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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

AMICUS CURIAE BRIEF OF
THE FLORIDA ASSOCIATION OF BLOOD BANKS, INC.
SUPPORTING POSITION OF RESPONDENT
SOUTHWEST FLORIDA BLOOD BANK, INC.

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PRELIMINARY STATEMENT

This brief of Amicus The Florida Association of Blood Banks, Inc., supporting Respondent Southwest Florida Blood Bank, Inc., is respectfully submitted in this consolidated appeal to review Silva v. Southwest Florida Blood Bank, Inc., 578 So.2d 503 (Fla. 2d DCA 1991) and Smith v. Southwest Florida Blood Bank, Inc., 578 So.2d 501 (Fla. 2d DCA 1991). In this Amicus brief the following references will be made:

Petitioners **John Smith, et ux**, will be referenced as **"the Smiths"**; citations to the Smiths' Initial Brief will be referenced as "Smith ____," followed by the appropriate page number;

Petitioners **Gerald Silva, etc.**, will be referenced as **"the Silvas"**; citations to the Silvas' Initial Brief will be referenced as "Silva ____," followed by the appropriate page number;

The **Smiths** and the **Silvas** will be referenced collectively as **"Petitioners"**;

Respondent **Southwest Florida Blood Bank, Inc.** will be referenced as **"Southwest"**;

Amicus Curiae the **Association of Florida Trial Lawyers** will be referenced as **"AFTL"**; citations to the Amicus Brief of the Association of Florida Trial Lawyers will be referenced as "AFTL ___," followed by the appropriate page number;

Amicus Curiae **John Doe** will be referenced as **"Doe"**; citations to the Amicus Brief of John Doe will be referenced as "Doe ___," followed by the appropriate page number;

Amicus Curiae **The Florida Association of Blood Banks, Inc.** will be referenced as **"FABB"**; and

Citations to the record will be referenced by the letter "R. __," followed by the appropriate page number.

I. STATEMENT OF THE CASE AND OF THE FACTS

FABB accepts and adopts Southwest's Statement of the Case and Facts. FABB adds, however, that the tragedies underlying the instant appeal must be viewed in their historical context. Both the Silvas' and the Smiths' claims have their genesis in one of the most -- if not the most -- disastrous diseases to strike humankind -- Acquired Immune Deficiency Syndrome ("AIDS").

AIDS is a modern plague and medical mystery. The first cases of AIDS were diagnosed in 1981. Kozup v. Georgetown University, 663 F.Supp. 1048, 1051 (D. D.C. 1987), aff'd. in part, vacated in part, 851 F.2d 437 (D. D.C. 1988). Little was known about the nature of this strange new disease when it first appeared. As more cases were diagnosed, it became apparent that AIDS was especially prevalent among certain groups of people, and

> [i]t was not until 1984 that the medical community reached a consensus as to the proposition that AIDS was transmissible by blood.
>
> In April, 1984, scientists identified the virus HTLV-III as the cause of AIDS. By May, 1985, an enzyme - linked immunosorbent assay (ELISA) test was made available which screens for the antibodies sensitive to HTLV-III. Once it was available, the Center for Disease Control issued guidelines for implementing the test.

Id. at 1052-53 (citations omitted).

In other words, the test does not detect AIDS; rather, the test detects antibodies developed by the body's immune system to exposure to the disease. Because of the time it takes the immune system to develop antibodies after exposure to the HIV virus, a time period of uncertain duration exists in which the disease may

be present, although the HIV test may be negative. Price, Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context, 94 Dickinson Law Review, Winter 1990, 435, 443; Hermann and Gormann, Hospital Liability and AIDS Treatment: The Need for a National Standard of Care, 20 U.C. Davis Law Rev., Spring 1987, 441, 445-6; Surgeon General's Report on Acquired Immune Deficiency Syndrome, U. S. Dept. of Health and Human Services, pp. 9-10, Oct. 22, 1986. It is a disturbing truth that even now, at the end of the twentieth century, medical science continues to be confounded by this destructive infectious disease which cannot be detected, treated or prevented.

Now that AIDS has become a household word (partly because of medical science's inability to eliminate it and partly because of the misery it has caused), it is easy to forget that nothing was known about the disease until a decade ago. In the context of cases such as the instant appeal, however, it is important to remember that what is taken for granted today was unknown a few years ago and that the current state of medical knowledge -- as imperfect as it is -- is far superior to the state of medical knowledge that existed less than ten years ago.

AIDS has had an impact on every aspect of life, including not only medicine, but economics, social mores, philosophy, art and law as well. In law, as in other aspects of life, the issues created by the AIDS crisis are painful to resolve. The issue now before this Court is no exception, because resolution of the issue

requires application of established rules of law to tragic situations, and the inevitable result is to bar the Petitioners from bringing their lawsuits. As heart-rending as the underlying cases are, however, the Court should not lose sight of established principles of law and the important functions which statutes of limitation serve in the administration of justice.

II. SUMMARY OF ARGUMENT

The issue before this Court is whether the medical malpractice statute of limitations applies to suits against blood banks for negligence in the procuring, processing and supplying of blood for transfusion into patients. Petitioners argue that the medical malpractice statute of limitations does not apply because (1) blood banks are not "health care providers" within the meaning of the medical malpractice statute of limitations; (2) a cause of action arising out of negligence in the procurement, processing and supplying of blood is not a cause of action arising out of medical diagnosis, treatment or care; and (3) in supplying the blood to hospitals for transfusion to patients, blood banks are not in privity with health care providers. Amici Doe and AFTL have added a fourth argument: they contend that the four year statute of repose contained within the medical malpractice statute of limitations is unconstitutional as applied to cases such as those on which the instant appeal is based. All four arguments are fatally flawed.

First, blood banks are health care providers, and causes of action arising out of the procurement, processing and supplying of blood correspondingly arise out of medical diagnosis, treatment or care. Those two facts are interrelated, and the grounds supporting one fact also support the other. Petitioners' contrary conclusions are based on misinformation, misinterpretation and misunderstanding.

The work performed by blood banks is inherently and inextricably tied to the medical care and treatment of patients. The legislature has statutorily defined blood banks as health care providers who are required to uphold a professional standard of care, and has explicitly acknowledged the medical nature of the work performed by blood banks and the role they play in the care and treatment of patients.

Indeed, non profit blood banks relying upon voluntary donations play the single most important role in obtaining and maintaining an adequate supply of blood to meet the needs of the citizens of this state. They are exhaustively regulated by statutes and administrative rules and regulations. By law and by reason of the services they provide, they are staffed by highly qualified professionals (including physicians) who screen voluntary donors for possible health risks and perform complex and technical procedures on blood obtained from those donors. Other states which have considered similar issues have determined, as has Florida, that blood banks are health care providers who are entitled to the protections of the medical malpractice statute of limitations.

