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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 REPLY BRIEF ON THE MERITS

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SUMMARY OF THE ARGUMENT

Southwest[1] fails to offer any substantive response to several of Silva's arguments proving that §95.11(4)(b) does not apply to actions based on a blood bank's alleged negligence. It is simply insufficient to argue blood banks are "involved in the practice of medicine" (AB 5). So are the medical suppliers who furnish the syringes to inject blood bank products and furnish the surgical equipment whose use requires the blood products. But Southwest has correctly recognized they are not within §95.11(4)(b).

Southwest tries but cannot distinguish this Court's recent decision recognizing the legislature could not have gone "back to the future" to use a definition adopted in 1977 to define a term contained in a limitations statute passed two years earlier in 1975.

Southwest is not in privity with a health care provider as contemplated by the statute. To even make its argument Southwest must contradict its position that the blood it provides is not property, or a product.

Silva believes the limitations issue is clear and must be decided in his favor. However, even if Southwest were deemed to raise a reasonable doubt as to whether the medical malpractice limitations statute applies to blood banks, this Court recently held that in cases of reasonable doubt, Florida courts apply the

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[1] Silva uses the same designations as in his initial brief. References to Silva's initial brief are denoted by "IB." References to Southwest's answer brief are "AB"; references to Amicus Florida Association of Blood Banks are "FABB"; references to the brief of the American Red Cross and American Association of Blood Banks are "ARC."

longer limitations period which permits a determination on the merits of the plaintiff's claim.

ARGUMENT

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

Clear conflict exists between Silva and Durden v. American Hospital Supply Corporation, 375 So.2d 1096 (Fla. 3d DCA 1979), cert. denied, 386 So.2d 633 (Fla. 1980). Durden found the donor's action against the blood bank did not come within the realm of actions contemplated by the §95.11(4)(b). The donor had personal contact with the blood bank, which would have cleaned the area from which the donation would be drawn, inserted the needle to draw blood, and then cleaned and bandaged the area. The Red Cross Amicus Brief recognized the blood bank treated Durden at ARC 23.[2] Thus, the blood bank in Durden had a much stronger argument that it cared for the plaintiff than Southwest has here as to Mrs. Silva.

Southwest wants to rely on the preamble to Chapter 69-157 for its merits argument, but ignores that the preamble lists the "procurement" of blood (as well as its distribution) as a "medical service." If Chapter 69-157 had any relevance to the statute of limitations (which it does not, see IB 19), then Durden's action would have been barred also. Namely, if the malpractice limitations period applied to all "medical services," then it

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[2] By contrast, the Florida Association's brief makes the incredible statement that Durden received no treatment or care. FABB 30.

should have applied in Durden. Thus, there is a conflict between Silva which would make §95.11(4)(b) apply to all activities listed in Chapter 69-157 and Durden which refused to. The Second District, the American Red Cross, and the American Association of Blood Banks recognize this clear conflict (ARC 22).[3]

Southwest argues this Court cannot consider the conflict between Silva and Brown v. St. George Island, Ltd. 561 So.2d 253 (Fla. 1990), and Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Association, Inc., 581 So.2d 1301 (Fla. 1991). The appellate rules do not require any separate invocation of jurisdiction, and in fact indicate to the contrary. When a party alleges conflict jurisdiction as the sole basis for jurisdiction, Fla. R. App. P. 9.120(d) requires a jurisdictional brief. When the district court certifies a question, the same rule prohibits jurisdictional briefs.

Southwest relies on this Court considering alternate grounds to sustain the district court's decision when it advances its privity argument. The same rule should apply to considering the Second District's determination that conflict exists. It is also consistent with this Court's preference to decide cases on the merits. See Skinner v. Skinner, 561 So.2d 260 (Fla. 1990).

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[3] Southwest argues the word "procurement" used in the preamble refers only to procuring blood for the ultimate recipient, not from the donor (AB 11-13). This tortured reading ignores two of the few preamble words Southwest does not underline at AB 11, that the activities listed (including procurement) provide the "general public" (not just recipients) with a desirable service.

