SUPREME COURT OF FLORIDA

NO. 82,147

J.B. AND J.W.B. INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, S.B. AND E.B. AND M.B., INDIVIDUALLY
Appellants

VERSUS

SACRED HEART HOSPITAL OF PENSACOLA
Appellee

ON CERTIFICATION FROM THE
UNITED STATES 11TH CIRCUIT COURT OF APPEALS

CIRCUIT NO. 92-2053

INITIAL BRIEF ON BEHALF OF APPELLANTS

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STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

J.B., his wife, J.W.B., and their children, S.B., E.B. and M.B., have brought the instant matter against Sacred Heart Hospital of Pensacola, herein referred to as "Hospital", as a result of J.B. contracting the AIDS virus due to the hospital's negligent failure to adequately warn him that his brother, L.B., was suffering from an extremely contagious illness, namely the AIDS virus, which could be transmitted by exposure to L.B.'s bodily fluids. At the time of the hospital's negligence, J. B. was a third-party, non-patient who was solicited by the Hospital to transport his patient-brother by private vehicle from the appellee hospital to a hospital in Birmingham, Alabama. The U.S. District Court's jurisdiction was invoked pursuant to diversity of citizenship and exceeding the jurisdictional amount in controversy, 28 U.S.C. Section 1332.

In June, 1991, Appellee filed a Motion to Dismiss based on several alternative grounds, one being that J.B.'s complaint of tortious conduct actually falls under Florida Medical Malpractice Law which requires a pre-suit screening before a medical review board. Based on these contentions, on December 17, 1991, an Order granting the hospital's Motion to Dismiss was entered in the record.

For purposes of the Order, the District Court considered only the application of Florida's Medical Malpractice Statutes to the plaintiff's claim in this case. Since the *Silva* case had not yet been decided, the Court recognized that there were no reported cases that addressed the specific issue and concluded that the plaintiff's claim was controlled by the Florida Medical Malpractice law, Chapter 766 of the Florida Statutes.

Appellants filed a Notice of Appeal of the Order on January 16, 1992. On appeal, Appellants contest the District Court's conclusion that the cause of action of J.B., a non-patient of the hospital, falls under the Florida Medical Malpractice Statutes. After briefs had been exchanged, this matter was argued before the U.S. 11th Circuit Court of Appeals on April 21, 1993. Subsequently, the 11th Circuit has certified the following two questions to the Supreme Court of Florida which are determinative of the cause in this matter:

1) Does a Complaint which alleges injuries to the brother of a hospital patient allegedly arising out of the defendant hospital's failure to warn the plaintiff brother of the patient's infectious disease, failure to properly instruct the plaintiff regarding transportation of the patient, and negligently using the non-patient brother as a transporter for the patient fall within Fla. Stat. Sect. 95.11(4)(b), the two year statute of limitations for medical malpractice actions?

2) Does Chapter 766 of the Florida Statutes apply to such a cause of action?

II. STATEMENT OF FACTS

J.B. and L.B. were brothers. In April, 1989, L.B., a diagnosed AIDS patient, was a patient of the Sacred Heart Hospital of Pensacola. The medical staff at Sacred Heart subsequently requested that he be transferred from the defendant facility to another facility in Birmingham, Alabama. When a hospital social worker, in her capacity as an employee of the appellee hospital, discovered that she was unable to secure payment for an ambulance from L.B.'s insurance, she contacted J.B. in Mississippi to provide transportation for his brother to the other facility. Despite L.B.'s serious condition, no suggestions regarding the family paying for an ambulance or alternative methods of funding the ambulance trip were pursued by the hospital.

On April 18, 1989, J.B., upon the request of the hospital, left his Gulfport, Mississippi, home to transport his brother from the Pensacola hospital. Although the physician had ordered the I.V. to be removed from L.B.'s arm before discharge, L.B. was placed into the appellant's car by the employees of the Sacred Heart Hospital with high fever and the Heparin Lock of the I.V. still in his arm. Notwithstanding that an ambulance's paramedics/E.M.T.s would have been notified of L.B.'s AIDS diagnosis on the "need to know exception" to the Florida confidentiality statute, J.B. was never informed by the Sacred Heart Hospital that L.B. was suffering from an extremely contagious blood disorder, much less that he had the AIDS virus. The hospital knew of J.B.'s potential exposure to the virus as evidenced by the nurses giving him a five minute lesson on the care of I.V. sites.