Second, and in the alternative, assuming arguendo that blood banks are not health care providers, the respondent blood bank in the instant cases was in privity with health care providers (the hospitals to which the blood was supplied for transfusion) at the time of the events complained of; therefore, the medical malpractice statute of limitations applies.

Third, the statute of repose "issue" is not properly an issue to this appeal because it was not raised below. Furthermore, it is not implicated in the instant appeal based on the underlying facts, and this Court has already determined that the medical malpractice statute of repose was constitutionally enacted.

Therefore, the medical malpractice statute of limitations properly applies to bar Petitioners' claims in the underlying actions. The Second District Court of Appeal's ruling should be affirmed.

III. ARGUMENT

A. BLOOD BANKS ARE HEALTH CARE PROVIDERS.

1. Blood banks are defined as health care providers under 766.102, Fla. Stat. (1989).

The statute of limitations for medical malpractice actions, § 95.11(4)(b), Fla. Stat., (1989) provides, in part, that

> [a]n 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; however, in no event shall the action be commenced later than 4 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 the 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.

(Emphasis supplied.)

Section 95.11(4)(b), Fla. Stat., (1989), does not define "health care provider." However, § 766.102, Fla. Stat., (1989) which sets the standards of recovery in all medical malpractice cases, explicitly adopts the definition of health care provider set forth in § 768.50(2)(b). Section 766.102(1) provides, in part, that

> [i]n any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s. 768.50(2)(b), the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented

> a breach of the prevailing professional standard of care for that health care provider.

(Emphasis supplied.)

Section 768.50(2)(b) specifically identifies blood banks and clinical laboratories[1] as health care providers. Section 768.50(2)(b) provides:

> "Health care provider" means hospitals licensed under chapter 395; physicians licensed under chapter 458; osteopaths licensed under chapter 459; podiatrists licensed under chapter 461; dentists licensed under chapter 466; chiropractors licensed under chapter 460; naturopaths licensed under chapter 462; nurses licensed under chapter 464; clinical laboratories registered under chapter 483; physicians' assistants certified under chapter 458; physical therapists and physical therapist assistants licensed under chapter 486; health maintenance organizations certificated under part II of chapter 641; ambulatory surgical centers as defined in paragraph (c); blood banks, plasma centers, industrial clinics, and renal dialysis facilities; or professional associations, partnerships, corporations, joint ventures, or other associations for professional activity by health care providers.

(Emphasis supplied.)

Although the Florida Legislature repealed § 768.50(2)(b) in 1986, the definition of "health care provider" set forth in that provision remains effective as part of § 766.102(1), as confirmed by a footnote to § 766.102(1) which states that "Section 768.50(2)(b) was repealed by s. 68, ch. 86-160. Note, however, that generally a specific cross-reference is unaffected by subsequent amendments to or repeal of the statute." § 766.102(1)

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[1]A blood bank is also regulated as a clinical laboratory because it is "a laboratory where examinations are performed on materials or specimens taken from the human body to provide information or materials for use in the diagnosis, prevention, or treatment of a disease or the assessment of a medical condition." § 483.041(1), Fla. Stat., (1989).

at n.1 (emphasis supplied). The footnote references p. viii of the Preface to Volume 5 of Florida Statutes (1989), which in turn provides, in relevant part:

> Legislative enactments frequently incorporate portions of the Florida Statutes by reference. A cross-reference to a general body of law (without reference to a specific statute) incorporates the referenced law and any subsequent amendments to or repeal of the referenced law. In contrast, as a general rule, a cross-reference to a specific statute incorporates only the language of the referenced statute as it existed at that time, unaffected by any subsequent amendments to or repeal of the incorporated statute. See Overstreet v. Blum, 227 So.2d 197 (Fla. 1969); Hecht v. Shaw, 112 Fla. 762, 151 So. 333 (1933); Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (1918); and State ex rel. Springer v. Smith, 189 So.2d 846 (Fla. 4th DCA 1966).

(Emphasis supplied.) Therefore, under well-established principles of statutory construction, a blood bank is a health care provider under § 766.102(1).

2. No other statutory definition of health care provider is appropriate.

Nevertheless, Petitioners contend that the definition of health care provider in that section is inapplicable to § 95.11(4)(b), the statute of limitations.[2] Petitioners argue that the medical malpractice statute (Chapter 766) includes more than one definition of health care provider and that some of those definitions exclude blood banks. However, the statutes Petitioners cite as examples, §§ 766.101(1)(b) and 766.105(1)(b), Fla. Stat., (1989) (Silva, 9), have a limited application and are not relevant to the circumstances involved here.

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[2]The Smiths have adopted the Silvas' argument on this point. (Smith, 24.)

Section 766.105, for example, deals exclusively with The Florida Patient's Compensation Fund. "The Fund," as it is known, is limited to certain participating health care providers. Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058, 1060-1 (Fla. 1985). Because blood banks are not members of The Fund, they are not defined as health care providers for purposes of that particular statute. Dentists, chiropractors, naturopaths and physical therapists are likewise not members of the Fund and are excluded from the definition of health care provider under that particular statute, although they are explicitly identified as health care providers under § 766.102(1). Similarly, § 766.101(1)(b) does not include blood banks (or naturopaths, nurses, physical therapists and others) within its definition of health care provider; however, that statute deals solely with the review of professional and medical competence by medical review committees.

In contrast, § 766.102(1) has a broad application. That statute sets the standards for recovery in all medical malpractice cases. It describes a plaintiff's burden of proof in all negligence actions against health care providers. By its incorporation of § 768.50(2)(b), it specifically identifies the health care providers against whom medical malpractice suits may be brought. Indeed, § 766.102 is entitled "Medical Malpractice; Standards of Recovery" and it is contained within Chapter 766, entitled "Medical Malpractice and Related Matters." The definition of health care provider in § 766.102(1) is the only definition in

the entire medical malpractice statute which could conceivably apply to § 95.11(4)(b).

3. The legislature is presumed to have known of the statute of limitations for health care providers when it enacted § 766.102.

Petitioners contend that the legislature "could not have intended the definition of health care provider" incorporated in § 766.102 to relate to the statute of limitations because the statute of limitations "predated the adoption of the definition of health care provider" in § 766.102. (Silva, 10, emphasis in original.) They contend that "there was no clear legislative intent to include blood banks as health care providers in the 1975 medical malpractice limitations statute." (Silva, 14.) Petitioners' argument overlooks the fact that the legislature explicitly recognized blood banks as providers of medical (or health) care even before it enacted the 1975 medical malpractice statute of limitations. In 1969, the Legislature proclaimed that

> WHEREAS, the procurement, processing, storage, distribution, or use of whole blood, plasma, blood products, and blood derivatives, for the purpose of injecting or transfusing the same, or any of them, into the human body provides the general public with a desirable and necessary medical service, and
>
> ***
>
> WHEREAS, the rendering of this service is an intricate part of the practice of medicine, and
>
> ***
>
> WHEREAS, the continuance of the operation of community and private blood banks provides the citizens of Florida with a service which might otherwise have to be provided by the State of Florida, and

> WHEREAS, the public policy declared by this enactment is a legislative prerogative ....

