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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

PETITIONER SILVA'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Gerald Silva, individually and as personal representative of the Estate of Anne Marie N. Silva, deceased, the plaintiff below, is referred to as "Mr. Silva."

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

References to the record on appeal are designated by the prefix "R."

STATEMENT OF THE CASE AND FACTS

Gerald Silva's wife died from AIDS after receiving a contaminated blood product provided by Southwest Florida Blood Bank. The trial court dismissed his suit, holding the medical malpractice statute of limitations, rather than the general negligence limitations statute, applied to Southwest. The Second District affirmed, but certified its decision as being in conflict with a decision of the Third District.

A. Mr. Silva's Action.

Anne Marie Silva and her husband, Gerald, were looking forward to the birth of their child in the summer of 1985 (R 88). Mrs. Silva's doctor told her that as a result of the birthing process, she would require transfusions of cryoprecipitate, a by-product made from blood (R 88). Her doctors relayed Southwest's assurances that its blood supply was safe and free from the HIV (AIDS

producing) virus,[1] because of the testing procedures Southwest used (R 88).

Mrs. Silva gave birth in August, 1985, and received multiple units of cryoprecipitate furnished by Southwest (R 89). Mrs. Silva tested negative for the HIV virus later in 1985, but then tested positive at the end of 1986 (R 89). In April 1989, Mrs. Silva began to become ill and was diagnosed as having AIDS, or acquired immune deficiency syndrome. (R 89) She died in January 1990. (R 89)

Mr. and Mrs. Silva initiated this action against Southwest in December of 1989 (R 50). Mr. Silva was substituted as the personal representative after his wife's death (R 68). The complaint was amended until the second amended complaint alleged three counts against Southwest, including negligence and breach of Southwest's warranty regarding the representations that its blood by-product was safe (R 89, 90). Mr. Silva alleged (and Southwest has not denied) that testing procedures were available to Southwest to test its blood products for the HIV virus by the summer of 1985 (R 90).[2]

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[1] HIV is the acronym for "human immunodeficiency virus." Once a person is infected with the virus it may produce no symptoms for some time (it may not even be detected by the standard (antibody) HIV test for many months). The HIV virus can eventually produce AIDS, or "acquired immune deficiency syndrome." **Scientific American**, "What Science Knows About AIDS," p. 90, 92, 94 (Oct. 1988) ("Scientific American"); Silva at A 4. "It is now estimated that about half of the people infected with HIV will develop AIDS in 10 years." **Scientific American** at p. 80.

[2] A test to detect the HIV virus in blood became generally available in March, 1985 when the Food and Drug Administration licensed what is known as the HTLV-III ELISA test. E.g. Kirkendall v. Harbor Insurance Company, 887 F.2d 857, 860 (8th Cir. 1989); Jenner, "Transfusion-Associated AIDS Cases," Trial 30 (May 1990).

Southwest moved to dismiss Mr. Silva's action based on the statute of limitations, arguing Southwest was entitled to rely on the medical malpractice statute of limitations, §95.11(4)(b), Florida Statutes (1989). Southwest argued it was a "provider of health care" as defined in the statute, and if it was not, it was in privity with a health care provider (R 55-56).[3]

The trial court granted Mr. Silva's motion for leave to file his second amended complaint and then dismissed the complaint in its entirety, based on its finding Southwest was a health care provider and thus, in the court's view, entitled to the medical malpractice statute of limitations (R 99-101). Mr. Silva appealed (R 103).

The Second District Court of Appeal affirmed the dismissal in Silva v. Southwest Florida Blood Bank, Inc., 578 So.2d 503 (Fla. 2d DCA 1991)(Hereafter referred to as "Silva" and included in the appendix at A 3-6). The court agreed that the medical malpractice statute of limitations applied to Southwest. The court acknowledged its decision conflicted with Durden v. American Hospital Supply Corporation, 375 So.2d 1096 (Fla. 3d DCA 1979), cert. denied, 386 So.2d 633 (Fla. 1980), which had refused to apply the medical malpractice limitations statute to an action by a donor against a blood bank (A 6).

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[3] Southwest also argued that Silva had to comply with the medical malpractice presuit procedures, but has conceded that if section 95.11(4)(b) does not apply, then AIDS plaintiffs need not comply with those procedures (Smith brief at p. 33)

Mr. Silva filed his notice invoking this Court's discretionary jurisdiction. This Court's order of June 4, 1991 set a briefing schedule and indicated the Court had postponed its decision on jurisdiction.

B. The Smith Action

In Smith v. Southwest Florida Blood Bank, Inc., 578 So.2d 501 (Fla. 2d DCA 1991), the same panel of the Second District affirmed the dismissal of the Smiths' action for the AIDS contaminated cryoprecipitate received by their son, relying on Silva (Hereafter "Smith," included at A 1-2)). The Smiths have also invoked the Court's discretionary jurisdiction and their action is pending as Case No. 78,012.

In its order of June 26, 1991, this Court consolidated the Silva and Smith actions.

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 PRODUCT 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 THIS COURT SHOULD EXERCISE ITS DISCRETION TO TAKE JURISDICTION IN THIS CASE?

SUMMARY OF THE ARGUMENT

"Provider of health care" is not defined in the medical malpractice limitations statute, §95.11(4)(b). Southwest relies on a repealed statute passed after the limitations statute. The legislature would have to have looked into the future to have intended the meaning Southwest urges. The legislative background of the limitations statute indicates it did not contemplate blood banks.

The only out-of-state appellate decision which addresses a statute worded like Florida's statute of limitations holds blood banks are not health care providers.

Even if Southwest were a health care provider, it did not provide medical "diagnosis, treatment or care" to Mrs. Silva as required by §95.11(4)(b). The blood shield statute's description of providing blood as a "medical service," even if applicable outside of a warranties context, does not insert "medical services" into the more narrowly worded, specific services covered by §95.11(4)(b).