During the trip to the Birmingham hospital, L.B. began to thrash about and accidentally disturbed the dressing of the Heparin Lock. In an attempt to prevent the Lock from dislodging, J.B. came in contact with fluid (blood) that originated from the I.V. site. Had the Lock been removed as the doctor had ordered, the source of contact with the known contagious bodily fluid, namely blood, would have been eliminated. The fluid subsequently came in contact with multiple cuts that J.B. had received on a recent fishing trip and, approximately four months later, he consequently was diagnosed with the AIDS virus stemming from his contact with L.B. Again, J.B. was never informed by Sacred Heart Hospital that their patient, L.B., was infected with an extremely contagious illness, namely the AIDS virus. In addition, J.B. never received any type of diagnosis, treatment or care from the defendant hospital.

SUMMARY OF ARGUMENT

Appellants submit that their cause of action is not controlled by Chapter 766 of the Florida Statutes, the Medical Malpractice Statute, but by the principles of ordinary negligence. As set out in the applicable statutes and cited jurisprudence, the appellant must have some type of direct "privity" with the appellee health care provider for the cause of action to be sounded in medical malpractice. As J.B. had no direct relationship, as a patient or otherwise, with the hospital, the required privity did not exist.

Appellants further submit that J.B.'s injury did not arise from any "medical, dental or surgical diagnosis, treatment, or care" which defines a "claim for medical malpractice" in the Florida statutes and distinguishes a cause of action based on simple/ordinary negligence from the more particularized theory of medical malpractice.

Lastly, appellants argue that the District Court's decision was based on non-binding inapposite authority which can be easily distinguished from the case at bar. The recently decided *Silva* case is directly on point as to what type of action constitutes medical malpractice. Based on the above, the appellants respectfully request that this Honorable Court respond to both questions posed by the 11th Circuit in the negative; that is, neither Fla. Statutes, Sect. 95.11(4)(b) nor Chapter 766 of the Florida Statutes apply to the case at bar.

ARGUMENT

Appellants submit that a careful reading of the pertinent Florida Statutes including the statute of limitations for malpractice actions, the Florida Medical Malpractice Statute and the below cited jurisprudence reveals that the appellants' claim herein is not based on medical malpractice as defined in the statutes mentioned above, but on the theory of ordinary negligence. As such, appellants' suit should not have been dismissed in order to comply with the pre-suit screening process required of Florida medical malpractice actions.

In the District Court's December 17, 1991, Order (R1-18), Judge Roger Vinson, stated that:

> For purposes of this Order, I consider only the application of Florida's Medical Malpractice statutes to the plaintiffs' claim in this case.
>
> Succinctly stated, plaintiffs' claim a wrongful exposure to an infectious disease (AIDS) brought about by the defendant hospital's failure to adequately warn plaintiff, J.B., a non-patient who had volunteered to transport his patient-brother by private vehicle from the defendant hospital to another hospital, that his brother was suffering from AIDS. There are no reported Florida cases that addressed this specific issue, and I have found no authorities directly on point. (R1-18-1).

Despite the lack of direct authority, the District Court, basing its decision on inapposite jurisprudence in New York and California, concluded that:

> "Plaintiff's claim in this case is controlled by Chapter 766, Florida Statutes, and plaintiffs must comply with the pre-suit screening procedures set out in Chapter 766. Such compliance is a prerequisite to filing suit." (R1-18-3).

It is from this conclusion that Appellants seek review.

Section 95.11(4)(a) and (b) of the Florida Statutes sets out a two year statute of limitations for professional malpractice and medical malpractice actions respectively. Both sections require "privity" between the petitioner and the professional/health care provider. Section 95.11(4)(b) also defines what type of conduct constitutes "an action for medical malpractice":

> 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).