Ch. 69-157, Laws of Fla. (emphasis supplied).

Furthermore, the legislature is presumed to have known of the statute of limitations pertaining to actions against health care providers when it enacted § 766.102 detailing the burden of proof in negligence actions against health care providers. See, e.g., State v. Dunmann, 427 So.2d 166 (Fla. 1982), in which case this Court noted that "[t]here is also a general presumption that the legislature passes statutes with knowledge of prior existing laws." Id. at 168, citing Oldham v. Rooks, 361 So.2d 140 (Fla. 1978).

4. Sections 95.11(4)(b) and 766.102(1) must be read in pari materia.

By operation of well established principles of statutory construction (and of common sense), § 766.102, which relates to standards of recovery in medical malpractice actions, must be read in pari materia with § 95.11(4)(b), which provides the statute of limitations for medical malpractice actions.

> [W]here two statutes operate on the same subject without positive inconsistency or repugnancy, courts must construe them so as to preserve the force of both without destroying their evident intent, if possible. It is an accepted maxim of statutory construction that a law should be construed together with and in harmony with any other statute relating to the same subject matter or having the same purpose, even though the statute were [sic] not enacted at the same time.

Mann v. Goodyear Tire & Rubber Co., 300 So.2d 666, 668 (Fla. 1974) (footnotes omitted)(emphasis supplied). See also, Wakulla County v. Davis, 395 So.2d 540, 542 (Fla. 1981), City of Boca Raton v. Gidman, 440 So.2d 1277, 1282 (Fla. 1983).

> Laws should be constructed with reference to the constitution and the purpose designed to be accomplished, and in connection with other laws in pari materia, though they contain no reference to each other. While the legislature may direct that such statutes be read in pari materia, the absence of such a directive does not bar construing two statutes in that manner.

Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So.2d 981, 988 (Fla. 1981) (citations omitted).

It is irrational to suggest that although blood banks are health care providers for purposes of § 766.102, they are not health care providers for purposes of the statute of limitations, inasmuch as § 766.102 addresses the burden of proving "that the alleged actions of the health care provider represented a breach of the professional standard of care for that health care provider." § 766.102(1). The logical interpretation is to read the two statutes, which are not inconsistent with each other, in pari materia.

5. Petitioners' reliance on the Brown and Baskerville-Donovan cases is misplaced.

Petitioners' reliance on Brown v. St. George Island, Ltd., 561 So.2d 253 (Fla. 1990) and Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Association, Inc., 16 FLW S440 (Fla. 1991) to support their position is misplaced. In Brown, this Court was asked to determine whether a reference to a prior disqualification of a judge under the provisions of § 38.10, Fla. Stat., included prior disqualifications under § 38.02, Fla. Stat. In answering that question in the negative, the Court concluded, as Petitioners have noted, that "the legislature could not have

intended the latter portion of § 38.10 to refer to § 38.02 because section 38.02 did not become law until ten years after section 38.10 was enacted." (Silva, 10.)

The basis for the Court's conclusion in that case, however, was essentially that disqualifications under § 38.02 are different from disqualifications under § 38.10. In other words, § 38.02 pertains _only_ to disqualifications sought on grounds that "[t]he judge or the judge's relative is a party or is interested in the result of the case, that the judge is related to one of the attorneys, or that the judge is a material witness," _Brown_, at 255; and § 38.10 pertains _only_ to disqualifications sought on the ground that the party requesting disqualification "fears he will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the appellant or in favor of the adverse party." _Id_. Both provisions are self-contained: the provisions relating to § 38.02 do not relate to § 38.10, and vice versa. In the instant appeal, precisely the opposite is true, because the two statutes in question (§§ 766.102(1) and 95.11(4)(b)) do relate to and complement each other.

Likewise, _Baskerville-Donovan Engineers, Inc. v. Pensacola Executive Housing Condominium Association, Inc._, 16 FLW S440 (Fla. June 13, 1991) is of no help to Petitioners. _Baskerville-Donovan_ stands for the unremarkable proposition that the legislature cannot be presumed to know the "different gloss" case law applies to concepts embodied in statutes in the years (and decades) following

the statute's enactment. Specifically, in Baskerville-Donovan, the Court noted that when the legislature included the word "privity" in the statute of limitations pertaining to professional negligence other than medical malpractice, it could not have been aware that third party beneficiary principles would later develop and "[e]xpand liability where a duty of care exists between a third party and a professional, ... despite the lack of direct contractual privity." Id. at S441. Baskerville-Donovan has no application to the case at bar; here, the legislature was aware of the statute of limitations for malpractice actions for health care providers when it enacted legislation specifically incorporating blood banks within the definition of health care providers.

6. Petitioners' alternative arguments are groundless.

Petitioners offer other arguments to support their contention that blood banks are not health care providers. Silva argues that "[t]here are reasons why the legislative [sic] should have elected to treat an entity such as blood banks differently [from other health care providers]. A patient selects his or her doctor and hospital and has first hand contact with them." (Silva, 29.)

That argument is flawed. Patients hospitalized on an emergency basis, patients who have no regular physician, patients who receive medical care in localities other than where they live (such as vacationing patients) and patients in particular demographic areas are subject to the luck of the draw in obtaining medical care. Furthermore, even when a patient has the luxury of choosing his or her attending physician and hospital, many of the

health care providers involved in the care, treatment and diagnosis of the patient are unknown to the patient -- before, during and even after the care, treatment or diagnosis is rendered. For example, the patient generally has no control over the selection of his or her nurses, respiratory therapists, consulting physicians, pathologists, and other medical personnel responding to emergency situations. Therefore, Petitioners' purported "reasons why the legislative [sic] should have elected to treat ... blood banks differently" are merely illusory.

Furthermore, "first hand contact" with a patient has no bearing on determining whether a person or entity is a health care provider. A pathologist who only examines tissue or a blood sample, a radiologist who only interprets x-rays, and a consulting physician who renders an opinion based solely on a patient's records without ever actually seeing a particular patient are all health care providers, even though none of them have any "first hand contact" with the patient.

In addition, Petitioners argue that the legislature's inclusion of blood banks within the definition of health care providers in § 768.50(2)(b) and incorporated in § 766.102(1) "proves [the legislature] did not believe blood banks were within the plain meaning of a health care provider." (Silva, 12.) Under that analysis, the legislature likewise did not consider physicians, chiropractors, dentists, physical therapists and hospitals to come within the plain meaning of health care provider because they are also included in the cited statutory definition.

