

8-2

IN THE SUPREME COURT OF FLORIDA

ANDREW CASH

Petitioner,

Case No. 79,896

District Court of Appeal,
First District - No. 91-1927

vs.

UNIVERSAL RIVET, INC., and
NATIONWIDE MUTUAL INSURANCE CO.,

Respondents.

FILED

SID J. WHITE

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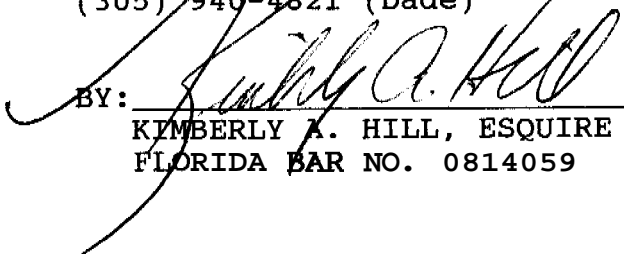
CLERK, SUPREME COURT.

By Chief Deputy Clerk

ANSWER BRIEF OF THE RESPONDENTS

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CASH. SUP

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PREFACE

In this Brief, the Petitioner, Andrew Cash will be referred to as Petitioner or by name. The Respondents, Universal Rivet, Inc. and Nationwide Mutual Insurance Company, will be referred to as the Respondents or as the Employer/Carrier.

All references to the record will appear as follows:

(R.____).

All references to the Appendix will appear as follows:

(A.____).

City Investing\General Development Corp. v. Roe, 566 So.2d 258 (Fla. 1st DCA 1990) shall be referred to as "Roe I", and Roe v. City Investing\General Development Corp., 587 So.2d 1323 (1991), shall be referred as "Roe II".

STATEMENT OF CASE AND FACTS

The Respondents herein agree with the Statement of the Case and Facts as set forth in the Petitioner's Initial Brief. Therefore, in accordance with the Florida Rules of Appellate Procedure, the Respondents will not reiterate the facts.

POINT ON APPEAL

CERTIFIED QUESTION

WAS THE FIXATION STAPLE INSERTED INTO CLAIMANT'S SHOULDER A "PROSTHETIC DEVICE", AS THAT TERM IS USED IN §440.19(1)(b), FLORIDA STATUTES (1985)?

SUMMARY OF ARGUMENT

CERTIFIED OUESTION

WAS THE FIXATION STAPLE INSERTED INTO CLAIMANT'S SHOULDER A "PROSTHETIC DEVICE", AS THAT TERM IS USED IN §440.19(1)(b), FLORIDA STATUTES (1985)?

Section 440.19(1)(b), Florida Statutes (1985) provides in pertinent part:

"All rights to remedial attention under this section shall be barred unless a claim therefore . . . is filed within two years after the time of injury . . . or within two years after the date of the last remedial attention . . . However, no statute of limitations shall apply to the right for remedial attention relating to the insertion or attachment of a prosthetic device to any part of the body.

The term prosthetic devise is not defined in Chapter 440, Florida Statutes (1985). Nor, has the term been defined in any succeeding versions of Chapter 440. As pointed out by the majority in Universal Rivet v. Cash, case no. 91-1927 (April 20, 1992), "[I]f a term is not defined in a statute . . . its common ordinary meaning applies." Department of Administration v. Moore, 524 So.2d 704,707 (Fla 1st DCA 1988). (A. 29). The First DCA concluded "[t]hat the term "prosthetic device," as used in Section 440.19(1)(b), Florida Statutes (1985), was intended to refer to an artificial substitute of replacement, whether external or implanted, for a missing or defective natural part of the body." Applying this definition to the facts developed below regarding the staple inserted into claimant's shoulder the Court further concluded "[t]hat the staple does not fit within the

definition; and, therefore, is not a "prosthetic device" for purposes of Section 440.19(1)(b)". (A. 30).

In its evaluation of the term "**prosthesis**", the majority considered several sources and established that the definitions found in the medical dictionaries and non-medical dictionaries are invariably similar: [A]n artificial part or substitute for a missing natural part of the body, as a limb, denture, eye, etc.," 3 J.E. Schmidt, M.D., Attorneys' Dictionary of Medicine P-345. (A. 29). Although the definitions vary slightly, the above definition is fairly standard.