A similar definition for a "claim for medical malpractice" is found in the Florida Medical Malpractice Statutes, Section 766.106(1)(a):

> "A claim for medical malpractice means a claim arising out of the rendering of, or the failure to render, medical care or services." (Emphasis added).

Therefore, under these definitions, it is imperative to review the relationship or privity between the appellants and the appellee health care provider.

Appellants submit that since J.B. did not receive any type of "diagnosis, treatment or care" as defined above, he lacked the necessary "privity" with Sacred Heart Hospital in order for his claim to fall under the definition of medical malpractice. The definitions of professional malpractice [95.11(4)(a)] and medical malpractice [95.11(4)(b)] both require "privity" between the claimant and the professional and/or the health care provider. Although there is little authority explaining the type of privity/relationship that is required between the plaintiff and the health care provider, four Florida cases shed some light on this issue: *Silva v. Southwest Florida Blood Bank*, 601 So.2d 1184 (Fla. 1992); *Baskerville and Donovan v. Pensacola Executive House*, 581 So. 2d 1301 (Fla. 1991); *Durden v. American*

Hospital Supply Corporation, 375 So. 2d 1096 (Fla. App. 3rd Dist. 1979), *cert. denied*, 386 So. 2d 633 (Fla. 1980); and *Buchanan v. Lieberman*, 526 So. 2d 969 (Fla. App. 5th Dist. 1988).

The exact definition of a "claim in medical malpractice" and its meaning has been interpreted by the Florida Supreme Court in the recent case of *Silva v. Southwest Florida Blood Bank, supra*. In *Silva*, the plaintiffs sued on behalf of patients who contracted the AIDS virus as a result of the transfusions of blood and blood products from the defendant blood bank. The trial court dismissed the claims against the blood bank as barred by the expiration of Florida's two-year statute of limitations for medical malpractice claims. An appellate court affirmed the district court's decision. The Florida Supreme Court reversed, holding that the actions of the blood bank were governed by the state's four-year statute of limitations for ordinary negligence claims. In the Court's opinion, the malpractice statute of limitation did not apply because the blood bank did not provide "diagnosis, treatment, or care" to the patients as required by the applicable Florida statutory definition. The Court explained that there was no

> ambiguity to clarify in the words 'diagnosis,' 'treatment,' or 'care,' and we find that these words should be accorded their plain and unambiguous meaning. In ordinary, common parlance, the average person would understand 'diagnosis, treatment or care' to mean ascertaining a patient's medical condition through examination and testing, prescribing and administering a course of action to effect a cure, and meeting the patient's daily needs during the illness. Id. at 1187. (Emphasis added).

Therefore, since the plaintiffs did not receive any diagnosis, treatment or care from the defendant blood bank, their claims were not governed by the Florida medical malpractice law.

This case clearly illustrates that the Florida Supreme Court distinguishes between someone who receives "diagnosis, treatment or care," such as patient L.B., and someone who does not, such as J.B. Employing the definitions set out above, J.B.'s claim is not based on the negligence of the appellee hospital in ascertaining his medical condition through examination and testing, prescribing and administering a course of action to effect a cure, and meeting his daily needs during the illness. In short, J.B.'s cause of action is based on ordinary negligence and is not a "claim for medical malpractice" as defined in the Florida statutes and interpreted by the Florida Supreme Court.

For a very similar case, see also: *Sweeney v. Presbyterian/Columbia Medical Center*, 763 F. Supp. 50 (S.D.N.Y. 1991) (where the complaint, which alleged that the plaintiff was transfused with HIV infected blood, was based on ordinary negligence principles, not medical malpractice, because it challenged the hospital's distribution procedures and not any medical decisions concerning the patient's treatment).