Petitioners have not proposed an alternative definition of "health care provider" to be used in applying the medical malpractice statute of limitations. Instead, Petitioners merely conclude that the "plain meaning" of health care provider excludes blood banks without suggesting any factual, legal or logical basis for that conclusion, nor do Petitioners define the "plain meaning" of health care provider. In its amicus brief, the AFTL boldly asserts that "[t]he 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." (AFTL, 5.) Presumably, the AFTL does not consider pathologists, radiologists or consulting physicians as health care providers, because they do not "actually care for or treat a patient." More importantly, the argument that blood banks do not come within the "plain meaning" of health care providers underscores the fact that Petitioners simply do not understand either the nature and purpose of blood banks or the services provided by blood banks, as discussed more fully in section B herein.

7. Courts of other states have ruled that blood banks are subject to a medical malpractice statute of limitations.

In analyzing the treatment of blood banks in other states, it is easy to become distracted by the differences in the language used in the various statutes, and based on the differences between Florida's statutes and the statutes of other states, to conclude that a comparison between Florida law and law from other

jurisdictions is inappropriate. For example, some states' statutes are couched in terms of health care "professionals" as opposed to health care "providers," and some states' statutes relate only to claims arising out of "medical services" as opposed to "medical diagnosis, treatment and care." The variations are numerous, but there is one common thread running through the statutes and interpretative case law of other jurisdictions: it is the intent that blood banks should be held to a higher standard of care than that required in general negligence actions. Most courts which have considered the issue have concluded that blood banks provide a highly skilled and technical medical service which is subject to a professional standard of care. See, e.g., Kaiser v. Memorial Blood Center of Minneapolis, 721 F.Supp. 1073 (D. Minn. 1989); Coe v. Superior Court, 220 Cal. App. 3d 48, 269 Cal. Rptr. 368 (Cal. 1st DCA 1990), rev. denied, ___ P.2d ___ (Cal. 1990); Kozup v. Georgetown University, 663 F.Supp. 1048 (D.D.C. 1987), aff'd. in part, vacated in part, 851 F.2d 437 (D.D.C. 1988); Doe v. American Red Cross Blood Services, S.C. Region, 125 F.R.D. 637 (D.S.C. 1989); McKee v. Miles Laboratory, Inc., 675 F.Supp. 1060 (E.D. Ky. 1987), aff'd, McKee v. Cutter Laboratories, Inc., 866 F.2d 219 (6th Cir. 1989); Howell v. Spokane & Inland Empire Blood Bank, 114 Wash. 2d 42, 785 P.2d 815 (Wash. 1990).

In Doe v. American Red Cross Blood Services, S.C. Region, 297 S.C. 430, 377 S.E. 323 (D.S.C. 1989), for example, the South Carolina court concluded that the collecting and processing of blood was a skilled medical service which required that blood banks

be judged by the professional negligence standard. Similarly, in Kaiser v. Memorial Blood Center of Minneapolis, 721 F.Supp. 1073 (D. Minn. 1989) the court determined that the blood banks were "health care professionals" for purposes of Minnesota's two-year statute of limitations for malpractice actions.

Recently, the United States District Court for the Northern District of Georgia concluded that Georgia blood banks are health care providers under a statute similar to Florida's statute of limitations. The basis for the court's ruling, which is equally applicable to the instant case, was that

> [i]t seems reasonable to conclude that if the collection, processing, and supply of human blood are medical or health-care services, then the entity that provides these services is a health care provider. This conclusion is further supported by certain sections of Title 31 and the corresponding administrative rules and regulations which regulate virtually every aspect of the operation of clinical laboratories. Most notable are the provisions governing the qualifications of clinical laboratory personnel which require that a clinical laboratory be run by a licensed physician and staffed by individuals with extensive medical and technical training and expertise. Additional support is found in recently enacted sections of Title 31 which define clinical laboratories, along with hospitals, clinics, treatment centers, and hospices, as "health care facilities," and define those who staff these laboratories, along with physicians, osteopaths, dentists, paramedics, and nurses, as "health care providers." Accordingly, the Court finds that blood banks, like hospitals, clinics, etc., are health care providers.

Bradway v. The American National Red Cross, No. 1: 89-CV-1073-MHS (N.D. Ga., July 8, 1991) Slip. Op. at 4-5 (citations omitted).

In line with the trend in other states, a further indicator that the Florida legislature intended that a professional negligence statute of limitations apply to blood banks is found in

§ 766.102(1) (discussed in Section A.1 herein). Section 766.102(1) provides, in relevant part, that in any medical malpractice action "[t]he claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider[3] represented a breach of the prevailing professional standard of care for that health care provider." (Emphasis supplied.) Petitioners' argument that blood banks -- which the legislature has recognized as providing a necessary and desirable medical service and as entitled to the protections of the professional standard of care applicable to other medical professionals -- are not intended to be afforded the same period of limitations is a feeble argument in the face of such strong declarations of intent.

8. Conclusion.

Blood banks are health care providers entitled to the benefits of the medical malpractice statute of limitations, § 95.11(4)(b). While that statute does not define health care provider, § 766.102(1), which describes the standards of recovery and burdens of proof in medical malpractice actions, includes blood banks within its scope. There is no other statutory provision in the medical malpractice statutes which could be applied appropriately.

Furthermore, the legislature of Florida, as well as the legislatures and courts of other jurisdictions, have recognized that blood banks, as highly skilled and technical providers of

[3]As discussed above, a blood bank is specifically identified as a health care provider for purposes of § 766.102(1).

medical services, are entitled to the treatment afforded other medical professionals by the medical malpractice statute of limitations.

B. BLOOD BANKS PARTICIPATE IN MEDICAL CARE, TREATMENT AND DIAGNOSIS.

The medical malpractice statute of limitations applies only to actions which arise out of medical care, treatment or diagnosis. Petitioners' attempts to characterize the underlying actions as arising solely out of the manufacture, distribution and sale of products, rather than out of medical care or treatment, demonstrates Petitioners' lack of understanding of the fundamental difference between blood (and blood components) and other medical products and of the unique role blood banks play in supplying blood to patients. Statements such as the following, taken from Petitioners' briefs, are illustrative of the misperceptions on which Petitioners' arguments are founded:

> The procedures it [the blood bank] performs to create, process and prepare cryoprecipitate are analogous to a drug manufacturer preparing drugs from other plant or animal sources. (Silva, 23.)

> Cryoprecipitate is a product, just like a medical sponge or a drug. (Silva, 17.)

> Mrs. Silva's situation is analogous to a drug manufacturer mixing up an impure or mislabelled drug at the factory and distributing it. (Silva 22-3.)

