IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

GERALD SILVA, etc.,

Petitioner

vs.

SOUTHWEST FLORIDA BLOOD BANK, INC.,

Respondent.

Case No. 77,980

District Court of Appeal
2nd District - No. ______

JOHN SMITH, et ux., etc.,

Petitioner

vs.

SOUTHWEST FLORIDA BLOOD BANK, INC.,

Respondent.

Case No. 78,012

District Court of Appeal
2nd District - No. 90-01216

ACADEMY OF FLORIDA TRIAL LAWYERS'
AMICUS CURIAE BRIEF
SUPPORTING POSITION OF PETITIONERS

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A. WHETHER THE CLAIM AGAINST A BLOOD BANK WHICH SELLS HIV-CONTAMINATED BLOOD PRODUCTS IS A CLAIM FOR "DIAGNOSIS, TREATMENT, OR CARE BY ANY PROVIDER OF HEALTH CARE"?

B. WHETHER THE BLOOD BANK IS IN "PRIVITY" WITH A PROVIDER OF HEALTH CARE?

II. WHETHER INCLUDING BLOOD BANKS WITHIN THE MEDICAL STATUTE OF LIMITATIONS VIOLATES FLORIDA'S CONSTITUTIONAL GUARANTEE OF ACCESS TO COURTS?

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PRELIMINARY STATEMENT

The Academy of Florida Trial Lawyers files this Brief of Amicus Curiae in support of Petitioners Smith and Silva.

Petitioners Smith and Silva are referred to as Petitioners or Smith and Silva.

Respondent Southwest Florida Blood Bank, Inc. is referred to as Southwest or Respondent.

STATEMENT OF THE CASE AND FACTS

Amicus accepts the Statement of Case and Facts as set forth by Petitioners' Initial Brief.

ISSUES ON APPEAL

I. WHETHER THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS APPLIES TO A BLOOD BANK THAT SELLS HIV-CONTAMINATED BLOOD PRODUCTS?

A. WHETHER THE CLAIM AGAINST A BLOOD BANK WHICH SELLS HIV-CONTAMINATED BLOOD PRODUCTS IS A CLAIM FOR "DIAGNOSIS, TREATMENT, OR CARE BY ANY PROVIDER OF HEALTH CARE"?

B. WHETHER THE BLOOD BANK IS IN "PRIVITY" WITH A PROVIDER OF HEALTH CARE?

II. WHETHER INCLUDING BLOOD BANKS WITHIN THE MEDICAL STATUTE OF LIMITATIONS VIOLATES FLORIDA'S CONSTITUTIONAL GUARANTEE OF ACCESS TO COURTS?

SUMMARY OF ARGUMENT

Florida's medical malpractice statute of limitations, §95.11(4)(b), Florida Statutes, provides in pertinent part as follows:

> An action for medical malpractice shall be commenced in two years from the time the incident giving rise to the action occurred or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than four years from the date of the incident or occurrence out of which the cause of action accrued. An "action for medical malpractice" is defined as a claim in tort or in contract for damages because of a death, injury, or monetary loss to any person arising out of any medical, dental or surgical diagnosis, treatment, or care by any provider of health care. The limitation of actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care.

The statute does not define the term "provider of health care". When a statute does not specifically define words of common usage, such words should be construed in accordance with their plain and ordinary meaning. The plain and ordinary meaning of the term "provider of health care" does not encompass blood banks such as Respondent Southwest.

Construing the medical malpractice statute of limitations so as to include blood banks achieves absurd and unreasonable results. If the statute is interpreted in this manner, any entity which provides goods or services to a health care provider would receive the protection of the statute.

Moreover, including blood banks within the term "provider of health care" would necessarily include blood banks within the statute of repose for a medical malpractice action. As such, a person infected by HIV-contaminated blood who did not develop AIDS or AIDS-related complex within four years would be barred from bringing an action. This would be an unconstitutional denial of access to courts. Courts should adopt constructive statutes that comport with the dictates of the Constitution. As such, this Court should not interpret the term "provider of health care" so as to include blood banks.

ARGUMENT

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

A. THE CLAIM AGAINST A BLOOD BANK WHICH SELLS HIV-CONTAMINATED BLOOD PRODUCTS IS NOT A CLAIM FOR "DIAGNOSIS, TREATMENT, OR CARE BY ANY PROVIDER OF HEALTH CARE".