Contrary to Southwest's suggestion, it is no bar to conflict jurisdiction that the Second District did not recognize the conflict with this Court's recent decisions on not looking to future legislation to derive legislative intent for previously adopted legislation. "It is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an 'express' conflict." Ford Motor Company v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981).

II. 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."

Southwest's answer brief does not specifically address the fact that it must meet both of the two criteria under §95.11 (4)(b). Southwest must show it is a provider of health care under that statute, and it must show Mrs. Silva's injury arose out of medical "diagnosis, treatment or care by" Southwest.

Southwest's argument begins with a crucial flaw. The very analysis it relies upon to argue it is a "health care provider" under §95.11(4)(b) proves it was not providing the necessary care to come within that statute. Southwest relies on the preamble from Chapter 69-157 (which predates the 1975 limitations statute) to argue the legislature must have been thinking of blood banks as health care providers in 1975 when it enacted the limitations

statute. As discussed below, this is dubious, but even if correct, does not aid Southwest.

If the legislature were thinking of the preamble to Chapter 69-157 when it passed the limitations statute, it would have been cognizant of all the terms therein. The preamble defines the blood bank's activities as "medical services." The statute of limitations does not apply the statute to all medical services, but only to "diagnosis, treatment, or care" by the health care provider. Thus, the legislature intended the shorter limitations statute to apply only to a narrower, specified class of medical services (a rational choice as discussed at IB 29-30). Otherwise, it would have used the broader "medical services" language from the Chapter 69-157 preamble. Consequently, the very paragraph Southwest cites to "prove" it is a health care provider also proves it is not providing the type of care required to come within the limitations statute.[4]

Before responding to specific points in Southwest's brief, Silva notes that his initial brief advanced several arguments -- each compelling reversal-- to which Southwest simply has no answer. Southwest wants to rely on the definition of "health care provider" in §768.50 (AB 22). Silva's brief at IB 9 noted that §768.50 limited the definition of health care provider therein "for purposes of <u>this</u> section." Hence, the need for the specific reference to §768.50 in §766.102. The legislature was already

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[4] Both amicus briefs suffer the same fatal problem. FABB 12; ARC 9.

aware of §95.11(4)(b) which it had previously passed. Thus, if the legislature wanted the specialized definition in §768.50 to apply to §95.11(4)(b), it would have amended §95.11(4)(b) to make a similar specific incorporation. At a minimum it would not have restricted the definition as it did in §768.50.[5]

The second point Southwest ignores is that there is nothing in Chapter 75-9, in which the legislature adopted §95.11(4)(b), suggesting the legislature was addressing any concerns as to blood banks (IB 12-13). Blood banks are never mentioned therein.

Southwest also has no response to this Court's recent and clear indication of how it views close questions in construing limitations statutes. Silva believes that in view of his arguments, it is clear the legislature did not intend to cover blood banks in the medical malpractice limitations statute. But even if there is "reasonable doubt", this Court construes the statute "to allow the longer period of time." Baskerville, at p. 1303 (IB 14).

Southwest at least attempts to respond to the death knell this Court's decisions in Brown and Baskerville sound for its argument. Those cases hold it is improper to construe a statute by looking to statutes or developments after the statute in question. This is what the Second District did in Silva.

Southwest attempts to distinguish Brown by arguing the two sections there were so distinctly different that the definition in

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[5] Similarly, Amici ignore the limitation in §768.50 to "this" section. FABB 9; ARC 8.

one could not have any bearing on the other (AB 23). In Brown, both sections dealt with disqualification of judges and both appeared in the same chapter of Florida Statutes. The crucial factor in Brown was that the legislature could not have been aware of a definition in the later statute when it passed the earlier statute. The same temporal circumstance exists here where Southwest wants to rely on a later definition. And in Southwest's case, the sections do not even appear in the same chapter.[6]

Southwest's response concludes with the assertion that the necessity to read statutes in pari materia "is not controlled by any date of enactment." (AB 25). Southwest cites no authority for this proposition. The reason is obvious. The correct cite would be "Contra, Brown."