> Blood banks are like any other medical suppliers -- whether of drugs, or dialysis machines, or surgical gloves. They do not diagnose patients, or care for patients or treat patients. In fact, they do not see or encounter recipient patients in any way, but rather -- like all other suppliers of medical products -- sell their products to hospitals. (Smith, 6.)

> The blood bank never saw the baby, never touched the baby, never had contact of any kind with the baby. (Smith, 8.)
>
> Blood banks simply have nothing to do with recipient patients -- because blood banks are not in the business of providing care or treatment. They are in the business of buying, processing and selling blood. (Smith, 9.)
>
> The blood bank simply sold a product which eventually -- through purchase and sales channels -- reached the baby. (Smith, 11.)

1. **Blood is unique**.

Contrary to Petitioners' misunderstanding, blood is not "just like" drugs, machinery, sponges or surgical gloves. Instead, blood is living human tissue, just like skin, organs and bone marrow. Blood cannot be made synthetically. Blood is uniquely human and is essential to life. Indeed, "blood" and "life" are often used synonymously, and at least one court has described blood as "the very fluid of life." Hutchins v. Blood Services of Montana, 161 Mont. 359, 506 P.2d 449, 453 (Mont. 1973).

Furthermore, cryoprecipitate (which was supplied by Southwest to Petitioners' decedents in both actions below) is neither a "by-product[4] of blood" nor "just like a medical sponge or a drug." Instead, cryoprecipitate is a component of blood, just like plasma and red cells. Gray, Attorney's Textbook of Medicine, Vol. 4C, ¶ 304.51(2) (3rd Ed. 1991). Different components are supplied to different patients according to need.

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[4] A "by-product" is "1. [s]omething produced in the making of something else. 2. [a] secondary result; side effect." The American Heritage Dictionary, 233 (2nd Ed. 1982).

Indeed, the idea that blood and its components are "just like" other commercially mass-produced products is as unsettling as it is erroneous. There is no substitution for blood, and there is no human life without it.

2. **Blood banks are not manufacturers**.

Blood banks do not make blood. They draw blood from volunteer donors; then,

> [o]nce the blood is collected, it is processed [by the blood bank] using a variety of test procedures including antibody screens, serologic tests, and other procedures to determine the suitability of blood for storage prior to a need for ultimate transfusion. Human blood can be and is frequently separated into various blood components. Separation into components can occur before or after various test procedures are performed. Once the blood or components have been completely processed, the label is identified as to blood type and immunohematologic properties. The blood is then stored until it is needed for transfusion. All of these procedures typically occur in the principal blood bank facilities and are referred to as processing.
>
> Before blood can be transfused to a patient, further procedures must be performed. When a physician orders blood or a blood component for transfusion to a patient, a sample must first be obtained from the intended patient/recipient. The patient's sample is then mixed with a sample of blood or blood component obtained by donation in order to test compatibility. This procedure is known as a crossmatch. If the blood is determined to be compatible, then it is provided to the hospital for transfusion to the patient/recipient. The hospital will then either transfuse the blood or store it awaiting transfusion. Crossmatch procedures are often performed in the principal blood bank facility. However, they are also performed in facilities known as "transfusion services" located in hospitals. These facilities are operated both by hospitals and blood banks.

Florida Association of Blood Banks, Inc. v. Department of Health and Rehabilitative Services, 9 FALR 367, 369-70 (Fla. Admin. Hearing Case No. 85-3141R, Final Order Dated December 18, 1986).

3. **<u>Blood banks are not merchants</u>.**

Blood banks are not "in the business of buying, processing and selling blood." (Smith, 9). Blood banks do not purchase blood; they obtain it from unpaid, volunteer donors. § 381.601, Fla. Stat. (1989). All blood banks in the state (including the respondent Southwest) are non-profit organizations. Blood banks, together with the donors who donate blood, ensure that the State's goal of assuring a safe and adequate blood supply to meet the needs of the citizens of this state is attained. The importance of that goal has been explicitly recognized by the Florida Legislature:

> It is the policy of the state to encourage the maintenance of an adequate supply of voluntarily donated blood of the highest quality accessible to all in need of blood. The state seeks with this policy to assure for its residents and visitors a system of blood supply, transfer and replacement that can supply all of the requirements for blood without unduly burdening persons who, due to age, illness or other circumstances, are unable to replace or arrange for blood replacement.

Section 381.601(4), Fla. Stat.

The Legislature has acknowledged that the work performed by blood banks is a medical service as opposed to a manufacturing process or a commercial enterprise:

> The procurement, processing, testing, storing or providing of human tissue and organs for human transplant, by an institution qualified for such purposes, is the rendering of a service; and such service does not constitute the sale of goods or products ....

§ 672.316(6), Fla. Stat. (emphasis supplied).

> [T]he procurement, processing, storage, distribution, or use of whole blood, plasma, blood products and blood derivatives, for the purpose of injecting or transfusing same, or any of them, into the human body provides the general public with a desirable and necessary medical service.

Ch. 69-157, Laws of Fla. (emphasis supplied).

4. Blood banks are medical laboratories.

Blood banks are rigorously licensed and regulated clinical laboratories which are essential to ensuring a safe and adequate blood supply for the citizens of this state. Blood banks are licensed as clinical laboratories under Chapter 483, Fla. Stat., which defines clinical laboratory as "a laboratory where examinations are performed on materials or specimens taken from the human body to provide information or materials for use in the diagnosis, prevention or treatment of a disease or the assessment of a medical condition." § 483.041. Rule 10D-41.066(1), F.A.C., defines clinical laboratory as

> laboratories operated by hospitals, blood banks, plasmapheresis banks, transfusion services, radioisotope, radiological, nuclear medicine, respiratory therapy, or related departments and independent laboratories where microbiological, serological,[5] chemical, hematological,[6] immunohematological,[7] cytological,[8] histopathological,[9]

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[5]Serology is the "branch of science concerned with serum, especially with specific immune or lytic serum." Stedman's Medical Dictionary, 1277, (24th Ed. 1982).

[6]Hematology is "the medical specialty that pertains to the anatomy, physiology, pathology, symptomology and therapeutics related to the blood and blood forming tissue." Stedman's Medical Dictionary, 627, (24th Ed. 1982).

[7]Immunohematology is the "division of hematology concerned with immune, or antigen-antibody, reactions, and with related changes in the blood." Stedman's Medical Dictionary, 696, (24th Ed. 1982).

[8]Cytology is the study of the anatomy, physiology and pathology of cells. Stedman's Medical Dictionary, 359, (24th Ed. 1982).

radioassay,[10] blood gas analysis,[11] cytogenic,[12] histocompatibility[13] testing or other examination of materials from the human body are performed.

Blood banks routinely perform serologic, hematologic, immunohematologic and histocompatibility procedures on donated blood. The provision of those services leads to the inclusion of blood banks within the definition of "health care facility." 10D-93.062(12), F.A.C.

