Third District Court of Appeal

State of Florida

Opinion filed December 26, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-895
Lower Tribunal No. 13-34634

Misty Mobley and Tavaris Sanders,
Appellants,

vs.

Homestead Hospital, Inc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Thomas J. Rebull, Judge.

The Carlyle Appellate Law Firm and Christopher V. Carlyle (Orlando), for appellants.

Falk, Waas, Hernandez, Cortina, Solomon & Bonner, P.A., and Glenn P. Falk, Richard A. Warren and Scott E. Solomon, for appellee.

Before FERNANDEZ, LOGUE and MILLER, JJ.

FERNANDEZ, J.

The plaintiffs, Misty Mobley and her husband, Tavaris Sanders (collectively referred to as the Mobleys), individually and on behalf of their minor son, Tavarion Sanders, appeal the trial court's "Order on Defendant, Homestead Hospital, Inc. d/b/a Homestead Hospital's Motion for Summary Final Judgment and Entry of Final Judgment" rendered on January 2, 2018. As we are unable to find the absence of a genuine issue of material fact with respect to the date that the statute of limitations began to run in this case, we reverse the Summary Final Judgment entered in Homestead Hospital, Inc.'s favor.

This is a complex medical malpractice case involving the delivery of a baby born with a neurological injury allegedly due to the improper care by defendants Homestead Hospital, Inc. ("Homestead Hospital"), Mohammad Shahmohamady, M.D., Mohammad Shahmohamady, M.D., P.A., and Manuel Antonio Cuello. Tavarion was born on September 16, 2009. At the time of the delivery, neither the hospital nor Dr. Shahmohamady (the delivering doctor) advised the Mobleys that Tavarion suffered any injuries during delivery. Tavarion was kept in the hospital for ten days after his birth, Ms. Mobley was told, due to an infection. On September 17, 2009, an ultrasound of Tavarion's brain was performed at Homestead Hospital and reported by Dr. Kenneth Mendelson as an "unremarkable head ultrasound." At the time Tavarion was discharged, Mrs. Mobley was told he was healthy and normal.

Months later, the Mobleys began to notice that Tavarion was not meeting certain developmental milestones.

After Tavarion's birth, Mrs. Mobley visited several doctors and specialists to find out what was wrong with her son. In January 2010, Tavarion's pediatrician, Dr. Amador at QualMed of South Dade, Inc., diagnosed him with GERD and a lazy eye. Nothing else was diagnosed. In March 2010, Tavarion was evaluated by Dr. Charria-Ortiz, a neurologist with Jackson Ambulatory Care Pediatric, for vomiting and delays. Dr. Charria-Ortiz diagnosed Tavarion with gastroesophageal reflux disease (GERD) and nothing else. On April 14, 2010, Tavarion was seen by one of his specialists, pediatric gastroenterologists Dr. Raghad Koutouby, and diagnosed only with vomiting. An April 2010 CT scan performed on Tavarion showed an old fractured skull injury.

In 2010, Mrs. Mobley requested additional Medicaid benefits for Tavarion but was denied. On May 26, 2010, Mrs. Mobley stated she met with attorney Jorge Silva to secure benefits for Tavarion, including therapies and home nursing. Mrs. Mobley denied that she retained Mr. Silva's law firm in order to purse a medical malpractice claim. When Mrs. Mobley met with Mr. Silva, no doctor had said anything about Tavarian having a brain injury or diagnosed Tavarion with a brain injury. On May 27, 2010, Mr. Silva sent a letter to Homestead Hospital as a formal request to the hospital for Tavarion's medical records under section 766.204, Florida

Statutes (2009). On July 20, 2010, Mr. Silva sent a follow-up letter requesting additional records that he had not received. Mr. Silva's firm stopped representing Mrs. Mobley in early October 2010.

On October 19, 2011, attorney Ronald Gilbert filed a NICA (Florida's Birth-Related Neurological Injury Compensation Association) petition pursuant to section 766.301, Florida Statues (2009), on Mr. Mobley's behalf. NICA denied Mrs. Mobley's petition because their experts opined that there was "no apparent obstetrical event," and Tavarion did not have substantial mental impairment. Mrs. Mobley received notice of the dismissal of her petition on August 16, 2012.