Southwest is not in privity with a provider of health care. The "privity" required under §95.11(4)(b), described by a decision of this Court, is not satisfied by Southwest in this case.

Based on the foregoing, the medical malpractice limitations statute should not control. Mr. Silva's action should be governed by the general negligence statute of limitations found at §95.11(3)(a), Florida Statutes (1989).

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 PRODUCT IS NOT A CLAIM FOR "DIAGNOSIS, TREATMENT, OR CARE BY ANY PROVIDER OF HEALTH CARE."

1. The medical malpractice statute of limitations: Section 95.11(4)(b).

Southwest persuaded the Second District this action was properly dismissed under Section 95.11 (4)(b). To be entitled to rely on this limitations statute, Southwest must satisfy both of two requirements under the statute. First, Southwest must show it is a provider of health care as contemplated by that particular statute. Second, it must show Mrs. Silva's injury arose out of medical "diagnosis, treatment or care by" Southwest.

Section 95.11(4)(b), Florida Statutes (1989) provides in pertinent part that an action for medical malpractice must be commenced two years from discovery. It then specifies the scope of the statute by defining an action for medical malpractice:[4]

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[4] The medical malpractice statute of limitations also contains a statute of repose. Because there is often a long latency period before the HIV virus becomes detectible (and an even longer period until there is an actual illness with symptoms), if this statute were held to apply to blood banks, the limitations period could run before the infected victim knows he or she has a cause of action. See the Amicus Brief filed on behalf of Mr. Doe.

> 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 added).

Mr. Silva did not bring an action against any provider of health care as contemplated in Section 95.11(4)(b). Even if Southwest were a provider of health care, it did not provide any diagnosis, treatment or care to Mrs. Silva.

2. Southwest is not a provider of health care under §95.11(4)(b).

The Second District concluded Southwest was a "provider of health care" within Section 95.11(4)(b). Silva at A 4. It appeared to offer two reasons.

First, the court observed that Mr. Silva's second amended complaint sought tort damages for negligence and contract damages for breach of implied warranties (A 4). The court did not explain how this made Silva's complaint an action for medical malpractice. A typical products liability claim asserting these alternative

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(No. 4 cont.) Although not an issue on this appeal, if the medical malpractice statute were to apply, the common delay between a positive test for the virus and the actual onset of illness could present a question as to which event commenced the running of the statute. See **Scientific American** at p. 80; **Newsweek** "AIDS: The Next Ten Years," p.20 (June 25, 1990)("An estimated 1 million Americans are infected with the virus -- and by the end of the decade, most of those people will be sick."); **Med. Liab. Rptr.** Vol. 12, No.5, p.99 (May, 1990)(noting conflict in decisions as to whether AIDS related illness or positive HIV test triggers running of statute).

theories of recovery would not be governed by the medical malpractice limitations statute. In sum, this "reason" was a non-sequitur.

Second, the court concluded the legislature meant to define "provider of health care" in Section 95.11(4)(b) by borrowing the definition of "health care provider" found in §766.102, Florida Statutes (1989), formerly located at §768.45, Florida (1987). (A 4-5; this was urged by Southwest, R 9, 55). Section 766.102 defines "health care provider" by reference to §768.50(2)(b), Florida Statutes (1985), which was a collateral source statute, now repealed.[5] Nothing in §95.11(4)(b) suggests the repealed definition from §766.102 was ever intended.

The repealed definition in §768.50 was contained in a subsection which began with the restriction "[f]or purposes of this section" (emphasis added). The legislature in adopting §766.102 implicitly recognized the need for a specific reference to such a restricted definition appearing in a different statutory section. Hence, the specific reference in §766.102 to §768.50(2)(b). Section 95.11(4)(b) does contain such a specific reference adopting the definition in §768.50(2)(b).

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[5] By contrast, other sections of the medical malpractice statute define "health care provider" so as not to include blood banks. See §766.101(1)(b), Florida Statutes (1989); §766.105(1)(b), Florida Statutes (1989).

The Second District assumed that the repeal of the referenced statute did not affect the remaining statute, but this is not always the case. See Reino v. State, 352 So.2d 853, 858-9 (Fla. 1977).

In fact, the legislature in adopting Section 95.11(4)(b) could not have intended the definition of health care provider Southwest urges. Section 95.11(4)(b) was passed as §7 of Ch. 75-9, Laws of Fla. This 1975 legislative action predated the adoption of the definition of health care provider which Southwest urges.

The now repealed definition of health care provider was adopted at §7, Ch. 77-64, Laws of Fla. in 1977.[6] It defies logic to argue the legislature's intent in using the term "provider of health care" in a 1975 limitations statute can be divined from its adoption of a collateral source statute in a later legislative session.

This Court has expressly rejected the type of analysis made by the Second District. In Brown v. St. George Island, Ltd. 561 So.2d 253 (Fla. 1990), the Court considered statutory construction questions involving the disqualification of a judge. The district court had undergone the same type of analysis as the Second District. It referred to §38.02, Florida Statutes (1989), for the meaning of "suggested the disqualification" used in §38.10. 561 So.2d at 256. This Court unanimously rejected such an analysis. It stated the legislature could not have intended Section 38.10 to refer to Section 38.02 "because Section 38.02 did not become law until ten years after Section 38.10 enacted." 561 So.2d at 256.

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[6] The definition was actually introduced in Ch. 76-260, Laws of Fla., which act was expressly superseded the following year by Ch. 77-64. The point is the same, because both were passed after the 1975 limitations statute.

Thus, this Court has rejected the argument that a term in an earlier statute can be interpreted by referring to a later enacted statute. Silva cited Brown to the Second District. While not citing Brown, the court apparently responded to the point in a footnote (A 5 at n. 1). It cited Oldham v. Rooks, 361 So.2d 140, 143 (Fla. 1978). The full sentence in Oldham, from which the footnote quotes a portion, is "[t]here is a general presumption that later statutes are passed with knowledge of prior existing laws, and a construction is favored which gives each one a field of operation, rather than have the former repealed by implication." This statement plainly does not refute or distinguish this Court's holding in Brown. In fact, it supports Silva's position.