Blood banks are directed and supervised by qualified, specialized professionals. 10D-41.067, F.A.C. et seq. In order for a blood bank to be permitted to perform a full spectrum of laboratory tests and procedures, the blood bank's director must be a pathologist certified or qualified for certification in both anatomical and clinical pathology by the American Board of Pathology or American Osteopathic Board of Pathology. Rule 10D-

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[9]Histopathology is "the science or study dealing with the cytologic and histologic structure of abnormal or diseased tissue." Stedman's Medical Dictionary, 652, (24th Ed. 1982).

[10]Radioassay procedures are "procedures wherein specimens which have been removed from the human body are subjected to biophysical determinations including but not limited to radioassays performed on material as part of an in-vitro test procedure." 10D-41.066(2), F.A.C.

[11]Blood gas analysis includes "in-vitro pH, PCO_2, PO_2, hemoglobin, hematocrit, oxygen saturation, hemoglobin derivatives, oxygen content, and base excess." 10D-41.066(3), F.A.C.

[12]Cytogenetics is the "branch of genetics concerned with the structure and function of the cell, especially the chromosomes." Stedman's Medical Dictionary, 359, (24th Ed. 1982).

[13]Histocompatibility is "[a] state of immunologic similarity or identity of tissues sufficient to permit successful homograft (allograft) transplantation; implies identity of histocompatibility genes in donor and recipient with respect to the particular tissue." Stedman's Medical Dictionary, 580, (24th Ed. 1982).

41.079(2), F.A.C. Performance of immunohematological procedures require supervision by a licensed physician. Rule 10D-41.079(3)(b), F.A.C Blood bank technicians and technologists are required to have specialized training in appropriate scientific and medical fields. Rules 10D-41.069 and 10D-41.070, F.A.C. The professional personnel who operate blood banks must be licensed, must take proficiency tests and are subject to rigorous continuing education requirements in health care related subjects such as laboratory medicine and HIV testing. Rule 10D-41.071, F.A.C., et seq. Rules and regulations promulgated by the Department of Health and Rehabilitative Services control procedures for operation of laboratories, and collection, storage and shipment of specimens.

5. Blood banks are instrumental in the diagnosis of HIV and AIDS.

Contrary to Petitioners' contentions, blood banks do diagnose diseases. Blood banks are instrumental in the diagnosis of HIV and AIDS. Testing for the presence of HIV antigens or antibodies first became possible in the spring of 1985; Florida law now requires that each unit of blood collected must be tested for the presence of these HIV antigens or antibodies in addition to other infectious agents. §§ 381.609(1) and 381.6105, Fla. Stat. (1989). These diagnostic procedures, which are performed routinely by blood banks, are "valuable tools in protecting public health." § 381.609(1), Fla. Stat. (1989).

6. Proof of Petitioners' claim requires medical evidence.

Had Petitioners' cases proceeded to trial, the evidence presented in both cases would have been predominantly of a medical nature. Specifically, qualified health care providers would have testified about the state of medical knowledge regarding the transmission of the HIV virus through blood transfusions at the times in question. Both sides to the dispute would have presented expert testimony and other authoritative evidence regarding appropriate procedures for screening, testing and detection of the HIV virus. Petitioners would have had to prove the causes and consequences of their alleged injuries, which in turn would have required the presentation of medical evidence. Moreover, pursuant to § 766.102(1), in order to prevail on their claims, Petitioners would have had to prove that the blood bank's actions "represented a breach of the prevailing professional standard of care" for blood banks. (Emphasis supplied.) In short, no matter how Petitioners now choose to characterize their lawsuits, had the cases proceeded to trial they would have been tried as medical negligence actions.

7. Durden is distinguishable.

In ruling in favor of the blood bank in the case below, the Second District Court of Appeal certified conflict with Durden v. American Hospital Supply Corp., 375 So.2d 1096, 1099 (Fla. 3d DCA 1979), cert. denied, 386 So.2d 633 (Fla. 1980). Durden, however, is easily distinguishable from the cases now before the Court.

In Durden, the plaintiff sold (not voluntarily donated, as in the instant case) his blood to a blood donor center (not a non-

profit blood bank, as in the instant case) and then sued the center for negligence after he contracted hepatitis, allegedly from a dirty needle. The Third District Court of Appeal ruled that the medical malpractice statute of limitations did not apply because the relationship between Durden and the blood center was that of vendor-vendee and there was no medical treatment, diagnosis or care rendered to Durden.

As the Silvas have aptly noted, the medical malpractice "statute limits its application to health care providers which provide diagnosis, treatment or care to the particular plaintiff." (Silva, 23, emphasis supplied.) Even though the procurement of blood is a medical service, in Durden, there was no medical care, treatment or diagnosis given to that particular plaintiff. The blood center merely purchased his blood; it was the recipient of the blood who received the medical care and treatment. The facts underlying the instant appeal are completely different, inasmuch as both the Silvas' and the Smiths' suits arise out of diagnosis, treatment or care rendered to the recipients of the blood. Therefore, there is no conflict between Durden and the Second District Court's holding in the Silva and Smith cases below.

8. Conclusion.

The idea that blood banks do not participate in the care, treatment or diagnosis of patients is based on a grave misunderstanding of the nature and function of blood banks. In performing their duty to ensure an adequate supply of blood to meet the needs of the citizens of this state, blood banks perform

complex medical procedures to make sure that each recipient of each unit of donated blood receives blood that is as safe, wholesome, and specifically matched to suit that particular patient as medical science currently permits.

C. **THE PRIVITY REQUIREMENT WAS SATISFIED.**

The medical malpractice statute of limitations is "limited to the health care provider and persons in privity with the provider of health care." Section 95.11(4)(b). Even assuming, arguendo, that a blood bank is not a health care provider, the medical malpractice statute of limitations applies to both underlying actions because Southwest, in both instances, was in privity with health care providers -- the hospitals which supplied Southwest's blood to Petitioners' decedents.

1. **"Privity" refers to the relationship between the defendant and the health care provider.**

Petitioners argue that the privity requirement refers to the relationship between a claimant and a provider of health care. In other words, Petitioners argue that there must be privity between their decedents and Southwest in order for the medical malpractice statute of limitations to apply. Controlling case law interpreting the statute, however, directs that "privity" refers to the relationship between the defendant and the health care provider. Applied to the instant case, "privity" refers to the relationship between Southwest and the hospitals where the transfusions of blood supplied by Southwest to Petitioners' decedents took place.

In Burr v. Florida Patient's Compensation Fund, 447 So.2d 349 (Fla. 2d DCA 1984), rev. denied, 453 So.2d 43 (Fla. 1984), the Second District Court of Appeal ruled that

> [i]t is clear to us that section 95.11(4)(b) applies when there is privity not only between the claimant and the health care provider, but also when anyone connected with the incident against whom the claimant alleges damages is in a privity relationship with the health care provider.

