the statute was apparently a legislative response to the *Miller* decision. This Court summarized the development of a law in *Daniel v. Holmes Lumber Company*, 490 So.2d 1252 (Fla. 1986). The two statutes of limitations were modified slightly and included

as two separate subsections of Section 440.19 in 1979. Ch. 79-40, §15, Laws of Florida.

The District Court interpreted the amended statute to apply only with voluntary payments. The Court reasoned that voluntary payments were in the nature of a waiver. The statute would not apply to extend the statute of limitations for compensation benefits where the payment of benefits was compelled by the filing of a claim. This interpretation is consistent with the waiver theory.

The interpretation of the statute by the Claimant essentially negates any statute of limitations for claims by claimants who have problems for which a "prosthetic device" may be utilized. The Claimant has taken the "prosthetic device" language in the statute and convinced the Deputy Commissioner and the District Court of Appeal that it would include any foreign fixative device which may be implanted and not removed when its purpose has been served. A plate or even simple screws used to fix any broken bones would qualify as a prosthetic device under this definition. If a worker suffers a broken femur, and screws and a plate are used to stabilize the break while the bone heals, the plate can be left in place after its purpose is served. Based upon the Claimant's reasoning, the plate and screws could also be used as a device to defeat the statute of limitations ten, twenty or fifty years later when the Claimant decides he wants to have the plate or screws

removed. This interpretation would markedly increase the risk insured by worker's compensation carriers. The interpretation is unreasonable and inconsistent with the development of the law regarding separate statutes of limitations. Even if the statute of limitations for remedial treatment could be extended by the statutory language, the legislature clearly did not intend to allow the statute to be used to bootstrap a claimant into additional compensation benefits. If the legislature had intended to provide that there would be no statute of limitations for remedial treatment and for compensation benefits where a prosthetic device is involved, it would not have limited the statutory language to remedial treatment.

The primary rule in construing statutes is to determine the intent of the Legislature. *City of Boca Raton v. Gidman*, 440 So.2d 1277, 1281 (Fla. 1983). No literal interpretation should be given to a statute if it leads to a ridiculous or unreasonable conclusion or to a purpose not intended by the lawmakers. *Id.* The legislative intent in connection with the statute of limitations and prosthetic devices is apparent. There are no causation questions as to accidents which result in the loss of a body part. That body part does not regenerate, and if a legitimate prosthetic device is available to replace the lost part, there is no question that the industrial accident was the reason for its necessity. Also, true prosthetic devices may

need occasional adjustments because of body changes as the claimant ages. The "remedial attention relating to the insertion or attachment of a prosthetic device" discussed in the statute relates to this type of situation. The statute may not state its intent as well as it could be stated, but the Legislature apparently did not anticipate that claimants would attempt to rewrite the substance of the workers' compensation law through this sentence in the statutes.

The interpretation placed upon the statute by the Deputy Commissioner and the District Court greatly increases the risk insured by worker's compensation carriers. As a practical matter, accepting this interpretation would result in a sudden, substantial increase in the need for Steffe plates or stabilizing rods for claimants who would otherwise fall outside of the statute of limitations period. As Dr. Kaler himself discussed, the spinal fusions may be accomplished without the insertion of foreign objects for the purpose of stabilization. There is no reason for distinguishing between the claimant who legitimately needs the reinforcing or stabilizing device and the claimant who does not need it. The distinction is purely arbitrary, and it serves no legitimate state purpose.

The only manner in which the statute may be read consistent with equal protection is that there is no statute of limitations which applies to the right for remedial attention relating to a true prosthetic device which was

inserted or attached prior to the expiration of the statute of limitations. The statute may literally be interpreted in this manner. Even if the language in the statute literally stated something to the contrary, the courts will depart from the letter of the law where there are cogent reasons for believing that the letter does not accurately disclose the intent of the legislature. *Shell Harbor Group, Inc. v. Department of Business Regulation*, 487 So.2d 1141, 1142 (Fla. 1st DCA 1986). The statutes are not interpreted literally when such an interpretation would lead to unreasonable conclusions. *Id.* The conclusion that the Steffe plates are a prosthetic device is both unreasonable and arbitrary. It results in an arbitrary classification of claimants which bears no relationship to a legitimate state interest.

An interpretation of the statutes which results in this arbitrary, total abolition of any limitation of action where prosthetic devices are involved would similarly bear no relationship to a legitimate state interest.

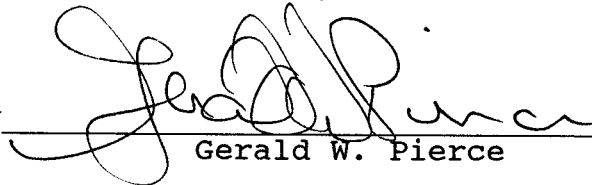
CONCLUSION

The District Court expanded the definition of "prosthetic device" beyond the purpose of the statute in finding that the Steffe plates were a prosthetic device. However, the Court correctly ruled that the legislative intent in enacting the statutory exception to the running of the statute of limitations for remedial treatment applies only to remedial treatment, and does not revive the statute of limitations for compensation benefits. Respondents, City Investing/General Development Corp. and Home Insurance Company, request that this Court reconsider the District Court's application of the statute to the Steffe plates, but that the decision otherwise be affirmed as to the absence of an extension of the statute of limitations for compensation benefits.

Respectfully submitted,

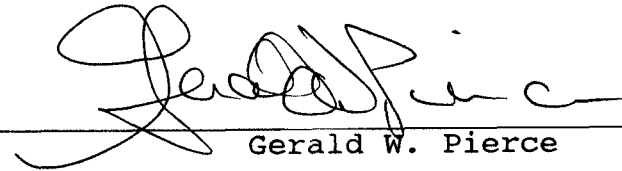
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to BILL MCCABE, ESQUIRE, 1450 S.R. 434 West, Suite 200, Longwood, Florida, 32750, and to THOMAS CASSIDY, ESQUIRE, Post Office Box 1606, Lakeland, Florida, 33802, by regular United States Mail this 21st day of December, 1990.


Gerald W. Pierce