In the *Baskerville* case, *supra*, a condominium association brought an action against an engineering corporation ("corporation") alleging that an engineering report prepared by the corporation misrepresented the actual condition of a roof. The corporation filed for a Summary Judgment under 95.11(4)(a) based on the association's failure to file within the two year statute of limitations. The Circuit Court agreed with the petitioner but the Appellant Court subsequently reversed on the grounds that there was no direct privity between the parties as required by Section 95.11(4)(a). The Florida Supreme Court affirmed and held that the "privity" must mean direct privity for purposes of Section 95.11(4)(a). Appellants would like to reiterate that the use of the word "privity" in

95.11(4)(a) parallels its use in 95.11(4)(b), the medical malpractice statute of limitation. More importantly, the Florida Supreme Court stated that the term "privity" as used in Section 95.11(4)(b), regarding medical malpractice actions, means direct contractual privity. *Id.* at 1303. The Court went on and explained that:

> Third party beneficiary principles have been employed recently in tort law to expand liability where a duty of care exists between a third party and a professional, again despite the lack of direct contractual privity. However, this Court has clearly distinguished between privity and duty of care as separate means of proving a professional's liability. Clearly, privity between the parties may create a duty of care providing the basis for recovery and negligence. ...Thus, we conclude that the legislature intended privity in Section 95.11(4)(a), to apply only to malpractice suits where direct privity is found to exist. *Id.* at 1303-1304. (Emphasis added).

Therefore, without direct privity, parties are not governed by Section 95.11(4)(a) regarding professional malpractice. Appellants' submit that, as this Honorable Court noted, this is also true regarding Section 95.11(4)(b) concerning medical malpractice.

The definition for a "claim for medical malpractice" is again interpreted in the *Durden* case, *supra*. In *Durden*, an action was brought by a seller of blood, who contracted hepatitis, and his wife against the operator of a blood donor center. The Circuit Court dismissed the complaint with prejudice as being barred by limitations, and plaintiffs appealed. The issue presented for the Court of Appeal's determination was whether the two-year statute of limitations for medical malpractice, Section 95.11(4)(b), was applicable or the four-year limitation for general negligence actions pursuant to Section 95.11(3)(a).

After citing the same passage of Section 95.11(4)(b) as cited by the appellants above, the Third Circuit explained that in:

> construing Section 95.11(4)(b) in its plain and ordinary sense, it is apparent that more than just the fact that a party defendant is a health care provider is required to bring a cause of action within this two year statute of limitations. In addition, the claim for damages must arise as a result of medical, dental or surgical diagnosis, treatment or care on the part of the health care provider. The relationship contemplated by the subject statute of limitation is in the nature of doctor (dentist) - patient or hospital - patient in contrast to the vendor-vendee relationship in the case at bar. Durden's third amended complaint is grounded upon allegations of ordinary negligence and, therefore, the four year statute of limitations, Section 95.11(3)(a), Florida Statutes (1977), is applicable. *Id.* at 1099. (Emphasis added).

Since there was no hospital/patient relationship between the parties, the plaintiffs' action could not be dismissed under the medical malpractice prescriptive period, but fell within the four-year prescriptive period afforded to all causes of action based on negligence.

The *Buchanan* case, *supra*, concerns a patient who was sexually assaulted in her doctor's office. Although this case involves an intentional battery, the opinion of the Court is helpful in the case at bar:

> An isolated reading of that statutory section [Section 768.45, Florida Statutes (1977) currently Section 766.102 Florida Statutes (1988)] could lead one to assume it was thereby intended to include every type, nature and description of negligence by a health care provider. However, read in context with other statutory and rule provisions applicable to medical liability mediation, it is clear to us that the legislative intent was to submit to medical liability mediation only claims arising out of those acts or conduct which are peculiarly malpractice when committed by a medical or osteopath physician, pediatrist, hospital, or health maintenance organization. *Id.* at 971. Citing *Zobac v. Southeastern Hospital*, 382 So. 2d 829, 830-831 (Fla. App. 4th Dist. 1980).

Therefore, the plaintiff's cause of action was not sounded in medical malpractice for purposes of applying the medical malpractice statutes.