Id. at 351 (emphasis in original). In so ruling, the court explicitly rejected the reasoning of the First District Court of Appeal in Gonzales v. Jacksonville General Hospital, Inc., 365 So.2d 800 (Fla. 1st DCA 1978), quashed on other grounds, 400 So.2d 965 (Fla. 1981). Nonetheless, Petitioners cite Gonzales as authority for their contention that privity refers to the relationship between the claimant and the health care provider. In quashing that decision, the Florida Supreme Court did not, as Petitioners assert, implicitly accept the First District Court of Appeal's construction of the privity requirement; instead, the court expressly refrained from reaching that issue. 400 So.2d at 968. Simply put, § 95.11(4)(b) applies "when anyone connected with the incident against whom the claimant alleges damages is in a privity relationship with the health care provider." Burr at 351.

2. There was privity between Southwest and the hospitals.

Petitioners' second argument on the issue of privity is that, even assuming that "privity" refers to the relationship between the health care provider and the defendant, there was no privity in the instant case between the health care provider (the respective hospitals) and the defendant/respondent herein (Southwest). As

noted by Smith, privity is neither defined by the medical malpractice statute of limitations, "[n]or is it a term for which one, universal, common-sense meaning springs to mind." (Smith, 25.) Nevertheless, both Smith and Silva affix one meaning to the word: mutuality of interest. They cite Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985), to support their preferred definition, ignoring the Florida Supreme Court's express acknowledgement that "there is no definition of privity that can be applied in all cases" and its recognition that mutuality of interest is but "one type of privity that describes aptly the relationship between the [Florida Patient's Compensation] Fund and its member[s]." 478 So.2d 1058, 1071 (emphasis supplied). The instant appeal does not involve the Fund and its members, so it is not chiseled in stone that the parties meet what Smith labels the "Taddiken mutuality of interest test." (Smith, 26.) Petitioners do not suggest any other meaning for "privity" in the context of the medical malpractice statute.

In Taddiken, however, this Court cited Black's Law Dictionary, which included within its definition of privity not only "mutuality of interest," but also "mutual or successive relationships to the same right or property," among other definitions. Taddiken at 1062. Southwest (which supplied the blood to the hospitals) and the hospitals (which in turn transfused the blood into the veins of Petitioners' decedents) clearly had successive relationships to the

blood.[14] Therefore, applying that "test," Southwest and the hospitals were, at all times material, in privity with one another.

Petitioners also refer to Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Association, Inc., 16 FLW S440 (Fla. June 13, 1991). In Baskerville-Donovan, the statute of limitations at issue was § 95.11(4)(a), which relates to actions for professional malpractice "other than medical malpractice." Id. It provides, in pertinent part, that it is "limited to persons in privity with the professional." Id. In that case, the Court determined that "privity" meant "direct contractual privity." Id. Accordingly, whereas this Court has ruled that there is only one definition of privity (direct contractual privity) that applies to malpractice suits other than medical malpractice suits, this Court has also determined that there is no single definition of privity that will apply to all medical malpractice suits. As the Third District Court of Appeal observed, "in fact, the meaning will vary according to the purpose for which the theory is invoked." Taddiken v. Florida Patient's Compensation Fund, 449 So.2d 956, 957 (Fla. 3d DCA 1984). Here, Southwest and the hospitals were in privity of contract because Southwest supplied the blood to the hospitals, which then transfused that same blood into the Petitioners' decedents.

[14]Furthermore, before blood can be transfused into a particular patient, the blood must be cross-matched with the patient's blood. Cross-matching requires interaction between and participation by the hospital and the blood bank. Gray, Attorney's Textbook of Medicine, ¶ 59.30 et seq. (34d Ed. 1991).

The Silvas make one argument which is truly remarkable. The Silvas argue that if entities having "contractual relationships" with hospitals "were as a result 'in privity' with the hospital would mean that virtually any type of business providing a product or service to a health care provider would be deemed in privity with a health care provider."[15] (Silva, 35.) Indeed, a business having a contractual relationship with a hospital is, by definition, in privity with that hospital. It does not follow, however, that "a food service providing meals to hospital patients could argue actions for food poisoning or botulism were covered by the two year medical malpractice statute" or that a "dry cleaning company which provided linen or hospital gowns could assert it was entitled to the benefits of the medical malpractice statute if it left a needle or pin in a clothing item it laundered which then stuck a patient while in the hospital." (Silva, 35-6.) Neither the dry cleaner nor the food service are health care providers and neither potential cause of action under those scenarios arose out of medical care, treatment or diagnosis. The medical malpractice statute of limitations applies only to "actions arising out of any medical ... diagnosis, treatment or care." § 95.11(4)(b), Fla. Stat. (1989).

3. Conclusion.

The concept of privity is a protean one for which no one definition will apply in all cases. In the instant case, there are

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[15]The Smiths and Amicus AFTL make similar arguments. Smith, 26-7; AFTL, 8.

at least two ways in which the blood bank could be said to be in privity with the hospital. First, the blood bank and the hospital had successive relationships to the blood which was ultimately transfused into the Petitioners' decedents. Second, the blood bank, as supplier of the blood to the hospital, which then supplied the blood to Petitioners' decedents, was in privity of contract with the hospital. Either way, the privity requirement was satisfied; therefore, even assuming arguendo that the blood bank was not a health care provider, it was in privity with a health care provider, and thus the medical malpractice statute of limitations applies.

D. THE STATUTE OF REPOSE IS NOT IMPLICATED AND WAS CONSTITUTIONALLY ENACTED.

The amicus briefs filed by John Doe and the AFTL interject an issue neither raised in the proceedings below nor addressed by Petitioners in their initial briefs (except for a passing reference in a footnote to the Silva brief (Silva, 7, n.4)). Petitioners' Amici argue that inclusion of blood banks within the medical malpractice statute of limitations violates Florida's guarantee of access to courts by operation of the statute of repose which applies to medical malpractice actions. Specifically, Petitioners' Amici argue that because some transfusion recipients may not learn that they have received blood containing HIV until after expiration of the statute of repose, their actions are unconstitutionally barred by operation of the medical statute of repose. This improperly interposed argument fails for two reasons.

1. <u>**The statute of repose is not implicated**</u>.

First, the statute of repose is not implicated in either of Petitioners' underlying suits. The statute of repose is contained within § 95.11(4)(b), which provides, in part, that

> [a]n 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; however, <u>in no event shall the action be commenced later than 4 years from the date of the incident or occurrence</u> out of which the cause of action accrued.
>
> ***
>
> In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the 4-year period, the period of limitations is extended forward 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, <u>but in no event to exceed 7 years</u> from the date the incident giving rise to the injury occurred.

(Emphasis supplied.)