This Court did not conclude the later statute in Brown repealed the earlier one. There the two statutes stood independent - each operated in its own field. Silva's argument is not that the later passed definition in 768.50 acted to repeal 95.11(4)(b). Each operates in its own field. Indeed, the fact that the legislature believed in 1977 it needed to provide a specific definition of health care providers (for collateral source purposes) which included blood banks, indicates it did not believe they were included in the commonly understood meaning of the term it had used in 1975 in §95.11(4)(b).

Both of these points are reiterated in this Court's recent opinion in Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Association, Inc., 16 FLW S440 (Fla. S.Ct. Case No. 76,755, June 13, 1991). Baskerville construed the

immediately preceding statute of limitations on professionals, section 95.11(4)(a), Florida Statutes (1983). In discussing the use of the term "privity" in the statute, the Court stated: "To the extent our recent cases may have applied a different gloss to the concept of privity for these limited circumstances, the legislature would have been unaware of it when enacting the law in 1974." This Court's unanimous opinions in Brown and Baskerville recognize that the Second District's "back to the future" approach is illogical and inappropriate for statutory construction.

Baskerville also noted the rules of construction that undefined words in statutes are to be given their plain or ordinary meaning. The Second District pointed to no indication that blood banks were within the plain or ordinary meaning of the phrase "health care provider" in 1975. In fact, the legislature's need to specifically include blood banks in the collateral source health care provider definition at a later date proves it did not believe blood banks were within the plain meaning of a health care provider.

Southwest can point to nothing in the 1975 adoption of 95.11(4)(b) proving the legislature intended to cover blood banks in the medical malpractice statute of limitations. Examining the comprehensive medical malpractice act passed by the legislature in 1975 demonstrates the legislature was not attempting or intending to address blood banks. Chapter 75-9 is a 17 page act containing 17 sections. Nowhere in the act are blood banks mentioned. By contrast, physicians, hospitals and a variety of health care

providers are specifically mentioned by name or chapter under which they are licensed. Neither blood banks nor clinical laboratories licensed under Chapter 483 are mentioned, although they were mentioned in the collateral source statute two years later. As Southwest itself has pointed out, the legislature was presumed to know of other laws existing in 1975, [7] and so could have covered clinical laboratories such as blood banks. Quite simply, there is nothing in the enactment of Section 95.11(4)(b) that remotely suggests the legislature intended to cover blood banks by its reference to "providers of health care".

The fact that the legislature felt a need in the 1977 legislation to define "health care provider" specifically, and in different ways, when it was used in different sections of a statute, further refutes Southwest's construction. By using varying specific definitions in later medical malpractice statutes, the legislature implicitly recognized that there was a narrower, plain or ordinary meaning to the undefined term "health care providers." The fact the legislature has never amended section 95.11(4)(b) to specifically redefine "providers of health care" to include blood banks is further evidence of the legislative intent not to incorporate one of the several subsequent, stylized definitions in that statute.

There was a statute predating the 1975 limitations statute which referred to health care rendered by providers of health

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[7] Southwest's brief in Smith n. 14 at p. 30, citing 49 Fla.Jur.2d Statutes §166.

service. See Ch. 72-62 §1, Laws of Fla.; Ch. 73-50 §1, Laws of Fla. This statute was revised in 1977 to include a specifically enumerated definition of health care providers that did not include blood banks or clinical laboratories. See Ch. 77-461 §1, Laws of Fla. This is now §766.101, Florida Statutes (1989).

Before cutting off valuable rights, there should be some clear indication of legislative intent that blood banks were to be considered providers of health care within the meaning of §95.11(4)(b). There is none.

Silva believes that the legislative history of Section 95.11(4)(b) and the principles of statutory construction demonstrate an intent not to extend the reach of that statute to clinical laboratories such as blood banks. At a minimum, the foregoing demonstrates there was no clear legislative intent to include blood banks as health care providers in the 1975 medical malpractice limitations statute. Accordingly, the principle of resolving such doubts in favor of the longer limitation period, just rearticulated by this Court in Baskerville, is directly applicable: "Where a statute of limitations shortens the existing period of time the statute is generally construed strictly, and where there is reasonable doubt as to legislative intent, the preference is to allow the longer period of time." See also Angrand v. Fox, 552 So.2d 1113, 1116 (Fla. 3d DCA 1989), review denied, 563 So.2d 632 (Fla. 1990) ("It is well established that a limitations defense is not favored ... and that therefore, any substantial doubt on the question should be resolved by choosing

the longer rather than the shorter possible statutory period." (cites omitted)).

3. Southwest did not provide "diagnosis, treatment or care." Even if Southwest provided "medical service," that would not bring it within §95.11(4)(b).

Even if Southwest were a provider of health care, to come within §95.11(4)(b) it would need to have provided diagnosis, treatment or care to Mrs. Silva.[8] Southwest did not diagnose Mrs. Silva. It did not treat her or provide her any care - there is no allegation she was ever at Southwest or cared for by it. See Miles Laboratories, Inc. v. Doe, 315 Md. 704, 556 A.2d 1107, 1125 (1989).

The Second District nonetheless concluded that Southwest had provided diagnosis, treatment or care to Mrs. Silva. It began by stating that "we acknowledge that at first blush this element seems incapable of satisfaction because Mrs. Silva did not directly receive treatment from Southwest" (A 5). The court then went on to state Silva's allegation of negligence implied Southwest owed a duty toward Mrs. Silva that it breached and that the existence of this duty fulfilled the requirement that Southwest provide diagnosis, treatment or care. This conclusion is a complete non-sequitur. Of course Southwest owed a duty to Mrs. Silva to supply her with an uncontaminated blood product and to adequately warn of

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[8] An "action for medical malpractice" requires the claim arise out of medical, dental, or surgical "diagnosis, treatment or care by" the provider of health care. Mr. Silva made no allegations against Southwest based on any of these.

any risks. However, the existence of those duties has nothing to do with whether Southwest was providing diagnosis, treatment or care to Mrs. Silva.