The fundamental rule of statutory construction is to construe statutes so as to effect the legislature's statutory intent. City of Tampa v. Thatcher Glass Corp., 445 So. 2d 578 (Fla. 1984). In the absence of a statutory definition, words should be given their plain and ordinary meaning. Simmons v. Schimmel, 476 So.2d 1342 (Fla. 3d DCA 1985). As this Court recently noted in Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Association, Inc., 16 FLW S440 (1991), an additional rule of construction applies specifically to statutes

of limitations. Where a statute of limitations shortens the existing period of time, the statute is generally constructed strictly, and where there is reasonable doubt as to legislative intent, the preference is to allow the longer period of time.

With these rules in mind, it is clear that a plain, common sense reading of the term "provider of health care" does not include blood banks. The average lay person would not regard a blood bank as providing health care or treatment. Instead, a common sense understanding of the term "provider of health care" would be one who actually cares for or treats a patient. Blood banks do not care for or treat anyone. Blood banks merely procure, process, store and distribute blood. The fact that the procurement, processing, storage and distribution has been declared to be service-oriented by §672.136, Florida Statutes, does not in any way mean that such procurement, processing, storage or distribution should be considered to be care or treatment to a patient. It is difficult to see how the procurement of blood from one person could possibly act as treatment to another person. The additional acts of processing, storage and distribution again provide no treatment to a patient. Only a health care provider who made the decision that a transfusion was necessary or who performed the transfusion could possibly be seen as engaging in the care and treatment of a patient.

At the very least, there is reasonable doubt as to whether or not the legislature intended to protect blood banks along with doctors and hospitals when enacting §95.11(4)(b), Florida Statutes.

As such, the rules of statutory construction would dictate that the longer four-year negligence statute be applied. Application of the four-year negligence statute of limitations is in accord with all previous cases involving blood bank liability.

Even if this Court finds that a blood bank is a health care provider the second requirement of §95.11(4)(b), Florida Statutes (1989), to wit, "diagnosis treatment, or care" by the health care provider/blood bank cannot be satisfied by the blood bank in this case because of the specific terms of the statute and applicable common law. Florida Courts have consistently recognized a cause of action for common law negligence against a blood bank for providing a recipient end-user a contaminated blood product. Crandell v. Southwest Florida Blood Bank, Inc., 16 FLW D274 (Fla. 2d DCA 1991); Williamson v. Memorial Highway Hospital, 307 So.2d 199 (Fla. 1st DCA 1975). A negligence action by a recipient end-user of a blood product against a blood bank is predominately founded on whether the blood bank failed to properly test and process the blood and whether the blood banks procedures are adequate and consistent with the standards prevailing in the blood bank industry. Crandell, at D274.

A cause of action for negligence traditionally falls within the four year statute of limitations provided under §95.11(3)(a), Florida Statutes (1989). In interpreting the subject statute, §95.11(4)(b), to determine if it now encompasses an action in negligence against a blood bank, the following rule of interpretation, as stated by this Court in Jones, Varnum & Co. v.

Townsend, 23 Fla. 355, 2 So. 612 (Fla. 1887) and restated in Ellis v. Brown, 77 So.2d 845 (Fla. 1955), is helpful:

> 'To know what the common law was before the making of a statute, whereby it may be seen whether the statute be introductory of a new law, or only affirmative of the common law, is the very lock and key to set open the windows of a statute. Further, as a rule of exposition, statutes are to be construed in reference to the principles of the common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced; for, if the parliament had that design, it is naturally said, they would have expressed it,' Potter's Dwar. St. 185.

Section 95.11(4)(b) did not specifically include blood banks therein at the time of its enactment nor does the statute indicate that the legislature intended to change the common law as to redefine a cause of action in negligence to be reclassified as a cause of action for medical malpractice as defined by §95.11(4)(b). To interweave §766.102, Florida Statutes (1989) (formerly located at §768.45) alters common law principles. The traditional actions of negligence available to recipient end-users of a blood product once founded on breach of the blood bank's duty in the collection, processing and transfusion of blood, would be improperly redefined thereby as a breach of the blood bank's diagnosis, treatment or care of the recipient of the blood. This modification of said cause of action was not contemplated by the legislature in enacting §95.11(4)(b). If the legislature desires

such an alteration of common law it must say so, as it must, unequivocally instead of by inference and implication. Law Offices of Harold Silver P.A. v. Farman Bank & Trust Co., 498 So.2d 984 (Fla. 1st DCA 1987).

B. A BLOOD BANK IS NOT IN "PRIVITY" WITH A PROVIDER OF HEALTH CARE.

Section 95.11(4)(b), Florida Statutes, provides in pertinent part:

> The limitation of actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care.