Jack Smith received a transfusion in February, 1984, and tested positive for exposure to HIV in April, 1986. (Smith, 2.) The Smiths filed their complaint in January, 1990, nearly four years after discovering the injury. (Smith, 2.) Anne Marie Silva received a transfusion in August, 1985, and tested positive for exposure to HIV "at the end of 1986." (Silva, 2.) The Silvas filed suit in December, 1989, almost three years after discovering the injury. (Silva, 2.) In both actions, Petitioners were aware of their decedents' injuries (and therefore, of Petitioners' potential causes of action) prior to the expiration of the medical malpractice statutes of limitations and repose. In other words,

the medical malpractice statute of repose did not bar either of Petitioners' causes of actions before they accrued; therefore, the statute of repose is not implicated in this appeal.

2. The Court has already determined that the medical malpractice statute of repose was constitutionally enacted.

Second, in recent decisions, this Court has ruled that the medical malpractice statute of repose was constitutionally enacted even though it may sometimes bar causes of action which do not accrue until after the period has expired. In Carr v. Broward County, 541 So.2d 92 (Fla. 1989), for example, the parents of a child diagnosed as suffering from severe brain damage filed a complaint against the health care providers nearly ten years after the alleged negligence occurred. They alleged that the health care providers fraudulently concealed the negligence. Nevertheless, this Court approved the appellate court's dismissal of the complaint:

> On appeal, the Fourth District determined that the brain damage injury to the Carr infant was a completed fact at the time of birth and the cause of action was permanently barred after September, 1982, by the seven-year statute of repose provision contained in section 95.11(4)(b). The court applied Kluger v. White, 281 So.2d 1 (Fla. 1973), determining the legislature had found overpowering public necessity for the legislation and the Carrs were not unconstitutionally denied access to courts guaranteed by article I, section 21, Florida Constitution. The court, in so holding distinguished this case from the product liability statute, stating:
>
>> Unlike the products liability statute of repose, (section 95.031(2), under which, where fraud is involved, the period runs from "the date of the commission of the alleged fraud") the incident of malpractice begins the period of repose in a medical malpractice case despite fraudulent concealment. Whether

> <u>public policy supports such a distinction is a matter for the legislature, not this court, to determine</u>.
>
> The medical malpractice statute of repose had its genesis in section 7 of Chapter 75-9, Laws of Florida, the Medical Malpractice Reform Act of 1975. The public necessity for the statutory reform embodied in the act was expressed by the legislature in the preamble as follows:
>
> WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed in the past few months; and
>
> WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance; and
>
> WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire, or practice defensive medicine at increased cost to the citizens of Florida; and
>
> WHEREAS, the problem has reached crisis proportion in Florida, NOW, THEREFORE, ... We here determine, subject to Supreme Court scrutiny in this or a later appropriate case, that the legislature has established an overriding public interest meeting the <u>Kluger</u> test as applied in <u>Overland</u> [Const. Co. v. Sirmons, 369 So.2d 572 (Fla. 1979)] and that the statute was therefore validly applied to the Carr's [sic] causes of action by the trial court.

<u>Id</u>. at 94 (emphasis supplied).

The Florida Supreme Court "agree[d] with the district court that section 95.11(4)(b) was properly grounded on an announced public necessity and no less stringent measure would obviate the problems the legislature sought to address, and thus the statute does not violate the access-to-courts provision." <u>Id</u>. at 95. The Court noted that it had, in past opinions, "recognized that

statutes of repose are a valid legislative means to restrict or limit causes of action in order to achieve certain public interests." Id. at 95.

Similarly, in University of Miami v. Bogorff, 16 FLW S149 (Fla., Jan. 18, 1991), this Court ruled that even if fraudulent concealment on the part of a physician tolled the statute of limitations for the plaintiffs to bring their medical malpractice claim, the claim was nonetheless barred by the statute of repose. The Court noted that

> [i]n contrast to a statute of limitation, a statute of repose precludes a right of action after a specified time which is measured from the incident of malpractice, sale of a product, or completion of improvements, rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued.

Id. at S150 (citations omitted). Applied to the case before it, the Court held that

> [a]ssuming arguendo that the Bogorffs' cause of action did not accrue until, as they contend, 1982, the statute of repose would still bar their action. In Carr v. Broward County, 541 So.2d 92 (Fla. 1989), we held that the statutory repose period for medical malpractice actions does not violate the constitutional mandate of access to courts, even when applied to a cause of action which did not accrue until after the period had expired. See also, Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) (receding from Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980) and holding the twelve-year statute of repose in products liability actions constitutional even as applied to causes of action which did not accrue until after the period expired) appeal dismissed, 475 U.S. 1114 (1986). Thus, under the interpretation of the facts most favorable to the Bogorffs, accrual of their cause of action in 1982 would result in their complaint being timely filed within the statute of limitation, but their suit would be barred by the statute of repose.

Id. at S150-1 (emphasis supplied).

Even more recently, in Public Health Trust of Dade County, Florida v. Menendez, 16 FLW S496 (Fla. Aug. 15, 1991), this Court ruled that under the medical malpractice statute of limitations

> [a] two-year limitation begins on the date of actual or constructive discovery; but there is also a "repose" period that bars any and all claims brought more than four years after the actual incident, even for acts of negligence that could not reasonably have been discovered within this period of time.

Id. (emphasis supplied). Accordingly, the statute of repose "issue" interjected in this case has already been determined, and the medical malpractice statute of limitations properly applies to transfusion-related suits against blood banks.

3. **Conclusion.**

There will always be situations in which negligence causes of action based on medical malpractice are barred before they accrue; however, the legislature has determined that perpetual liability places an undue burden on health care providers and has set reasonable limits on such liability. The Florida Supreme Court has affirmed that the policy reasons supporting those statutes are sound and that the statutes were constitutionally enacted. It is up to the legislature, not the judiciary, to carve out an exception for actions against blood banks for transfusion-related suits should sound policy considerations call for such measures. Unless and until the legislature makes such changes, the four year statute of repose contained in § 95.11(4)(b) appropriately and constitutionally applies to actions against blood banks.

CONCLUSION

This Court should affirm the Second District Court of Appeal's ruling in the two cases underlying the instant appeal. The two year medical malpractice statute of limitations, not the general negligence four year statute of limitations, properly applies to causes of action against blood banks for negligence in the procurement, processing and supplying of blood for transfusions because blood banks are health care providers (or, in the alternative, are in privity with health care providers) and such causes of action arise out of medical care, treatment or diagnosis. The statute of repose contained within the medical malpractice statute of limitations does not unconstitutionally deny access to the courts. Accordingly, the Silva and Smith cases were properly dismissed by the trial courts, and the Second District Court of Appeal's ruling upholding those dismissals should be affirmed.

Respectfully submitted,

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