All manufacturers owe a duty to the ultimate users of their products to see that those products are not unreasonable dangerous. All handlers and processors of food owe a duty to ultimate users not to supply impure foods. But the existence of these duties does not mean those parties are providing diagnosis, treatment or care. Here, the duty Southwest owed to the ultimate users of its blood products to supply wholesome products is indistinguishable from the duty of medical equipment and medication suppliers to supply safe products. Even Southwest admits, however, that suppliers of medications or medical equipment do not come within §95.11(4)(b). (Smith brief at p. 22). Thus, the duty not to harm Mrs. Silva through an impure or unsafe product cannot be the basis of a holding that Southwest came within Section 95.11(4)(b).

The Second District concluded the legislature's treatment of blood banks "reveals an acknowledgment that blood banks do provide treatment for those who receive their blood" (A 5). The court relied on two other statutory schemes. First it cited to the preface of the enacting chapter for blood shield statute which defines several activities related to blood as "medical services:"

> [T]he 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 ... the rendering of this service is an intricate part of the practice of medicine....

Ch. 69-157, Laws of Fla., adopting 672.316(5), Florida Statutes (1989), (A 5).

Section 672.316(5) is located in the sale of goods portion of Florida's Uniform Commercial Code statutes. Chapter 69-157 created a legal fiction whose obvious purpose was to limit the applicability of Uniform Commercial Code warranties to sales of blood. Cryoprecipitate is a product, just like a medical sponge or a drug.[9] This Court had held a blood bank's providing blood constituted the sale of blood, which carried implied warranties, and was not a service. See Community Blood Bank, Inc. v. Russell, 196 So.2d 115 (Fla. 1967)[10]. Chapter 69-157 was a reaction to this holding and limited the application of the Uniform Commercial Code in the context of blood.

There is no suggestion the legislature intended the legal fiction (that selling blood is a service) to apply in any other context, including the statute of limitations.[11] Specifically, there is no suggestion the legislature intended the medical malpractice statute of limitations to apply to the selling of blood products, anymore than it would apply to the selling of drugs or

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[9] The actual transfusing of blood to a patient, like injecting medicine into a patient, is the service.

[10] This ruling was confirmed in Rostocki v. Southwest Florida Blood Bank, Inc., 276 So.2d 475 (Fla. 1973).

[11] The First District recently held that the blood shield statute applied only to limit warranties in breach of contract actions, and did not shield blood banks from allegations of negligence. Sicuranza v. Northwest Florida Blood Center, 16 FLW D1581 (Fla. 1st DCA 1991).

medical equipment, or any other product that might be sold for ultimate use with a patient.

Second, even if selling blood products were deemed a "medical service," for limitations purposes, 95.11(4)(b) does not exempt health care providers when providing all "medical services." Only certain services are enumerated in the medical malpractice statute of limitations: "diagnosis, treatment or care by" the provider of health care. Southwest did not provide any of these for Mrs. Silva.[12]

As Southwest has argued, in construing the medical malpractice limitations statute, the legislature is presumed to know of existing law when it enacts new laws (see n. 7 supra). Hence, the legislature must be presumed to have known of the 1969 legislation describing selling blood as a "medical service." If the legislature then intended the 1975 malpractice limitation statute to apply to any activity related to a blood product, it would have made the malpractice limitations statute applicable to all "medical services". It did not. Instead it more narrowly limited the statute of limitations so that it only applied to specific services: "diagnosis, treatment or care by" a provider of health care.

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[12] Southwest' attempted reliance on several cases describing the providing of blood as a "medical service" misses the point. First, as discussed herein, simply providing a "medical service" is not sufficient to invoke the statute of limitations. Second, those cases, discussed below at part 4, address "medical service" in the context of quoting blood shield statutes, not statutes of limitations.

The Second District's analysis of Chapter 69-157's enacting clause was the source of its conflict certification. The enacting clause refers to the "procurement" of blood products as a medical service. If all of Chapter 69-157's "medical services" are automatically covered by the medical malpractice statute of limitations, procurement of blood would then be covered by the medical malpractice statute of limitations. As the court recognized, this would conflict with the holding in Durden v. American Hospital Supply Corp., 375 So.2d 1096 (Fla. 3d DCA 1979), cert. denied 386 So.2d 633 (Fla. 1980) (negligence statute and not medical malpractice statute applies to action based on procurement of blood).

Durden correctly concluded that not all "medical services" are within the medical malpractice statute of limitations. The only "medical services" governed by 95.11(4)(b) are "diagnosis, treatment or care by" the health care provider. Durden observed "the relationship contemplated by the subject statute of limitation is in the nature of doctor (dentist)-patient in contrast to the vendor-vendee relationship in the case at bar." 375 So.2d at 1099. The Southwest-Mrs. Silva relationship was also in the nature of a vendor-vendee relationship, where Mrs. Silva was the ultimate vendee.[13] "To paraphrase Durden, "there was no medical, dental or

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[13] Southwest complained below that the charges made to patients for blood are not "payments," but are fees. Section 381.601(2)(e), Florida Statutes (1989), defines "processing fee" as the fee charge to recipients of blood or blood products to recapture all or part of the cost to the blood banks of providing the "service." This is part of the same legal fiction which defines the sale of blood as a service. See Rostocki, supra. Perhaps restaurants should no

surgical diagnosis, treatment or care rendered by [Southwest] to [Mrs. Silva]." 375 So.2d at 1099.