On July 2, 2012, a second brain MRI was performed on Tavarion. The results were "normal" as per Dr. Papazian. On November 20, 2012, after Tavarioin had a follow-up MRI, Tavarion's neurologist, Dr. Mojtabaee, diagnosed him for the first time with spastic cerebral palsy, and Mrs. Mobley was informed that this type of cerebral palsy most often is caused from lack of oxygen to the infant's brain during labor and delivery and delayed c-sections. As a result of this information, Mobley retained the law firm of Diez-Arguelles & Tejedor for investigating the medical malpractice case. Every doctor who treated Tavarion from the time of his birth in 2009 through 2012 reported the cause of his injuries as "unknown" and/or related to a genetic issue. On June 7, 2013, Berto Lopez, MD, reviewed Tavarion's medical records and opined that Tavarion's injuries were result of medical malpractice.

On July 22, 2013, a Notice of Intent was filed, and on November 5, 2013, the Mobleys filed their complaint against Homestead Hospital, the delivering doctor, Dr. Mohammad Shahmohamady, M.D., and his P.A., as well as the surgical assistant, Manuel Antonio Cuello, for medical malpractice related to the birth of Tavarion.[1] An amended complaint was filed on January 29, 2014. On August 11, 2017, Homestead Hospital filed a motion for summary judgment claiming that the Mobleys' lawsuit was barred by the statute of limitations that the hospital claims expired, at the latest, on June 21, 2013. The trial court granted Homestead Hospital's motion on the basis that the hospital was entitled to summary judgment as a matter of law because the Mobleys' lawsuit was barred by the statute of limitations.

On appeal from the trial court's order granting the hospital's motion for summary judgment, the Mobleys contend there is a genuine issue of material fact with respect to when the statute of limitations began to run in this case. The Mobleys claim that the statute of limitations began to run in November 2012 when Tavarion was examined by Dr. Mojtabaee and his nurse, who informed Mrs. Mobley for the first time that Tavarion's diagnosis of spastic cerebral palsy might be related to his delivery. Homestead Hospital, on the other hand, argues it was entitled to summary judgment because under section 95.11(4)(b), Florida Statutes (2013), the statute of

[1] The Summary Final Judgment was entered only on behalf of Homestead Hospital. Thus, the hospital is the only appellee in this appeal.

limitations on the Mobley's claim had already expired. The hospital contends that May 27, 2010 is the date that should be used as the date that the statute of limitations started to run because that is the date the Mobleys should have discovered that an incident giving rise to medical negligence occurred. This is the date that the Mobleys' former attorney, Mr. Silva, requested Tavarion's medical records pursuant to section 766.204.

A movant is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, conclusively show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fla. Rule Civ. P. 1.510(c). When considering a motion for summary judgment, the trial court may not weigh the credibility of witnesses or resolve disputed issues of fact. Strickland v. Strickland, 456 So. 2d 583, 584 (Fla. 2d DCA 1984). The court must draw every possible inference in favor of the party against whom summary judgment is sought. Gonzalez v. B & B Cash Grocery Stores, Inc., 692 So. 2d 297, 299 (Fla. 4th DCA 1997). The existence of a genuine issue of material fact precludes summary judgment. Pinchot v. First Fla. Banks, Inc., 666 So. 2d 201, 202 (Fla. 2d DCA 1995). Moreover, "[s]ummary judgments should be cautiously granted in negligence and malpractice suits." Davis v. Green, 625 So. 2d 130, 131 (Fla. 4th DCA 1993).

In a medical malpractice action, accrual of a cause of action under section 95.11(4)(b), Florida Statues (2009), provides that: "An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence . . . ." In addition, "[T]he limitations period for a child begins to run when the child's parents (natural guardians) know of the child's injuries…" Arthur v. Unicare Health Facilities, Inc., 602 So. 2d 596, 599 (Fla. 2d DCA 1992).

In Tanner v. Hartog, 618 So. 2d 177, 181-82 (Fla. 1993), the Florida Supreme Court stated:

> We hold that the knowledge of the injury as referred to in the rule as triggering the statute of limitations means not only knowledge of the injury but also knowledge that there is a reasonable possibility that the injury was caused by medical malpractice. The nature of the injury, standing alone, may be such that it communicates the possibility of medical negligence, in which event the statute of limitations will immediately begin to run upon discovery of the injury itself. On the other hand, if the injury is such that it is likely to have occurred from natural causes, the statute will not begin to run until such time as there is reason to believe that medical malpractice may possibly have occurred.

The mere fact that a plaintiff becomes aware of a medical condition or suspects some wrongdoing is not sufficient to determine when the statute of limitations accrues. Cohen v. Cooper, 20 So. 3d 453, 455-56 (Fla. 4th DCA 2009).