Applying the above cited Florida cases to the case *sub judice*, it is clear that J.B. did not receive any "diagnosis, treatment or care"; and therefore, does not enjoy the type of privity with Sacred Heart Hospital that is required for his claim to fall under the Florida

Medical Malpractice laws. J.B. had no connection with the appellee hospital except as that of a brother of a diagnosed AIDS patient that was being treated there. The appellee hospital's negligence did not arise from its failure to render medical care or services to J.B. because, as a non-patient, he did not need medical care. Appellee cleverly attempts to disguise this fact by previously arguing that J.B.'s cause of action is inextricably connected with the "diagnosis, treatment and care" that the appellee provided to L.B. by allowing him to be transported by his brother. In short, J.B.'s cause of action has no connection to any claim L.B.'s heirs could bring for improper diagnosis, treatment or care.

Except for those cases cited above, appellants have found no other Florida cases or authorities directly on point; however, appellants respectfully submit additional authority from other jurisdictions as persuasive.

In *Hutchinson v. Patel*, 1993 WL 255484 (La. App. 1st Cir., July 8, 1993), the plaintiff, a non-patient third-party (like J.B.), brought an action against a psychiatrist for his failure to warn her of a patient's potential violent behavior. The Court stated that because this cause of action does not involve the medical care or treatment of a patient, it is not covered under the Louisiana Medical Malpractice Act.

Bradshaw v. Daniel, 854 S.W. 2d 865 (Tn. 1993), provides another case which is strikingly simailar to the one at bar. In *Bradshaw*, an action was brought alleging the defendant physician failed to warn a non-patient, third party family member of the risks of exposure to Rocky Mountain Spotted Fever. The Tennessee Supreme Court explained:

> While it is true that a physician-patient relationship is necessary to the maintenance of a medical malpractice action, it is not necessary for the maintenance of an action based on negligence, and this court has specifically recognized that a physician may owe a duty to a non-patient third party for injuries caused by the physician's negligence, if the injuries suffered and the manner in which they occurred were reasonably foreseeable. *Id.* at p. 870.

In *Johnson v. West Virginia University Hospitals*, 413 S.E. 2d 889 (W.Va. 1991), a patient was brought to the defendant hospital where, in the presence of seven doctors and nurses, stated that he was infected with the AIDS virus. Due to the patient's unruly behavior, the plaintiff, a police officer employed by the defendant as a security guard, was called to the scene. While attempting to assist the other hospital employees, the patient bit the plaintiff on his forearm. It was not until after this incident that the plaintiff was informed that the patient had the AIDS virus. It was established that at least one-half hour had elapsed from the time the hospital personnel learned that the patient had AIDS to the time the plaintiff began assisting with the patient. The plaintiff filed a suit against the hospital based on ordinary negligence. Specifically, the plaintiff claimed that the hospital negligently failed to warn him that the patient had AIDS, and that as a result of his exposure to AIDS, the plaintiff had suffered damages. The jury returned a verdict in favor of the plaintiff which was affirmed by the Supreme Court of Appeals of West Virginia.

In *Heigert v. Riedel*, 565 N.E. 2d 60 (Ill. App. 5th Dist. 1990), a nurse, who contracted tuberculosis from a hospital patient whose physicians negligently failed to diagnose the patient's illness as being contagious, brought a medical malpractice action against the patient's physicians. The Circuit Court denied the physicians' Motion to Dismiss based on no cause of action and an appeal was taken. The Appellate Court, recognizing that the work of nurses such as the plaintiff was critical to the control of communicable diseases, nevertheless reversed the district court's ruling and granted the physicians' Motion to Dismiss.

The court explained:

> "We consider that the preferable view, and the one consistent with this court's holdings and with legislation based on social and public policy, is that a plaintiff cannot maintain a medical malpractice action absent a direct physician-patient relationship between the doctor and the plaintiff or a special relationship, as present in *Renslow*, between the patient and the plaintiff." Id. at 65, citing *Kirk v. Michael Reese Hospital and Medical Center*, 513 N.E. 2d 387, 399 (Ill. 1987), cert. denied, 485 U.S. 905 (1987). [*Renslow* allowed a child to bring an action against the hospital and physician for injuries she received as a result of negligent acts committed against her mother before she was conceived.]

