SUPREME COURT OF FLORIDA

GERALD SILVA, etc.,

Petitioner,

vs. CASE NO. 77,980

SOUTHWEST FLORIDA BLOOD BANK, INC.,

Respondent.
_____/

JOHN SMITH, et ux, etc.,

Petitioner,

vs. CASE NO. 78-012

SOUTHWEST FLORIDA BLOOD BANK, INC.,

Respondent.
_____/

ON CERTIFIED CONFLICT FROM THE SECOND DISTRICT COURT OF APPEAL

BRIEF OF AMICUS JOHN DOE

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STATEMENT OF INTEREST OF AMICUS

John Doe, individually and as personal representative of his late wife, Jane Doe, files this amicus brief in support of Petitioner Silva's position. Mr. Doe is vitally interested in the outcome of this proceeding.

John and Jane Doe commenced circuit civil action 91-1065 in the Twelfth Circuit, Manatee County, against the Manatee County Blood Bank, Inc. ("MCBB") earlier this year, suing MCBB for providing blood contaminated with the HIV virus to Mrs. Doe. Jane Doe has since died from AIDS related conditions. John Doe also asserted individual claims for loss of companionship, fear of contracting AIDS, and emotional distress.

As discussed below, the Does' factual situation differs somewhat from the Silvas', because the Does did not learn Jane Doe had the AIDS producing virus until over four years after MCBB provided the contaminated blood. Thus, if the medical malpractice statute applies, Mrs. Doe's case may present statute of repose issues not presented in Silva's case.

The determination by this Court as to whether AIDS actions against blood banks are governed by the medical malpractice or negligence statute of limitations could be crucial to Mrs. Doe's case. Counsel for the Southwest Florida Blood Bank in the Silva case is also counsel for the Manatee County Blood Bank.

STATEMENT OF THE CASE AND FACTS

Mr. Doe adopts the Statement of the Case and Facts as set forth in Silva's initial brief, insofar as it pertains to that case.

The facts in Mrs. Doe's case differ in the following respects. As alleged in the Does' complaint, Mrs. Doe received four units of blood provided by MCBB while hospitalized in July, 1984. Mrs. Doe was first diagnosed as suffering from AIDS in December, 1989, and had no reason to believe she had contracted the HIV virus or AIDS before that time.

Mrs. Doe filed suit in March, 1991 and subsequently died. MCBB has moved to dismiss, alleging, inter alia, that the repose section of the statute of limitations has run.

ISSUES ON APPEAL

Mr. Doe adopts the issues as set forth in Silva's initial brief.

SUMMARY OF ARGUMENT

Holding that the medical malpractice statute of limitations applied to blood banks providing HIV contaminated blood or blood products could deprive seriously harmed victims from seeking redress if their condition did not manifest within the repose period under that statute. AIDS often has a long latency period. In light of this Court's recent decisions discussing the medical malpractice repose period, it appears that AIDS victims who did not learn of their condition within four years of the transfusion might be barred from obtaining compensation if that statute applied.

ARGUMENT

I. THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS DOES NOT APPLY TO A BLOOD BANK THAT SELLS HIV CONTAMINATED BLOOD PRODUCTS.

Doe adopts and will not reiterate the legal arguments made in Silva's initial brief. Doe writes to present a scenario not presented in the Silva or Smith cases. In those cases the victims tested positive and apparently knew they had the HIV virus and an AIDS related disease within four years of receiving the blood products. Those actions were not commenced within two years of the onset of an AIDS related disease. The question presented in those cases is whether the two year limitations period in the medical malpractice statute applies.

In Mrs. Doe's case, she learned she contracted AIDS in December, 1989 and filed suit in March, 1991. Thus, even if the medical malpractice limitations statute applied, she filed within two years of discovery.

However, section 95.11(4)(b) also contains a four year repose period, running from the date of the medical incident. Assuming the medical malpractice statute applies, then for the purpose of this brief, Mr. Doe assumes the incident (for Mrs. Doe's claim) was the providing of the contaminated blood in 1984. Mrs. Doe did not even learn of her potential cause of action until 1989, over five years after receiving the blood. If the medical malpractice

statute of repose applies, Mrs. Doe's claim is barred before she could become aware of it.