In the Mobleys' case, the issue revolves around the date when Mrs. Mobley had knowledge that there was a reasonable possibility that Tavarion's injuries resulted not from a natural cause, but from medical malpractice. This is the date that the statute of limitations begins to run. Florida courts have held that this determination of when a person knew or reasonably should have known of the possibility of medical malpractice is "fact-specific and within the province of the jury, not the trial judge." Id. at 456. Florida law is clear on this issue. Gonzalez v. Tracy, 994 So. 2d 402, 405 (Fla. 3d DCA 2008). Suspecting wrongdoing has been held not to be enough. Thomas v. Lopez, 982 So. 2d 64, 68 (Fla. 5th DCA 2008).

Here, Mrs. Mobley testified in her deposition that in May 2010, she went to see Mr. Silva and, thereafter, Mr. Giller for a NICA petition, that she had no idea there was an issue of medical malpractice. She testified she was going to see them to help her obtain benefits for Tavarion, including home health care for him. The evidence in the record indicates that every doctor who treated Tavarion from the time of his birth in 2009 through 2012 informed the Mobleys that the cause of Tavarion's final condition as "unknown" and/or related to a genetic issue. Although Mr. Silva testified in his deposition that his May 27, 2010 letter was sent pursuant to section 766.204, it was not until November 2012 when Tavarion was examined by Dr. Mojtabaee and his nurse that Mrs. Mobley received information for the first time that Tavarion's condition may be birth-related. Before 2012, none of

Tavarion's head studies reported birth-related brain damage. Because there remained a genuine issue of material fact as to when Mrs. Mobley acquired knowledge that there was a reasonable possibility that Tavarion's injuries were caused by medical malpractice, the trial court improperly granted summary judgment in the Homestead Hospital's favor. As the Fifth District Court of Appeal stated in Baxter v. Northrup, 128 So. 3d 908 (Fla. 5th DCA 2013), in reversing the trial court's summary judgment entered for defendants in a medical malpractice action against a surgeon and a hospital for complications following a surgery:

> It is difficult to envision how a layperson can be charged with knowledge that particular symptoms suggest an act of negligence when medical professionals, who scrutinize the case with the clarity of hindsight, conclude that the symptoms are the product of unexplained, natural causes.
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> . . .
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> Though [the patient's] suspicions might have been mounting throughout the period following his surgery, this alone does nothing to pinpoint, as a matter of law, a definitive start date for the commencement of the running of the statute. This is a question for the jury, not appropriate for summary judgment.

Id. at 910, 912.

Furthermore, despite Homestead Hospital's urging, we are unable to find a case in Florida that stands for the proposition that contacting an attorney who then files a section 766.204 letter to request medical records satisfies the standard articulated in Tanner for determining when a statute of limitations begins to run in a

medical malpractice case; that is, when the plaintiff possesses knowledge of a reasonable possibility of medical malpractice.

Because there is a disputed material fact regarding when the statute of limitations began to run in this case, specifically whether it began to run in November 2012 when a pediatrician diagnosed Tavarion with spastic cerebral palsy and told Mrs. Mobley that it was often caused by lack of oxygen to the brain during labor and delivery and delayed c-sections, summary judgment on this issue was improper. Consequently, we reverse the trial court's Summary Final Judgment entered in favor of Homestead Hospital and remand the case to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

MILLER, J., concurs.

LOGUE, J. (concurring)

I write only to note that the majority opinion properly avoided any reference to the superannuated "scintilla rule." Long ago, this rule was displaced by other developments in the law. It continues to appear, however, as one of several out-of-date ideas that distort Florida's summary judgment standard.

Hundreds of cases in Florida improperly attached to the summary judgment standard some statement like the following: "[i]f the record on appeal reveals the merest possibility of genuine issues of material fact, or even the slightest doubt in this respect, the summary judgment must be reversed." Piedra v. City of N. Bay Vill., 193 So. 3d 48, 51 (Fla. 3d DCA 2016) (emphasis added) (citing Estate of Marimon ex rel Falcon v. Fla. Power & Light Co., 787 So. 2d 887, 890 (Fla. 3d DCA 2001)). As is apparent, the references to "merest possibility" and "slightest doubt" are variations of the old "scintilla rule," which requires summary judgment be denied if opposed by even a "scintilla" of evidence. Carnes v. Fender, 936 So. 2d 11, 14 (Fla. 4th DCA 2006).