The only evidence presented below as to the purpose of the fixative staple is found in Dr. Ennis' testimony. Dr. Ennis' testimony establishes that there is a clear distinction between a prostheses or prosthetic device and an internal fixation device. The doctor testified that the "staple" which was surgically implanted into the Claimant's arm is medically known as an internal fixation device which, in this case, served to hold ligaments in place while **the** natural processes of healing occurred. Dr. Ennis further testified that the major distinction between a prostheses and a fixation device is that a prosthetic device replaces a missing part, while a fixation device becomes obsolete after the healing occurs. If a prostheses, once in place, is removed a person loses function. If a fixation device is removed, no function is lost.

Based upon the facts developed below the First DCA determined that the fixation staple was not a prosthetic device, Respondents believe that the Court is correct and that the certified question should be answered in the negative.

ARGUMENT

CERTIFIED QUESTION

WAS THE FIXATION STAPLE INSERTED INTO CLAIMANT'S
SHOULDER A "PROSTHETIC DEVICE", AS THAT TERM IS
USED IN §440.19(1)(b), FLORIDA STATUTES (1985)?

Section 440.19(1)(b), Florida Statutes (1985) provides in
pertinent part:

"All rights to remedial attention under
this section shall be barred unless a
claim therefore , . . is filed within two
years after the time of injury . . . or
within two **years** after the date of the
last remedial attention . . . However,
no statute of limitations shall apply to
the right for remedial attention relating
to the insertion or attachment of a
prosthetic device to any part of the
body.

Judge Webster, in the Opinion of the District Court of Appeal,
in Universal Rivet v. Cash, case no. 91-1927 (April 20, 1992),
correctly points out that the certified question is a mixed question of
law and fact. (A. 29). First, the meaning of the term "**prosthetic
device**", as used in the statute, must be ascertained - (a question of
law). Then, the facts, as developed below, must be analyzed to
determine whether or not the staple fits within the statutory meaning -
(a question of fact). It is asserted by the Respondents herein that
the finding of the JCC that the staple was a prosthetic device is
clearly erroneous and the reversal by the District Court of Appeal,
First District should be upheld.'

¹ The First DCA concluded "[t]hat the term "**prosthetic device**," as
used in Section 440.19(1)(b), Florida Statutes (1985), was intended to
refer to an artificial substitute or replacement, whether external or

The term prosthetic devise is not defined in Chapter 440, Florida Statutes (1985). Nor, has the term been defined in any succeeding versions of Chapter 440. As pointed out by the majority in Universal Rivet v. Cash, case no. 91-1927 (April 20, 1992), "[I]f a term is not defined in a statute . . . its common ordinary meaning applies." Denartment of Administration v. Moore, 524 So.2d 704,707 (Fla 1st DCA 1988). (A. 29). Furthermore, where legislative intent is clear, it is incumbent on the courts to give effect to such intent and a statute may not be enlarged or expanded to cover cases not falling within its provisions." Barruzza v, Suddath Van Lines, 474 So.2d 861 (Fla. 1st DCA 1985).

Moreover, the rules of statutory construction provide that the express mention by the legislature of one thing implies the exclusion of another. PC Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988). It seems clear, in light of the fact that staples, pins and other such devices are commonly used in the medical profession, that if the legislature had intended for this exception to apply to other medical implements it would have so stated. Therefore, even under the most liberal construction of the act this Court would have to write into the act words and meanings which simply **are** not there and, to that extent, such an interpretation would be contrary to the clear legislative intent. Furthermore, such an expansive interpretation would make the

implanted, for a missing or defective natural part of the body." Applying this definition to **the** facts developed below regarding the staple inserted into claimant's shoulder the Court further concluded "[**t**]hat the staple does not fit within the definition; and, therefore, is not a "prosthetic device" for purposes of Section 440.19(1)(b)". (A. 30).

statute of limitations, set forth by the legislature in section 440.19, Florida Statutes, virtually ineffective.