Therefore, since the plaintiff had no direct physician-patient relationship with the defendants, a medical malpractice cause of action was held to be inappropriate.

Appellants respectfully request that this Honorable Court also see: *Sewell v. Doctors Hospital*, 600 So. 2d 577, 580 (La. 1992) (where plaintiff's cause of action for injuries sustained when his hospital bed collapsed did not fall under Louisiana's Medical Malpractice Statute as La. R.S. 40:1299.41(A)(8), in defining malpractice for the purpose of the act, provides for liability of a health care provider for negligent acts or omissions in rendering health care or professional services to a patient); and *Guidry v. Garrett*, 591 So.2d 806 (La. App. 3rd Cir. 1991) (where the court found that a dentist who provided prescription drugs to himself which led to his shooting of the plaintiff's wife, did not constitute a cause of action based on medical malpractice since the negligent health care must be rendered to a patient).

Lastly, appellants wish to distinguish the cases relied upon by the appellee and the district court in its December 17, 1991, Order. In *Merchants National Bank v. Morriss*, 269 F.2d 363 (1st Cir. 1959), a 33 year old case from the U.S. First Circuit, a malpractice action

was brought against a physician who negligently wounded the plaintiff's (mother's) hand with a needle while she was holding her child whom the physician was vaccinating. The court found that the plaintiff's action was barred by the two year statute of limitations prescribed for medical malpractice actions. This antiquated case is easily distinguishable from the facts of the case at hand since the injury to the non-patient was committed physically by the health care provider and not by the patient. Furthermore, appellants suggest that the numerous legal developments which have occurred in the past decade alone regarding malpractice claims reflect that the *Merchants* case carries little authoritative weight in the case before this Honorable Court.

The District Court also cited *Hedlund v. Superior Court of Orange County*, 669 P.2D 41 (Cal. 1983). In *Hedlund*, the allegations of negligence were that the health care providers, psychotherapists, failed to diagnose or predict dangerous behavior in a patient which could result in injury to a third party. In the case at bar, there is no allegation of the appellee's failure to diagnose L.B.'s illness. More importantly, Florida courts have specifically rejected the theory that psychiatrists have a duty to warn potential victims of danger posed by a patient. *Boyton v. Burglass*, 590 So. 2d 446 (Fla. App. 3rd Dist. 1991).

Logic and reason, when viewed in light of the above-cited cases and arguments, mandate the finding that J.B.'s cause of action, negligence to a non-patient, does not sound in medical malpractice but in ordinary negligence. Therefore, the appellants' claim should be allowed to proceed in the district court at once without the various medical malpractice prerequisites including the screening process before a medical review board.

CONCLUSION

The hospital's failure to disclose vital information regarding L.B.'s illness constituted ordinary negligence that did not require special medical knowledge nor the professional expert judgment that distinguishes a cause of action based on simple/ordinary negligence from the "more particularized theory of medical malpractice." *Jones v. Bates*, 403 S.E. 2d 804 (Ga. 1991). In fact, it is common public knowledge that exposure to bodily fluids of a person infected with the AIDS virus creates a great risk that anyone exposed to those fluids may subsequently contract the virus. The appellees's failure to warn J.B. of his brother's condition, despite contacting him to provide transportation for the patient, callously prevented him from fully appreciating, confronting and protecting himself from the danger known to all at the hospital. As a third party non-patient having no connection whatsoever to the appellee hospital, their failure to warn must be viewed as ordinary negligence and not medical malpractice. Therefore, the appellants respectfully request that this Honorable Court respond to both questions posed by the 11th Circuit in the negative; that is, neither Fla. Statutes, Sect. 95.11(4)(b) nor Chapter 766 of the Florida Statutes apply to the case at bar.

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served on all counsel of record by depositing a copy of same in the United States Mail postage prepaid and properly addressed this 16th day of August, 1993.

ADRIAN A. COLON, JR.