The "scintilla rule" ultimately derives from the hoary common law rule that a directed verdict be denied if the record contained a "scintilla" of evidence. Referring to this rule as being outdated in 1871, the United States Supreme Court noted, "[f]ormerly it was held that if there was what is called a scintilla of evidence in

support of a case the judge was bound to leave it to the jury." Schuylkill & Dauphin Imp. Co. v. Munson, 81 U.S. 442, 448 (1871). By the time the Court made this observation in 1871, however, English and American courts were already discarding the scintilla rule. "Recent decisions," the Supreme Court explained, "have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." Id. (citations omitted). By the 21st century, virtually every American court had abandoned the scintilla rule as it applied to directed verdicts, including, as discussed below, Florida.

Because a directed verdict and a summary judgment serve essentially the same function to screen cases for trial albeit at different procedural points, it was reasonable to assume that, if a directed verdict had to be denied based on a scintilla of evidence, a summary judgment should be denied on the same basis. This is apparently why the scintilla rule came to be applied to summary judgments. By the same reasoning, however, because a directed verdict and a summary judgment serve essentially the same function and because the scintilla rule has been replaced with a more precise test in directed verdicts, the scintilla rule should also be replaced with the more precise test in summary judgments.

Directed verdicts and summary judgments are two sides of the same coin. The purpose of both is to secure the just, speedy, and inexpensive resolution of cases by avoiding a trial when there is not sufficient evidence for a jury to legally find for the non-movant. The over-arching question in both is whether there is a factual issue for trial. For both a motion for directed verdict and summary judgment, the United States Supreme Court has recognized, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (citing First Nat'l Bank of Az. v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968)).

Therefore, the only proper question when deciding summary judgment is whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Asking whether there exists a "scintilla of evidence," "slightest doubt," or "merest possibility" does not advance that inquiry. A court might sense a scintilla, conjure up a "mere possibility," or feel a "slightest doubt" even when an objective review of the record reveals the absence of "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Indeed, the vagueness of these terms introduces a subjective element into an analysis which must be objective if it is to serve its purpose.[2] Significantly, although

[2] One definition of scintilla is a "trace," which means a quantity too small to be measured. "Slightest doubt" is presumably less than "reasonable doubt." If so, it arguably includes qualms excluded from reasonable doubt like "a mere possible

purporting to be part of the summary judgment standard, the scintilla rule mysteriously disappears in opinions allowing summary judgments which normally lack any reference to scintillas, mere possibilities, or slightest doubts.[3]

It might be argued that the standard for summary judgment should be different from the standard for directed verdicts even if such a difference means cases will proceed to trial only to have verdicts directed. This argument has been rejected by the courts that have considered it: a "party should not be put to the expense of going through a trial, where the only possible result will be a directed verdict." Martin Petroleum Corp. v. Amerada Hess Corp., 769 So. 2d 1105, 1108 (Fla. 4th DCA 2000). See Catrett v. Johns-Manville Sales Corp., 756 F.2d 181, 188 (D.C. Cir. 1985) ("There is no point in sending a case to trial only to have the

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doubt, a speculative, imaginary or forced doubt." Cavagnaro v. State, 117 So. 3d 1111, 1112 (Fla. 3d DCA 2012) (quoting Fla. Stnd. Jury Inst. (Crim.) 3.7). The "mere" in "mere possibility" could be understood to mean "only," in which case it is redundant, or "inchoate," which would make the term even more vague. In either event, asking a judge to find "the mere possibility of an issue of fact" in a record rather than an actual issue of fact is an exercise that reveals more about the judge's ingenuity, creativity, or timidity than the actual state of the record. The same is true for asking a judge to find imaginary doubts or evidence too small to be measured.

[3] See, e.g., Harrell v. Ryland Grp., 277 So. 3d 292, 299 (Fla. 1st DCA 2019); Stewart Agency, Inc. v. Arrigo Enters., Inc., 266 So. 3d 207, 209 (Fla. 4th DCA 2019); Lago v. Costco Wholesale Corp., 233 So. 3d 1248, 1249 (Fla. 3d DCA 2017); Castellano v. Raynor, 725 So. 2d 1197, 1198 (Fla. 1st DCA 1999).

judge direct a verdict.") (Bork, J. dissenting), rev'd sub nom. Celotex Corp. v. Catrett, 477 U.S. 317 (1986)).[4]

Florida summary judgment law has not missed these modern developments. Summary judgment "is designed to test the sufficiency of the evidence to determine if there is sufficient evidence at issue to justify a trial or formal hearing on the issues raised in the pleadings." The Fla. Bar v. Greene, 926 So. 2d 1195, 1200 (Fla. 2006).[5]

Florida has recognized that "the summary judgment motion may be categorized as a 'pre-trial motion for a directed verdict.' At least it has most of the attributes of a directed verdict motion." Harvey Bldg., Inc. v. Haley, 175 So. 2d 780, 783 (Fla. 1965) (quoting Locke v. Stuart, 113 So. 2d 402 (Fla. 1st DCA 1959)). This is the black-letter law of Florida: "Harvey Building has been continuously cited for