The Second District also relied on Chapter 483, Florida Statutes, and the related administrative code provisions, pertaining to clinical laboratories. First, this analysis suffers the same problem discussed above. Clinical laboratories were not mentioned in the bill enacting the medical malpractice statute of limitations and there is no suggestion the legislature considered them providers of health care for that purpose. Even ignoring that fatal defect in the analysis, the clinical laboratory statute does not mean the blood banks are providing treatment, diagnosis or care as contemplated under 95.11(4)(b).

The fact that Chapter 483 and the code provisions "regulate virtually every aspect of the operations of clinical laboratories" is simply not dispositive (A 5). As the court's description noted, clinical laboratory directors and supervisors do not have to have any medical degree - it is sufficient if they have specified chemical, physical or biological science degrees and are board certified.

Furthermore, simply because a business license includes a medical degree as one means of qualifying for the license does not mean that a holder of that license is providing diagnosis, treatment or care. Under the court's rationale, if a blood bank

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longer sell meals, but should merely charge "processing fees" to recapture the cost of providing them. We seriously doubt, however, that this Court would conclude that such a change in nomenclature would eliminate liabilities as to the wholesomeness of its food.

improperly disposed of contaminated blood and infected a sanitation worker, his action would be governed by the medical malpractice limitations statute.

The more pertinent question is what role a clinical lab/blood bank is playing in Mrs. Silva's situation. The Second District emphasized that under Chapter 483 clinical laboratories provide "materials for use in the diagnosis, prevention, or treatment of a disease or assessment of a medical condition" (A 6, citing §484.041(1)). Medical bandage suppliers and drug suppliers are also providing materials for use in diagnosis, prevention or treatment. Yet an action against such manufacturers for contaminated bandages or impure drugs would not come within §95.11(4)(b), as Southwest admits.

The medical suppliers are not providing the medical diagnosis, treatment or care - the hospital and the doctor are. Similarly, the blood bank may have supplied the product, but there was no "diagnosis, treatment or care by" the blood bank. The statute is limited to "the" health care provider which provided diagnosis, treatment or care.

Southwest argued that a transfusion of blood into a patient is a medical service under §95.11(4)(b). (R 9; Smith brief at 10, 19). This is no help to Southwest. Southwest did not transfuse any blood into Mrs. Silva. It sold a blood product to the hospital which transfused it. The hospital was treating and caring for Mrs. Silva and it is a health care provider as contemplated under 95.11(4)(b). See Chapter 75-9.

Southwest admits suppliers of medications or medical equipment do not come within §95.11(4)(b). (Smith brief at p. 22) It argues blood is different because blood is not a generic product, but is typed, labeled and identified to a particular patient. First, how much more particular can one get than a prescription for a specific patient which the medication supplier (Eckerd in Southwest's example) filled incorrectly. There is a second problem with Southwest's position.

There are three types of "services" a blood bank performs on blood before selling it: collection, processing and "transfusion services." Florida Association of Blood Bank, Inc. v. Department of Health and Rehabilitative Services, 9 FALR 376, 369 at ¶8 (Fla. Admin. Hearing Case No. 85-3141R, Final Order dated December 18, 1986).[14] The testing activities for problems with the blood occur at the processing phase. 9 FALR at 369-370, ¶6. The activity that matches a unit of blood to a particular patient - cross matching - occurs in the "transfusion services" phase. 9 FALR at 360, ¶7.

Mr. Silva has no complaint regarding the only activity specifically related to units of cryoprecipitate used by Mrs. Silva - the cross matching. The alleged negligence occurred in the blood bank's earlier, more general, operations of collection or processing (e.g., not applying the ELISA test properly or not warning of its limitations). Mrs. Silva's situation is analogous to a drug manufacturer mixing up an impure or mislabeled drug at

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[14] Southwest was a party to this action and its director testified at the hearing. 9 FALR 368, 372.

the factory, and distributing it. The negligence did not occur when the blood product was specifically selected for Mrs. Silva (which might be analogous to a doctor mis-prescribing a "pure" or "good" drug).

In the Second District, Southwest went to great lengths arguing Silva misread the Florida Association case and misunderstood the procedures a blood bank performs. Southwest may perform many procedures on cryoprecipitate, including forming it by exposure to cold (Southwest's brief in Silva at p. 20, citing Gray, Attorneys' Text Book of Medicine). If anything, this helps Silva's argument, because Southwest is not simply collecting and passing along blood. The procedures it performs to create, process and prepare cryoprecipitate are analogous to a drug manufacturer preparing drugs from other plant or animal sources.

None of this shows that a blood bank is "the health care provider" contemplated by 95.11(4)(b). The statute limits its application to health care providers which provide diagnosis, treatment, or care to the particular plaintiff. The health care providers which provided these services here were the hospital and the doctor. The blood bank, like the surgical bandage supplier or the drug supplier, supplied a tangible product which the health care provider used.

Southwest complained there would be some lack of equity or logic in treating it differently for statute of limitations purposes than an internal unit of a hospital which provides blood. This argument misses the point that different statutes of

limitations can apply to the same conduct, depending on the status of the defendant. A doctor administering a patient an incorrect dosage of a drug in his office would be subject to the medical malpractice statute of limitations. However, if the error in providing an incorrect dosage were made by a pharmacy, or by mislabeling by a drug manufacturer, those defendants would not be subject to the medical malpractice statute of limitations.

Maryland's highest court had no difficulty drawing the distinction between hospitals and outside blood banks. In Roberts v. Suburban Hospital Association, Inc., 73 Md. App. 1, 532 A.2d 1081 (1987), a patient alleged a hospital sold and transfused HIV contaminated blood to him. 532 A.2d at 1081. The court held this was a case of rendering health care, and therefore subject to Maryland's health claims legislation.