Southwest's inability to respond to these determinative points prompts it to urge this Court to embrace its nebulous argument for a "flexible" definition of health care provider based on "medical realities." Southwest argues courts should conduct ad hoc determinations of who is a health care provider years after the legislature acted. This violates the Court's recent observation that its duty is to construe statutory language according to what the legislature intended when it passed the statute. Brown at p. 1302.

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[6] FABB says the two disqualification provisions are "self-contained." This is not a distinction. Section 95.11(4)(b) and §766.102 are also self contained -- indeed, §95.11(4)(b) existed and operated for some years before §766.102 was enacted. Either could be repealed or amended without affecting the operation of the other.

When the legislature acted in 1975 to pass §95.11(4)(b), blood bank liability was not "a rapidly changing condition unforeseen by society" (AB 41). The legislature had passed the blood shield statute six years earlier. Southwest argues for a broad, ever enlarging definition of health care provider which catches plaintiffs unaware. This violates Baskerville's holding that limitations statutes are to be construed "strictly" so as "to allow the longer period of time" in which to bring suit.

There is a sound public policy reason behind this rule. Using the longer statute of limitations merely means a defendant will be put to a defense on the merits. Using the shorter statute where there is reasonable doubt means meritorious claims will be cut off with no determination on the merits.

Because blood banks are involved with health care, Southwest can cite to myriad provisions regarding health care. But simply being involved with health care is not the test under §95.11(4)(b), as demonstrated above. Southwest cannot contend that it is more involved than the medical equipment supplier that supplies the very needle which injects the blood product, or a medical supplier that provides a piece of crucial surgical equipment used in the operation occasioning the transfusion. Yet it has correctly conceded that those defendants would not come within the statute (IB 16). Southwest's position must be that if a patient contracted AIDS from a transfusion, his claim would have to be filed within two years if the blood bank's blood caused it, but he would have four years to sue the syringe supplier if the syringe used to

transfuse the blood caused it. With that perspective on Southwest's position, Silva turns to its remaining specific points.

Southwest must concede that "health care providers" are defined differently in different statutes.[7] Nothing in §95.11(4)(b) or its adoption suggests blood banks were contemplated there. An appropriate definition for an undefined term in a limitations statute is its narrowest understood meaning, consistent with this Court's recent holdings (see also the amicus brief of AFTL). It is also logical to consider the "health care providers" who were identified in the adopting chapter (75-9) as a guide to the legislature's intent. As noted, nowhere are blood banks mentioned.

Southwest's argument at AB 29 misconstrues Silva's point on Southwest's lack of any specific "medical" contact with Mrs. Silva. Southwest's failure to adequately test or warn regarding its cryoprecipitate are liability problems that accompany any supplier of a product or a service which injures someone. The medical malpractice limitations statute provides a special, shorter, period for a narrow class of health care providers who treat, diagnose or care for a patient. Southwest did none of those for Mrs. Silva. When Southwest shipped its cryoprecipitate to the hospital, it could have been used on any patient who had a compatible cross

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[7] Southwest cannot deny that statutes predating §95.11(4)(b) defined "health care provider" so as not to include blood banks (see IB 14). It argues that because one of those referred to pharmacists, Silva must contend they are included in §95.11(4)(b), (AB 27). This is a nonsequitur. It was Southwest that conceded suppliers of medications and medical equipment are not within §95.11(4)(b) (see IB 16).

match. The hospital transfused it. This is analogous to drugs sent to the hospital for use on any of several patients. Yet Southwest admits that supplier would not come within §95.11(4)(b).