[4] See Cascar, LLC v. City of Coral Gables, 274 So. 3d 1231, 1234 (Fla. 3d DCA 2019) (same); Gonzalez v. Citizens Prop. Ins. Corp., 273 So. 3d 1031, 1035 (Fla. 3d DCA 2019) (same); Keys Country Resort, LLC v. 1733 Overseas Highway, LLC, 272 So. 3d 500, 503 (Fla. 3d DCA 2019) (same); Shands v. Cty. of Marathon, 261 So. 3d 750, 752 (Fla. 3d DCA 2019) (same); Perez-Rios v. Graham Companies, 183 So. 3d 478, 479 (Fla. 3d DCA 2016) (same); Sokoloff v. Oceania I Condo. Ass'n, Inc., 201 So. 3d 664, 664 (Fla. 3d DCA 2016) (same).

[5] See also Diaz v. Casino Café, Inc., 271 So. 3d 1066, 1067 (Fla. 3d DCA 2019) (same); Gorrin v. Poker Run Acquisitions, Inc., 237 So. 3d 1149, 1153 (Fla. 3d DCA 2018) (same); Perez-Gurri Corp. v. McLeod, 238 So. 3d 347, 349 (Fla. 3d DCA 2017) (same); Bogatov v. City of Hallandale Beach, 192 So. 3d 600, 601 (Fla. 4th DCA 2016) (same); Grimes v. Family Dollar Stores of Fla., Inc., 194 So. 3d 424, 426 n.1 (Fla. 3d DCA 2016) (same); Bertoni v. Stock Bldg. Supply, 989 So. 2d 670, 673 (Fla. 4th DCA 2008) (same).

over sixty years and remains the black letter law today." Gonzalez, 273 So. 3d at 1036 n.3. See, e.g., The Fla. Bar v. Mogil, 763 So. 2d 303, 307 (Fla. 2000) (citing Harvey, 175 So. 2d at 783); Landers v. Milton, 370 So. 2d 368, 370 (Fla. 1979) (same).[6]

In Florida, the standard for a directed verdict is not the scintilla rule but rather whether the non-movant "has presented evidence that could support a finding [for the non-movant on issues where the non-movant bears the burden of proof]." Cox v. St. Josephs Hosp., 71 So. 3d 795, 801 (Fla. 2011) ("If the plaintiff has presented evidence that could support a finding that the defendant more likely than not caused the injury, a directed verdict is improper."). See Friedrich v. Fetterman & Assocs., P.A., 137 So. 3d 362, 365 (Fla. 2013) (same).

Because summary judgments and directed verdicts are two sides of the same coin, Harvey, 175 So. 2d at 783, the standard for summary judgment in Florida, like the standard for directed verdicts, should focus on whether the non-movant "has presented evidence that could support a finding [for the non-movant on issues where

[6] See also Tank Tech, Inc. v. Valley Tank Testing, L.L.C., 244 So. 3d 383, 389 (Fla. 2d DCA 2018) (same); Cong. Park Office Condos II, LLC v. First-Citizens Bank & Tr. Co., 105 So. 3d 602, 607, 610 (Fla. 4th DCA 2013) (same); Juarez v. New Branch Corp., 67 So. 3d 1159, 1160 (Fla. 3d DCA 2011) (same); Cassady v. Moore, 737 So. 2d 1174, 1178 (Fla. 1st DCA 1999) (same); Magma Trading Corp. v. Lintz, 727 So. 2d 377, 378 (Fla. 5th DCA 1999) (same).

the non-movant bears the burden of proof]." Cox, 71 So. 3d at 801. In this more precise analysis, the "mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." Anderson, 477 U.S. at 252. The same holds for "merest possibility" and "slightest doubt."

Although long overtaken by other developments in the law, the scintilla rule resists eradication. It continues to reappear and distort Florida's summary judgment standard, probably because it has never been expressly disavowed by the Florida Supreme Court. The litigants, lawyers, and taxpayers of Florida would be well served by a restatement of the summary judgment standard to bring Florida in line with the best practices adopted long ago by most other jurisdictions in the nation. The point of such a restatement is not to make summary judgments more or less frequent: the point is to make the summary judgment standard more analytical and less subjective and thereby make rulings on summary judgment more predictable and uniform. Providing clarity regarding the standard for summary judgment can only serve our courts' prime purpose of providing equal justice under the law.

MILLER, J., concurs.