In its evaluation of the term "prosthesis", the majority considered several sources and established that the definitions found in the medical dictionaries and non-medical dictionaries are invariably similar: [A]n artificial part or substitute for a missing natural part of the body, as a limb, denture, eye, etc.," 3 J.E. Schmidt, M.D., Attorneys' Dictionary of Medicine P-345. (A. 29). Although the definitions vary slightly, the above definition is fairly standard. Respondents concede that even the definition adopted by the JCC is in line with the standard definitions found in many medical and legal dictionaries.²

However, the JCC did not consider the glaring differences between an "internal fixation device" and "prosthetic device". Instead, the JCC found that there was a only a theoretical distinction between a prosthetic device and a fixation device. The JCC also found that it was not within the legislative intent to quibble over words. (A. 5). Consequently, the JCC, misapplied the law and violated one of the primary rules of statutory construction, the "plain meaning rule".

The legislature did not provide an exception to the statute of limitations for all artificial devices or medical implements. The only exception to the two year statute of limitation deals with "remedial treatment relating to the insertion or attachment of a

² [a] prosthesis or prosthetic device is a "replacement of a missing part by an artificial substitute or . . . a device to augment performance of a natural function". (A. 5).

prosthetic device to any part of the body". The legislative intent is clear and the specific statutory language should not be expanded to allow an exception to the statute of limitations for medical implements which were specifically excluded by the legislature. Barruzza, supra.

Petitioners assert that the definition of a prosthetic device will become broader and be deemed to include things which we are unable to imagine at this point in time. This may certainly be true, however, fixative staples have been in existence for quite some time and the legislature certainly must have been aware that staples, pins, screws and other fixative devices were in wide use at the time of this legislative enactment. The legislature has chosen not to amend this section to include these devices. Respondent's disagree with Petitioners statement that the legislature provided an exception when an artificial object is inserted or attached to a body. The legislature provided for an exception to the statute of limitations only where a prosthetic device is involved.

Here, we are not dealing with a prosthetic device or prostheses as commonly defined or as interpreted by the case law and the other sources already mentioned **herein**.³ We are dealing with an

³ The issue of what constitutes a prosthetic device has never **been** addressed by the District Courts or the Supreme Court. However, there have been several cases decided in Florida which have dealt indirectly with this issue. In Trindade v. Abbey Road Beef 'N Booze, 443 So.2d 1007 (Fla. 1st DCA 1983), the First DCA, sitting en banc, remanded the case to the JCC for a determination of whether a "knee cage" could be considered a "prostheses" as the term is interpreted by the "**division**" in connection with other statutory provisions (Sections 440.19(2)(b) which has been renumbered to 440.19(1)(b) and section 440.02(6). The Court cited Dorland's Medical Dictionary, Twenty-Fourth Edition (1965) which contains the following definition of "**prostheses**": "**An** artificial substitute for a missing part, such as an eye, leg, or denture; the

"internal fixation device" which serves a limited purpose once in place. An "internal fixation device" is a artificial implement which is used to fix an injured part and to hold it in place while the normal processes of healing occur. (A. 51). A "**prostheses**" is a substitute for a normal body part. If an artificial knee, an artificial hip or some other artificial body part was in place, you could not remove **the** artificial part without removing a specific important function. (A. 53).

The Petitioners place a great deal of reliance on Judge Ervin's concurring and dissenting opinion in Universal Rivet v. Cash (A. 33 - 36). Respectfully, the Respondents disagree with Judge Ervin's position. Judge Ervin adopts the position expressed in Justice McDonald's specially concurring opinion in "Roe II". Specifically, he states:

[although I am not positive that the internal fixation device described by the treating physician qualifies as a prostheses, such was a fact question and I cannot say that the Judge's determination in this **regard was** clearly erroneous based on the evidence below". Roe II.

In his specially concurring opinion, Justice McDonald stated:

[T]he first question that must be answered is whether steffee plates qualify as prosthetic

term is also applied to any device by which performance of a natural function is aided or augmented, such as a hearing aid or eyeglasses." Although the Court did not find that the knee cage was a prostheses, it seems to have adopted the definition of prosthesis cited above.

devices under the **statute**.⁴ From my review of the record, I am not confident that a steffee plate conforms to the definition of prostheses. In addition, I am doubtful that the legislature intended to exemption to encompass items such as the steffee plate. Unfortunately, respondents failed to put forth any evidence on this issue and the only evidence on this issue contained in the record was provided by the deposition of the petitioners treating physician. The determination as to whether a steffee plate is a prostheses was for the trier of fact and the standard of review is that the determination be clearly erroneous. Therefore, while I am not confident that a steffee plate qualifies as a prostheses, I cannot say that the trial court was clearly erroneous based on the the facts developed below. Roe II.