There is often a significant delay before a person infected with the HIV virus will test positive for the virus, and much longer before they actually become ill or have any reason to suspect they are infected. See Scientific American, p.80, 92, 94 (Oct. 1988).

Cutting off a right to sue before a person could even learn of their condition suggests serious constitutional due process and access to courts problems. See Pullum v. Cincinnati, Inc., 476 So.2d 657, 659 n. (Fla. 1985), appeal dismissed, 475 U.S. 1114, 106 S.Ct. 1626, 90 L.Ed. 174 (1986); Diamond v. E.R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981). Doe believes AIDS in his wife's case is like the situation described in the Pullum footnote and in Diamond. That is, her injury did not become evident until after the repose period had run. Therefore, it should be unconstitutional to bar the claim on a repose basis.

However, Doe is aware of this Court's recent decisions applying the seven year fraud repose provision in medical malpractice cases. University of Miami v. Bogorff, 16 FLW S149 (Fla. 1991); Carr v. Broward County, 541 So.2d 92 (Fla. 1989). Doe is understandably concerned that if the medical malpractice statute is applied to the claims on behalf of Mrs. Doe, there is a risk a court could hold them barred by the statute of repose.

Consequently, Doe urges this Court to consider not only the harsh ramifications of applying the two year medical malpractice

statute to AIDS claims against blood banks, but the implications for the four year repose provision as well. Society has stigmatized even AIDS victims who contracted the virus from blood banks or sources other than sexual conduct or drug abuse. There is an understandable difficulty in facing the reality of this life threatening condition. Filing a lawsuit is not typically the first reaction of victims and their families trying to cope with such a tragedy.

Here, even if the Does had sued as soon as they learned of Mrs. Doe's condition, the suit would have been filed over four years after MCBB's blood secretly infected her. Mrs. Doe's action should be treated as it would against any other supplier of an impure medicine, food product, etc.

If the holding that the medical malpractice statute applies to the claim of a person receiving blood products provided by a blood bank stands, it will create irrational results. Here, Mr. Doe unquestionably received no "diagnosis, treatment, or care by" the blood bank. Thus his independent claims for fear of AIDS and emotional distress cannot be barred by the medical malpractice statute of limitations. Holding the medical malpractice statute applies to persons actually receiving the blood products means the rights of those more directly injured will be cut off sooner than other victims.

CONCLUSION

Based on the foregoing and the arguments made in Silva's initial brief, Mr. Doe urges this Court to hold that the negligence statute of limitations applies to actions against blood banks, rather than the medical malpractice statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent to TED R. MANRY, III, ESQ. and D. JAMES KADYK, ESQ., Macfarlane, Ferguson, Allison & Kelly, Post Office Box 1531, Tampa, Florida 33601; KELLY GELB, ESQ., Krupnick, Campbell, 700 S.E. 3rd Avenue, Ft. Lauderdale, FL 33316; RAYMOND T. ELLIGETT, JR., ESQ., Schropp, Buell & Elligett, P.A., NCNB Plaza, Suite 2600, 400 N. Ashley Dr., Tampa, FL 33602; F. RONALD FRALEY, ESQ., Fraley & Fraley, 501 E. Kennedy Blvd., Suite 1002, Tampa, FL 33602; ROBERT A. FOSTER, JR., ESQ., Robert A. Foster, Jr., P.A., Landmark Building, Ste. 1207, Tampa, Florida 33602; THOMAS J. GUILDAY, ESQ., Huey, Guilday, Kuersteiner & Tucker, P.A., P. O. Box 1794, Tallahassee, FL 32302; ELIZABETH RUSSO, ESQ., Elizabeth Russo, P.A., Suite 601 New World Tower, 100 N. Biscayne Blvd., Miami, Florida 33132; ANDERSON, MOSS, PARKS & RUSSO, P.A., Suite 2500 New World Tower, 100 N. Biscayne Boulevard, Miami, Florida 33132; and to: JUDITH S. KAVANAUGH, ESQ., Peeples, Earl & Blank, 1800 Second St., Suite 888, Sarasota, FL 34236; by U. S. Mail, this 3 day of July, 1991.

Attorney