Respondent has argued that even if it is not a health care provider, that it is in privity with the provider of health care. If Respondent's construction of the statute was adopted, any person or entity in privity with the provider of health care would be protected by the two-year statute of limitations. This would have absurd and undesirable consequences. For example, the maintenance company for a hospital which waxed the floors upon which a patient slipped would have the benefit of a two-year statute of limitations since the maintenance company would be in privity with the hospital. A food service provider who provided adulterated food to a patient would be protected by the statute. Clearly, causes of action against such entities were not intended by the legislature to be included within the phrase "action for medical malpractice".

Even limiting the entity to a "medical service" provider does not render the statute any less absurd and unreasonable. A medical supply company which provides syringes, prostheses, x-ray machines, all of which involve medical services, would be entitled to protection of the statute. It is clear that the legislature did not intend causes of action against such entities to be encompassed within the phrase "medical malpractice action".

The only interpretation of privity which results in a reasonable construction is the definition of privity adopted by this Court in Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985). There, this Court adopted a definition of privity as being a mutuality interest or an identification of interest of one person with another. Applying this definition of privity to this case, it is clear that a hospital and a blood bank are not in privity because they do not share a mutuality of interest or identification. Since this is the only definition of privity which does not result in an absurd or unreasonable construction of the statute, it should be adopted by this Court in this context.

II. INCLUDING BLOOD BANKS WITHIN THE MEDICAL STATUTE OF LIMITATIONS VIOLATES FLORIDA'S GUARANTEE OF ACCESS TO COURT.

If actions against blood banks for selling HIV-contaminated blood were included within the medical malpractice statute of limitations, the medical malpractice statute of repose contained

within §95.11(4)(b) would also necessarily apply to such actions. As such, in those instances where the blood donee did not develop AIDS or AIDS-related complex within four years of the date of transfusion, the donee would be barred from bringing a cause of action before the cause of action even came into existence. In such cases, such persons would be deprived of due process of law and access to the courts in violation of Article I, Section 21 of the Florida Constitution. Article I, Section 21, Florida Constitution provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without fail, denial or delay.

This Court has held that where a statute of repose has the effect of barring a cause of action before it ever accrues, then the statute of repose violates a plaintiff's access to court under Article I, Section 21, Florida Constitution. Diamond v. E. R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981). Therefore, if actions against a blood bank were included within the definition of "medical malpractice action", the statute of repose contained within §95.11(4)(b) would be unconstitutional as applies to cases where a plaintiff did not develop AIDS until more than four years from the date of the transfusion.

In addition to the previously referenced statutory rules of construction, one further rule of statutory construction provides that where a statute may be reasonably construed in more than one manner, the court should adopt the construction that comports to the dictates of the constitution. For example, in

Vildibill v. Jackson, 419 So.2d 1047 (Fla. 1986), this Court was called upon to interpret Florida's Wrongful Death Statute, and in particular §768.21(6)(a)(2), Florida Statutes (1983), which allows the estate of the decedent to recover net accumulations "if the decedent is not a minor child as defined in §768.18(2) and did not have survivors as defined in §768.18(1)." As this Court noted, a strict literal reading of the section would have precluded an adult decedent's estate from recovering for loss of net accumulations where the decedent was survived only by non-dependent parents. This Court found that such a construction would create an irrational classification which would violate the constitutional guarantee of equal protection of law. Therefore, the Court adopted a less strict literal interpretation of the term "survivors" so that the constitutional guarantee of equal protection of law would not be violated.

Similarly here, the term "provider of health care" should be interpreted in a way which would not violate the constitutional guarantee of access to courts. The statute involved in Vildibill actually referred to a statutory definition found in a separate statute, nevertheless, this Court refused to accept this interpretation because of the harsh and unconstitutional result which it would impose. In this case, §95.11(4)(b) does not even reference a statutory definition of the term "provider of health care". Therefore, an argument for a common sense construction of the term "provider of health care" which would comport with constitutional requirements is even more persuasive.

CONCLUSION

Based on the foregoing, Amicus AFTL requests that this Court hold that the correct statute of limitations for an action against a blood bank for the sale of HIV contaminated blood is the four year statute of limitations, and accordingly reverse the order of dismissal in this case.

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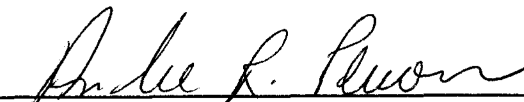

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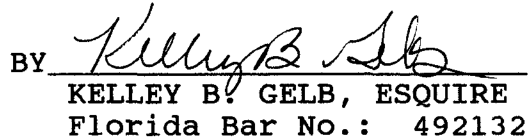
BY 
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