There is a critical distinction between the facts as developed in Roe and the facts as developed in the present case which was apparently overlooked by Judge Ervin in Cash. The only evidence as to the purpose of the staple is found in Dr. Ennis' testimony. There was no other medical evidence presented.

Dr. Ennis testified that the staple which was surgically inserted in the Claimant's shoulder was an internal fixation device, rather than a prosthetic device. (A. 50 - 55). The doctor opined that an internal fixation device is an artificial or manmade object which is used to fix an injured part and to hold it in place while the normal processes healing occur. (A. 51). Accordingly, he stated, an internal fixation device may be left in place permanently or may be removed. (A. 51). When asked to explain the difference between an "internal

⁴ The majority in Roe II declined to address the correctness of the district court's determination that Steffee plates are prosthetic devices.

fixation device" **and** a "prosthesis or prosthetic device," Dr. Ennis explained as follows:

Both a prosthesis and an internal fixation device are artificial. On the one hand, one is a substitute for a normally occurring body part and therefore, must necessarily remain a permanent part of the patient. The other is a temporary enhancement to the body's healing function and under appropriate circumstance can be removed without altering the body's functioning. It's an important distinction between the purposes of each device. They're used for different reasons. (A. 55).

The staple did not augment the performance of a natural function. In fact, once the healing process was complete, the staple became obsolete. A prosthesis or a prosthetic device "**replaces**" a function. If the prosthesis or prosthetic device is removed, necessarily, there is a loss of function. For example, the removal of eye glasses necessary to augment one's vision would result in deteriorated vision; the removal of an artificial limb would result in one being unable to use that limb; the removal of a knee cage would result in one being unable to maintain stability in the affected knee and, thus, would affect the function of the knee. However, in the case of a fixative staple, it could be removed and no loss of function would occur.

Respondents agree with Petitioners analysis on the need for the exception to the two-year Statute of Limitations for prosthetic devices. However, Respondents do not agree that this need for the exception extends to internal fixation devices. Petitioner argues that the policy reasons for §440.19(1)(b) extend to internal fixation devices even though it was clearly established before the JCC that

there is a genuine distinction between a prostheses and a fixation device. Moreover, there was not evidence presented by Petitioners that fixation devices such as the metallic staple securing the Claimant's shoulder are subject to mechanical and physicochemical forces within the body, Nor was evidence presented on probabilities of corrosion or breakage. Finally, the most important variable of all, if a prosthesis or prosthetic device "breaks down" there will be a loss of function until the prastheses is replaced. Thus, the necessity for the one exception to the two year statute of limitations. The same does not hold true for a fixation device which can be surgically removed without altering a normal bodily function.

The Claim for Dr. Ennis' medical services was denied by the First DCA on several grounds. Firstly, the Court found that the metallic staple **was** not a "prosthetic device". Secondly, they found that there was no competent medical evidence to support the JCC's finding that the staple was a "**prosthetic** device". Finally, the Court found that the examination ordered by the JCC did not relate to the insertion or replacement of the metallic staple and, therefore, the bills could not be reimbursed even if the "**staple**" was classed as a prosthesis.

The statutory language is clear that a Claimant is entitled to remedial treatment, even after the two year statute of limitations has run, if the treatment relates to the insertion or attachment of a prosthetic device. However, the bills of Dr. Ennis are not payable by the Employer/Carrier even if the "**staple**" is a prosthetic device within the meaning of §440.19(1)(b). None of the Claimant's visits to Dr.