Southwest attempts to rely on administrative regulations discussing tests performed on specimens or information provided for use in diagnosis, prevention or treatment of a disease (AB 18, 32). This does not overcome the fatal problems noted above. Furthermore, Southwest did not run any tests on Mrs. Silva's blood or provide here any information to her health care providers about her blood. This also distinguishes Southwest's attempt to analogize itself to radiologists, pathologists and diagnosticians (AB 39). Southwest was not providing any diagnosis for Mrs. Silva like a radiologist or pathologist would for a specific patient (FABB 28; ARC 20).

The inclusion of blood banks in the medical standard of care statute itself and the out-of-state cases discussing similar statutes add nothing to the analysis. [8] This simply means that a plaintiff has to prove a violation of the prevailing professional standard of care by the blood bank (for example, that the blood bank should have adequately warned of the risks of using its cryoprecipitate). A plaintiff suing any defendant who contended he was a professional would try to prove the defendant was negligent when compared to the prevailing standard in his profession. Yet that does not mean the defendant would necessarily be a

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[8] ARC 7-8, 24-25; FABB 19, 21. Contrary to the suggestion made by the sub-argument heading at FABB 18, the vast majority of the cases it cites did not even address limitations issues. See IB 28.

professional within §95.11(4)(a), (much less have the required privity with the plaintiff).

The argument that blood banks are required to be supervised by "professionals" adds nothing (FABB 27, ARC 12-13). Simply because a hospital is required to be staffed by physicians licensed under specified professional chapters of the Florida Statutes does mean every act of negligence it commits (even as to its patients) is diagnosis, treatment or care. See §395.011, Florida Statutes (1989); Zobac v. Southeastern Hospital District of Palm Beach County, 382 So.2d 829 (Fla. 4th DCA 1980)(patient's suit for slipping on water left on bathroom floor was not action for medical malpractice); see also IB 20-21.[9] As the Red Cross brief illustrates, no medical doctor need be (or typically is) involved in the actual (1)screening or physical examination of donors, (2) drawing of blood, (3) testing of the blood, (4) processing of the blood, or (5) storage of the blood (ARC 13).

Silva addressed most of the foreign cases cited by Southwest at AB 33-37 (see IB 26-30). Southwest cites one new federal trial court case, Bradway v. The American Red National Red Cross (N.D. Ga. 1991, included as exhibit A to the amicus brief of American Red Cross). It emphasizes one of Southwest's fatal defects.

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[9] Southwest's argument on the detail in blood bank regulations, even as to facilities is inapposite. Chapter 10D-28.081, Fla. Adm. Code dictates numerous specifics for hospitals, including their bathrooms (§10D-28.082 even specifies finishes, including floor materials). But as Zobac demonstrates, a patient slipping on a bathroom floor does not have a medical malpractice action.

Bradway cited to the Georgia blood shield statute which described blood bank activities as the rendition of "medical services," just as Florida's does. See Bradway at p. 3. But Georgia's limitations statute applied to "health, medical, dental, or surgical service, diagnosis, prescription, treatment, or care ..." Bradway at p. 2, emphasis added. Thus, Georgia's limitations statute is much broader than Florida's, and specifically covers "medical services." Florida's does not.

The breadth of Georgia's limitations statute is also evident in the court's observation that it covers pharmacists. Bradway at p. 5 (see also the specific reference to "prescriptions" above). But Southwest here has conceded the Florida limitations statute would not cover a defendant who supplied medications (IB 22).

Southwest's protestations that it would be illogical to distinguish between blood banks and hospitals for liability ignore that those types of distinctions are both logical and common in our tort system (AB 31 at n.8). See IB 25. A plaintiff injured by an impure aspirin would have to sue an administering doctor or hospital under §95.11(4)(b), but would proceed under different limitations statutes if he obtained the aspirin at a pharmacy or a supermarket. There are logical reasons why the legislature would limit the statute of limitations to defendants who provided "diagnosis, treatment, or care" to a patient (see IB 29-30).