Two years later Maryland's highest court held the health claims act did not apply to an outside blood bank, even though it applied to the hospital that actually transfused the blood. Miles, supra, 556 A.2d at 1125. The court in Miles cited Roberts several times. 556 A.2d at 1111, 1112, 1114. As Miles noted, the blood bank was not sued for medical malpractice, but for its' failure to adopt proper procedures to eliminate the contamination of its blood donations. 556 A.2d at 1125.

A difference in status can subject defendants not only to different limitations, but to different theories of liability. North Miami General Hospital, Inc. v. Goldberg, 520 So.2d 650 (Fla. 3d DCA 1988), held a plaintiff could not sue a hospital in strict

liability for an injury from the hospital's use of a defective medical product. Southwest's approach would preclude a strict liability action against the manufacturer as well, and give that manufacturer the benefit of the medical malpractice limitations statute. But Southwest has admitted that actions against medical equipment suppliers are not subject to §95.11(4)(b).

In support of its argument for a broad reading of the limitations statute, Southwest cites cases where failure to maintain medical warning equipment,[15] or a patient's slipping on amniotic fluid while descending an examination table[16] were considered medical malpractice. This line of cases actually supports Mr. Silva's position. These were actions against the treating health care provider. If the failure in the medical warning system had resulted in a suit against the manufacturer, it would not have been a medical malpractice action. In Riccobono v. Cordis Corporation, 341 So.2d 805 (Fla. 3d DCA 1977), the plaintiff sued the hospital and the catheter manufacturer when the tip of a catheter broke off and injured him. The opinion addressed the need to comply with the medical malpractice statute as to the hospital - not the manufacturer. Again, the same negligence may give rise to different statutes of limitations for different parties, based on their status.

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[15] Mount Sinai Hospital of Greater Miami, Inc. v. Wolfson, 327 So.2d 883 (Fla. 3d DCA 1976).

[16] Neilinger v. Baptist Hospital of Miami, Inc., 460 So.2d 564 (Fla. 3d DCA 1984).

4. The out-of-state cases which are more relevant and follow statutes more closely worded like Florida's support Silva and not Southwest.

In an AIDS case against the Red Cross for providing contaminated blood, Maryland's highest court held the Red Cross was not a "health care provider". Miles Laboratories, Inc. v. Doe, 315 Md. 704, 556 A.2d 1107, 1125 (1989). The court held "the claims against the Red Cross are not for medical malpractice of its employees, but for the organization's failure to adopt proper testing and screening procedures to eliminate the contamination of its blood donations." Similarly, Mr. Silva claims Southwest failed to properly test the blood product before it was sold for use by his wife.

Southwest has cited one non-Florida trial court decision holding a blood bank was a "health care professional" under a Minnesota statute. Kaiser v. Memorial Blood Center of Minneapolis, Inc., 721 F.Supp. 1073, 1076 (D. Minn. 1989). The Minnesota statute is broader. It uses the term "health care professional" instead of "health care provider," as in the Florida statute. Obviously, in this context the term "professional" is broader than "provider". For example, a judge is a professional because he is a lawyer. But, by virtue of his position, he is not able to provide legal services to people who would seek them from lawyers who are not judges. Thus, a judge is a legal professional, but not a provider of legal care.

Kaiser noted the Minnesota statute defining "professionals" included doctors and nurses but did not specifically include blood banks. 721 F.Supp. at 1076. It then discussed in detail evidence on how a physician director at the blood bank had established its scientific and medical policies. It held that because the blood bank's "professional" employees could take advantage of a limitations defense, that defense inured to the blood bank under a respondeat superior theory in Minnesota. Id[17]

The Minnesota statute is much broader than Florida's in another important respect. The Minnesota statute of limitations applied to actions against health care professionals for "malpractice, error, mistake or failure to cure, whether based on contract or tort..." 721 F.Supp. at 1075. Florida's medical malpractice statute of limitations does not apply to all types of errors or mistakes, but only to actions based on "diagnosis, treatment or care by" a health care provider. As discussed above, Southwest did not provide diagnosis, treatment or care to Mrs. Silva.

The Second District's reliance on footnote 3 to the Kaiser opinion is misplaced. That footnote says alleging a blood bank owes a duty to a blood recipient is inconsistent with holding blood banks are not health care professionals under the Minnesota

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[17] Kaiser was decided on summary judgment. There is no such evidence here. For example, Southwest has not established that any Southwest physician director established policies for not adequately warning with regard to risks associated with AIDS. Such an argument would be inappropriate on a motion to dismiss in any event.

statute. 721 F.Supp. at 1075. As discussed above, simply because a defendant owes a duty to a patient does not mean there is diagnosis, treatment or care by the defendant. A drug manufacturer, a medical device manufacturer and a pharmacist all owe duties to recipients of their products. Southwest admits they are not covered by §95.11(4)(b). (Smith brief at p. 22). Clearly an entity can owe a duty to the ultimate recipient of a product it sells to a health care provider, and not be a health care provider itself.[18]

Southwest has attempted to rely on several cases describing blood sales as a service or medical service, rather than a product, but these have arisen in the context of blood shield statutes. Kirkendall, supra; McKee v. Cutter Laboratories, Inc., 866 F.2 at 219 (6th Cir. 1989); Doe v. American Red Cross Blood Services, 125 F.R.D. 637 (D.S.C. 1989), citing Doe v. American Red Cross Blood Services, 297 S.C. 430, 377 S.E. 2d 323 (1989); Kozup v. Georgetown University, 663 F. Supp. 1048 (D. D.C. 1987), modified, 851 F.2d 437 (D.C. Cir. 1988); Howell v. Spokane & Inland Empire Blood Bank, 114 Wash. 2d 42, 785 P.2d 815, 820 (1990).[19] As discussed above, Florida's medical malpractice statute does not apply to all medical

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[18] Also, pharmacists are specifically included as health care professionals in the broader Minnesota statute.