Ennis, after the Statute of Limitations had run, relate to the insertion or attachment of a prosthetic device. Dr. Ennis evaluated the Claimant several times after August 1988 and found each time that the staple was not causing the Claimant's problems and that it should remain in place. It is clear that these subsequent visits to Dr. Ennis had nothing whatsoever to do with "the insertion or attachment of a prosthetic device."⁵ Therefore, the Petitioners argument that the bills are payable by the Employer/Carrier in this case, because the evaluation by Dr. Ennis was to determine the causal relationship of the Claimant's most recent complaints to the original injury, is without merit. Incidentally, the Petitioner falsely states that the Claimant became symptomatic again without any apparent explanation, thus creating the need for an evaluation."

Finally, there is no conflict between this case and Roe II as asserted by Petitioner. **As** correctly, stated by Petitioner, the issue of compensation disability benefits was not raised on cross-appeal by Petitioners. The First DCA did not affirm the denial of compensability. Judge Webster, in his opinion, did not address or affirm the denial of compensation benefits. Judge Webster simply

⁵ **As** stated by Judge Webster, [e]ven if the staple did qualify as a "**prosthetic** device," the claim for reimbursement of the fee charged by Dr. Ennis for his **1991** examination would still be barred by the 2-year statute of limitations. This is true because, in our opinion, it is clear that the visit to Dr. Ennis in 1991 had nothing whatsoever to do with "the insertion or attachment of such a device."

⁶ Dr. Ennis noted: [C]laimant relates his shoulder pain back approximately 18 months ago when he apparently had an injury with his motorcycle and states up until that time his shoulder was fine and pain free. This statement followed the August 16, 1988 visit.

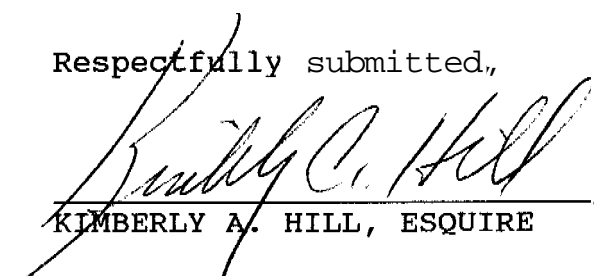
stated, [T]herefore, like the other claims presented below, which the judge found to be barred; so, too, is the claim for remedial attention related to replacement or removal of the staple, including the claim for reimbursement of the cost of a 1991 examination by Dr. Ennis. (A. 31).

Petitioners also urge this Court to address two issues in addition to the certified question. Firstly, the Petitioner requests this Court to address the issue as to whether or not the statute refers to insertion an attachment of an artificial device during the treatment of a claimant and before the Statute of Limitations has run, or whether it means at any time. This issue that was not presented or argued below. Therefore, the Petitioner is essentially asking this Court to rule on an issue which is being raised for the first time in this case. It is a well settled principle that an issue not raised before a lower tribunal, cannot be raised for the first time on appeal. This issue is not properly before this Court. Finally, Petitioners ask this Court, indirectly, to award indemnity benefits. Again, this issue was not raised by cross-appeal and, therefore, cannot be raised for the first time in the Supreme Court.

CONCLUSION

Petitioners are asking this Court to go beyond the **plain** meaning of the term "prosthetic device" to include staples, pins, screws and other fixation devices. This would be inconsistent with one of the primary rules of statutory construction. Moreover, there is no evidence in the record to support the findings of the Judge of Compensation Claims. Therefore, the question certified by the First DCA should be answered in the negative and the decision of the First DCA should be upheld.

Respectfully submitted,

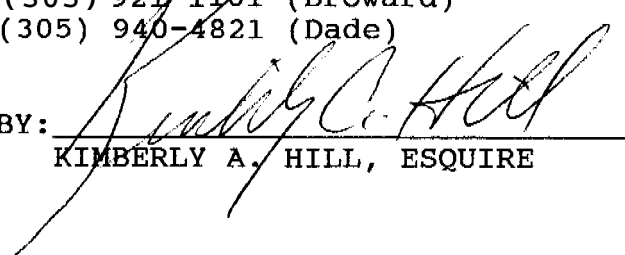


KIMBERLY A. HILL, ESQUIRE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/hand-delivered this 8th day of July, 1992, to: JANET M GREENE, Esquire, Underwood, Gillis & Kartcher, 44 W. Flagler Street, Penthouse Suite, Miami, Florida 33130, and Clerk of the Court, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee 32399-1925.

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