One final point is in order. Southwest continues to argue it provided a service and not a product. This is a red herring as far as the limitations argument goes. A hospital treating a patient

would come under §95.11(4)(b), whether the claim was based on poor service or a poor product (say, impure medicine). The hospital would commonly be understood by any average citizen to be a health care provider and hospitals were discussed in the adopting chapter. The hospital is providing treatment to the patient. Southwest's problem is that it is not a health care provider and did not provide diagnosis, treatment or care to Mrs. Silva.[10]

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

Southwest's rhetorical beginning to its argument fails again to appreciate the posture of the legislature in adopting the limitations statute (AB 41). In 1975 blood bank liability was not "unforseen," as evidenced by the blood shield statute passed six years earlier. The legislature did not include everyone who supplied a service to the health care provider. It did not include those who provided a "medical service" to the health care provider (its language in adopting the blood shield statute). Instead it strictly limited the statute to those "in privity" with the health care provider.

Southwest advances two points to support its privity contention. First, it argues it is in contractual privity with the

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[10] Southwest protests that it does nothing with blood to make it a "product." AB 17-18. Southwest overlooks that by its own description it does perform procedures to create cryoprecipitate, which is not a naturally occurring substance such as blood (IB 23).

hospital and doctors (AB 42).[11] As Silva argued, if this is what privity means, it leads to absurd results (see IB 35-36). Even Southwest must tacitly concede that privity cannot simply mean contractual privity (AB 44).

Southwest then reargues that it provides services which are part of the diagnosis, treatment and care of the patient (AB 44). This is immaterial to the privity portion of the statute. The language regarding diagnosis, treatment or care applies to the health care provider. It does not create any further limitation on the privity portion of the statute.[12]

Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985), conclusively refutes Southwest's argument. In Taddiken this Court held the Patient's Compensation Fund was in privity with the health care provider. Yet the Fund did not participate in the diagnosis, treatment, or care of the patient. Southwest realizes its contractual privity argument fails without its suggested modification on the type of services, and Taddiken proves that suggestion is wrong. Thus, it is apparent that mere contractual privity is not sufficient to invoke the limitations statute, even when tempered by Southwest's suggested modification (which finds no support in the statute in any event).

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[11] Southwest offered no proof below that it had contracts with anyone, and the claim is certainly suspect as to doctors. The cases are here on a dismissal on the pleadings.

[12] The Florida Association's argument at FABB 35 commits the same error in logic. It would have to contend the bed in which the patient recovers is not part of his care by the hospital.

Southwest next argues it is in privity with the doctor and hospital because there is "a '... mutual or successive relationship to the same right of property...' (the blood to be transfused)." (AB 44). It is simply incredible that Southwest would argue so strenuously that blood is not a product --not property--, but then change its position to make its privity argument.[13]

Even if permitted to make this flip-flop, Southwest could not prevail. To adopt its logic would mean that the linen supplier and the food supplier would also be in privity -- they would have the same mutuality of interest and right of property in the food and linen. But even Southwest realizes that would be "nonsensical."[14]

CONCLUSION

Silva asks this Court to hold that the unfortunate few who do contact AIDS from blood bank negligence not be penalized by an artificial and retroactive imposition of a shortened limitations period. He requests 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.

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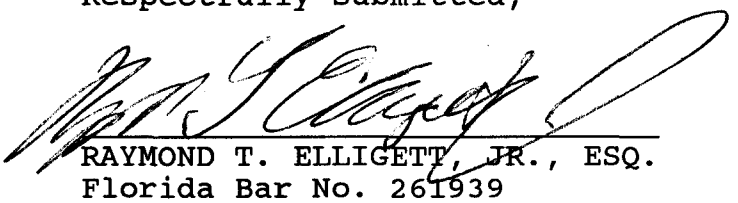
[13] FABB 33 shows the same intellectual inconsistency.

[14] Southwest again ignores the rule that if there is a reasonable doubt, the statute of limitations is construed in favor of the plaintiff, Silva.

Respectfully submitted,



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