[19] Howell affirmed a partial summary judgment that the plaintiff could not sue the blood bank on a strict liability theory. However, the plaintiff's negligence count against the blood bank remained pending, and there was no suggestion it was subject to any "medical malpractice" considerations.

services, but only to diagnosis, treatment or care by the health care provider.

Southwest also cited Coe v. Superior Court, 220 Cal. App. 3d 48, 269 Cal. Rptr. 368 (1990). Coe is not a statute of limitations case, but arose in the context of California's medical injury compensation reform act, which placed ceilings on awards against health care providers. The California act defined health care providers by reference to licenses. The appellate court rejected the contention that the blood bank was a "health facility." The court concluded the blood bank was within the statute because it was a "health dispensary." This is of no assistance to Southwest. This definition is unique to California's statute and is not found in Florida's limitations statute.

The Coe case did make a comment reflecting the true nature of blood bank activity. It stated, "'Health dispensary' is a separate category which includes blood banks since a blood bank dispenses a product and provides a service inextricably identified with the health of humans." 269 Cal. Rptr at 371 (emphasis added). Thus, the rationale of Coe refutes Southwest's position that it provides only a service.

Southwest's argument that blood banks should be considered an integral part of health care and thus entitled to a more restrictive statute of limitations begs the question. There are reasons why the legislative should have elected to treat an entity such as the blood banks differently. A patient selects his or her doctor and hospital, and has first hand contact with them. A

patient (at least in 1985) would not have shopped around and chosen a blood product supplier, a medical equipment supplier, or a medicine supplier. It makes sense to give injured patients additional time to learn the identity of such entities, not to mention time to learn their products caused them some injury.

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

1. There is no privity as contemplated by the statute.

Southwest alternatively argued below that, even if it was not a health care provider, it was in privity with a health care provider, namely the hospital at which Mrs. Silva received the units of blood product, and was therefore entitled to the two-year statute of limitations. The Second District did not reach this argument in rendering its opinion. See, Smith, at A-2. Since Silva anticipates that Southwest may again attempt to argue this as an alternative ground before this Court, he offers the following initial observations.

Southwest relied below for its "privity" argument on case law involving the Florida Patient's Compensation Fund (R 56). E.g., Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985). The Florida Patient's Compensation Fund, however, is significantly differently situated than a third-party supplier such as Southwest. In Taddiken, quoting Black's Law Dictionary, this Court defined "privity" as:

> In its broadest sense, "privity" is defined as mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right (citation omitted). Derivative interest founded on, or growing out of, contract, connection, or bond of union between parties; mutuality of interest (citation omitted).

478 So.2d at 1062.

In holding that the requirement of privity between the hospital and the Fund had been met in Taddiken, the Court relied upon the fact that the Fund was required to pay claims against its member health care providers, 478 So.2d at 1060; that the statute establishing the Fund required it to be joined as a defendant, 478 So.2d at 1061; and that the Fund was statutorily required to develop a risk management program for its health care providers. Id.

Plainly, these facts have no parallel in the relationship between Southwest and the hospital in this case. There is no statute which renders Southwest liable for any negligence of the hospital. Likewise, there is no statute which would require that Southwest be named as a defendant in an action involving the hospital and indeed such joinder would be improper unless the action arose out of actions by both Southwest and the hospital. In addition, Southwest is not a successor to the hospital, is not so identified with the hospital that it represents the same legal right, nor does it have an interest derivative of the hospital.

Equally important with the obvious factual distinctions between the Fund and a third-party supplier such as Southwest is the absence of mutuality of interest which this Court found to be

at the heart of the privity claim in Taddiken. 470 So.2d at 1062. In Taddiken, both the hospital and the Fund were sought to be held liable for the same act of alleged malpractice, and accordingly both had a common interest in the suit, the claims, and the damages. Id., 478 So.2d at 1062. There is plainly no corollary in the present case, in which Southwest has no potential liability for the negligence of anyone but itself. Indeed, to the extent there is a "mutuality of interest" as that term was used in Taddiken, it would be between Silva and the hospital rather than the hospital and Southwest. Silva and the hospital share the common interest of insuring that patients, such as Mrs. Silva, are not injured or killed by contaminated or defective products provided by third-party suppliers and administered to the hospital's patients. Indeed, the hospital would also appear to have a common interest with the patient in allowing the patient, where appropriate, to obtain compensation for such injury directly from the third-party supplier. This potential tort liability for negligence will encourage the hospital's suppliers to provide safe products and services, and will avoid potential attempts to shift this liability to the hospital itself. Southwest's reliance on Taddiken is totally misplaced.

Likewise, Southwest can draw no comfort from this Court's recent decision in Baskerville, supra, which held that the two-year statute of limitations set forth in §95.11(4)(a), Florida Statutes, applies only to professional malpractice actions where direct privity of contract exists between the plaintiff and the

professional. It would be both anomalous and absurd for Southwest to contend that a decision holding that a direct contractual relationship is required before privity may exist for purposes of the professional malpractice statute of limitations, also implies that privity automatically exists for purposes of the medical malpractice statute of limitations whenever there is a contractual relationship between a third-party supplier and a health care provider.

For example, in Taddiken, this Court affirmatively endorsed the Third District's observation that there was no single definition of privity that could be applied in all cases (478 So.2d at 1061), a conclusion which led the Third District to further observe that "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). In Baskerville, the theory of privity was being invoked for the purpose of narrowing the class of persons to whom the shortened statute of limitations for professional malpractice was applicable. Under Southwest's argument, the theory of privity would be invoked for the purpose of dramatically increasing the class of persons entitled to the benefit of the two-year statute of limitations for medical malpractice. As this Court and the Third District have noted, it makes no sense to inflexibly apply a singular definition of privity for these diametrically opposite purposes. This is particularly true when one considers that both §95.11(4)(a) and §95.11(4)(b) expressly provide that the limitation of actions

provided in their subsections "shall be limited to" the persons specified, thereby clearly expressing the legislature's intention was one of limitation, not expansion, of the class of persons entitled to the benefit of the shortened malpractice limitations period.

In addition, in Baskerville, this Court specifically adopted the principle of statutory construction that statutes of limitation shortening the existing period of time within which a suit may be brought are generally construed strictly, with any doubt as to legislative intent resolved in favor of allowing the longer period of time. Limiting the scope of the professional malpractice statute of limitations to those with a direct contractual relationship to the professional furthers that goal; extending the benefit of the statute to third-party suppliers such as Southwest is diametrically opposed to that principle.

In Baskerville, this Court also noted that a reasonable basis for the distinction drawn by the legislature between those in privity and those who were not was that a shorter limitations period may be appropriate when a potentially injured party is immediately on notice of its rights and obligations under the contract than when those not a party to the contract are damaged by the professional's services. That rationale applies with equal or greater force in this case. As in Baskerville, the patient is a stranger to the contract between the hospital and the third-party supplier. Moreover, while a patient generally selects his or her health care providers, the same patient rarely if ever selects, and

frequently does not even know the identity of, the myriad of suppliers who furnish the drugs, equipment or other medical supplies he uses while hospitalized. Under such circumstances, "the legislature is clearly within its authority to establish a shorter limitations period" for the hospital than the medical goods or services supplier such as Southwest. Id., at 16 FLW S441.

A final and perhaps most telling reason why conferring "in privity" status with the health care provider on a third-party supplier such as Southwest makes no sense is that it would lead to absurd results. Literally dozens of entities have contractual relationships with any particular hospital. A holding that these persons 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. As noted, Mr. Silva has no complaint with regard to any diagnosis, treatment or care Mrs. Silva received from the hospital. She did not receive any "diagnosis, treatment or care by" Southwest. If Southwest's convoluted notion of privity were adopted, anyone or anything tangentially related with a person's hospital stay would be covered by a two-year statute of limitations.

For example, 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. Similarly, 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. Indeed, every supplier of drugs, medical equipment or anything else to a hospital would be entitled to assert the medical malpractice statute of limitations. Even Southwest realizes this is an absurd contention. See also, Riccobono, supra.

In sum, if the legislature had intended that someone in the position of Southwest, who is simply supplying a product or service to a health care provider, should receive the benefit of the two-year limitations statute, it could have easily added language to that effect to the statute. It did not, and the statute should not be read in contravention of settled principals of statutory construction to deprive Mrs. Silva's family of their rights.

2. Even if Southwest were in privity, Mr. Silva's action is not one for medical malpractice.

Even if this Court were to determine Southwest is in privity with the hospital, the statute would still not apply. The statute requires there be an "action for medical malpractice", which is defined as a claim arising out of care by a provider of health care. Mr. Silva is not suing based on any care provided by a provider of health care (namely the hospital or the doctors). His claim does not assert any wrongdoing by those entities. Simply because an entity may be in privity with a provider of health care does not mean the medical malpractice statute of limitations applies when the claim does not arise out of the providing of health care.

For example, if a maintenance service took care of the floors in an hospital and a plaintiff slipped on a wet floor, that would be a general negligence claim against the maintenance service even though (according to Southwest's argument) that maintenance service would be in "privity" with the hospital. See Foremost Insurance Company v. Hartford Insurance Group, 385 So.2d 110 (Fla. 3d DCA 1980).

The Middle District of Florida federal court recently noted that whether the Patient's Compensation Fund was liable for "baby-switching" which occurred in a hospital turned on whether the acts were "medical care or services." The opinion held this was factual and could not be determined on a motion to dismiss. Twigg v. Hospital District of Hardee County, 4 FLW Fed. D 67, 68 (M.D. Fla. 1990).

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO TAKE JURISDICTION IN THIS CASE.

The Court's June 4, 1991 and June 26, 1991, orders indicated it was reserving its decision on jurisdiction. The Court has jurisdiction based on the conflict certified by the Second District and another conflict.

The Second District certified conflict with the Third District's decision in Durden. This was correct. Durden conflicts with Silva. Durden held the blood bank was not providing treatment or care to a donor with whom it had actual contact. There was no

doctor-patient or hospital-patient relationship as contemplated by the limitations statute. Similarly, Mrs. Silva had no such relationship with Southwest.

Durden noted that the plaintiff there was a vendor, or seller of his blood. This should not affect the analysis for conflict purposes. Durden's holding turned on the absence of the type of relationship the Third District said the statute required. That relationship also did not exist between Mrs. Silva and Southwest, but the Second District still held the statute applied.

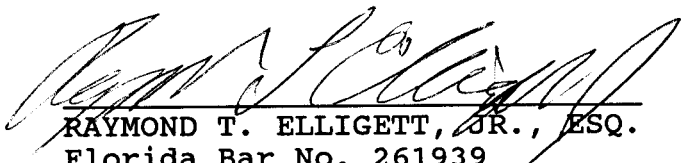
There is a second conflict between the Second District's holding and decisions of this Court on statutory construction. As discussed above, the Second District relied on a definition in a subsequently enacted statute to interpret section 95.11(4)(b). This Court has just rejected the concept that the legislature "anticipates" definitions which are only used in later statutes. Brown; Baskerville. Thus, Silva conflicts with Brown and Baskerville.

Mr. Silva urges this Court to exercise its discretion to accept this case. AIDS victims and their survivors face painful losses. Statutes which potentially cut off their rights should be construed in their favor, as this Court noted in Baskerville.

CONCLUSION

Based on the foregoing, Mr. Silva requests that this Court hold the correct statute of limitations against Southwest in an AIDS case is the four year statute of limitations, and accordingly reverse the order of dismissal in this case.

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; KENNEDY LEGLER, III, ESQ., Legler & Flynn, 2027 Manatee Avenue West, Bradenton, FL 34205; 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 5th day of July, 1991.

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