

IN THE SUPREME COURT OF FLORIDA

KAYNAN FITCHNER, as Personal
Representative of the Estate
of Chase Fitchner, deceased,

Petitioner/Plaintiff,

vs.

LIFESOUTH COMMUNITY BLOOD
CENTERS, INC.,

Respondent/Defendant.

S.C. Case No. SC08-174

1st DCA Case No. 1D06-4475

Trial Court Case No.

01-04-CA-1574, 8th Jud. Cir.
Alachua County, Florida

**JURISDICTIONAL BRIEF OF RESPONDENT
LIFESOUTH COMMUNITY BLOOD CENTERS, INC.**

On Review from the District Court of Appeal,
First District, State of Florida

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STATEMENT OF THE CASE AND FACTS

LifeSouth generally accepts Petitioner's statement of the case and facts with one notable exception. Petitioner claims the First District found that:

the 2003 revisions to the medical malpractice statutes require an individual who has no contact with or relationship with a blood bank, other than as a recipient of blood, must comply with presuit requirements.

Pet. Br. at 2 (emphasis added). The First District's decision does not suggest that the Fitchners had no prior contact with LifeSouth. That is not surprising since, under section 766.204, Florida Statutes (2003), the Fitchners were legally entitled to contact LifeSouth to obtain relevant medical records before they sued any healthcare provider, including LifeSouth.¹

SUMMARY OF THE ARGUMENT

The opinion below does not expressly and directly conflict with Silva or Damiano. In fact, it expressly distinguishes those two cases. In the early 1990's, when Silva and Damiano were decided, blood banks in Florida were not defined as "healthcare providers." Then, in 2003, the Legislature made "crucial changes" to chapter 766, extending the protections in Florida's medical negligence statutes to blood banks. Because the First District is interpreting different statutes with

¹ The Fitchners did, in fact, contact LifeSouth before they filed this lawsuit. They requested and obtained documents from LifeSouth related to their son's West Nile Virus infection.

different language, there is no conflict with prior cases that interpreted earlier, materially different statutes.

This Court should decline to accept discretionary jurisdiction for another reason. Florida's 2003 medical negligence statutes fully protect all citizens' constitutional right of access to courts to assert potential medical negligence claims against blood banks. Florida law requires that all healthcare providers, including blood banks, must promptly provide all relevant documents to any potential claimant on request--before a medical negligence lawsuit is filed. Any failure to provide such documents would subject a blood bank to statutory penalties and sanctions under Florida law.

Here, Plaintiffs made a strategic decision not to comply with Florida's presuit notice requirements, and to assert instead that those requirements do not apply to blood banks. In light of her strategic decision, Petitioner cannot now be heard to suggest that the presuit documents she actually obtained from LifeSouth (or those documents she was legally entitled to obtain from LifeSouth, under the 2003 version of chapter 766) were insufficient, as a matter of law, to require her to comply with her statutory presuit obligations. The fact is, she never tried to comply with those obligations in the first instance.

ARGUMENT

I. NO CONFLICT EXISTS REGARDING WHETHER THE DECISION BELOW, WHICH INTERPRETS SECTION 766.106, FLORIDA STATUTES (2003), CONFLICTS WITH EARLIER FLORIDA CASES INTERPRETING MATERIALLY DIFFERENT STATUTES

Petitioner fails to identify a single statement in the decision below that expressly and directly conflicts with either Silva v. Southwest Florida Blood Bank, Inc., 601 So. 2d 1184 (Fla. 1992), or Community Blood Centers of South Florida, Inc. v. Damiano, 697 So. 2d 948 (Fla. 4th DCA 1997). The reason is simple--no such express and direct conflict exists.

In Silva, this Court held that blood banks were not subject to the two-year statute of limitations set forth in section 95.11(4)(b), Florida Statutes (1991) because: a) blood banks were not defined as health care providers, and b) blood banks did not render "diagnosis, treatment, or care" to blood recipients. See 601 So. 2d at 1189. In Damiano, the Fourth District, following the reasoning in Silva, held that the presuit notice requirements set forth in section 766.106, Florida Statutes (1992), did not apply to blood banks. See Damiano, 697 So. 2d at 951.

In 2003, with the full knowledge of the courts' statutory interpretations in Silva and Damiano, the Legislature expressed its clear intent to override those decisions, substantially rewriting chapter 766 and, in particular, broadening its

application to blood banks. See LifeSouth Cmty. Blood Ctrs., Inc. v. Fitchner, 970 So. 2d 379, 382 (Fla. 1st DCA 2007). The Legislature expressly provided that blood banks are healthcare providers, id.; §766.106, Fla. Stat. (2003); and enacted numerous other statutory changes concerning blood banks:

1) it amended section 766.102, to incorporate the "health care provider" definition from section 766.202(4) (which now includes "blood banks"); it defined "medical negligence" as a claim against a healthcare provider "arising out of the rendering, or failure to render, medical care or services," see LifeSouth, 970 So. 2d at 381 (emphasis added); as this Court previously recognized, the "medical services" category of claims is broader than the category of claims based on "diagnosis, treatment, or care," see Silva, 601 So. 2d at 1188;

2) it amended sections 766.106, 766.1115, 766.112, 766.113, 766.201, 766.203, 766.2021, and 768.21, Florida Statutes (2003), which previously referred to "medical malpractice" claims, and now refer to the broader term, claims for "medical negligence," see LifeSouth, 970 So. 2d at 382;

3) it enacted a law requiring all "blood establishments" in Florida to comply with 21 C.F.R. § 600-640 (2003), the federal regulations governing blood banks. See Ch. 2003-38, Laws of Fla.; see also §381.06014(2), Fla. Stat. (2003); LifeSouth, 970 So. 2d at 383. Under those regulations, every step of the blood

collection process--including all blood donor interviews--must be conducted or supervised by a qualified physician. 21 C.F.R. §§ 640.3, 640.4; see also LifeSouth, 970 So. 2d at 383;

4) it amended section 672.316(5), to eliminate the then-existing statutory exception by which blood could be considered a "product." Hence, after 2003, the process of collecting and processing human blood for transfusion was, by statute, always considered to be a "service." See Ch. 2003-74, Laws of Fla.; see also LifeSouth, 970 So. 2d at 381.²

In light of these extensive changes to Florida law regarding blood banks, the First District held that "neither Silva nor Damiano control the outcome of the instant case." LifeSouth, 970 So. 2d at 381. As the Court explained, "the Silva holding was limited to whether blood banks were subject to the two-year statute of limitations for medical malpractice suits in 1991." Id. at 381. The court went on to hold that, since Silva and Damiano, "the Legislature made crucial changes to the medical malpractice statute, in particular, broadening its application to blood banks." Id. at 382.

The First District expressly rejected Petitioner's argument that the 2003 amendments controlling medical negligence claims

² The Legislature made other numerous changes to chapter 766 affecting all healthcare providers, not just blood banks. See, e.g., §766.118, Fla. Stat. (2003), setting limits for non-economic damages in claims "arising from medical negligence."

against blood banks apply only to claims arising from the taking of blood from blood donors:

The greatest liability exposure of blood banks is not in the relatively simple process of taking blood, but in the donor screening process, where critical decisions are made about providing blood to sick patients. . . .

[B]y including blood banks in the definition of "health care provider," the Legislature implied a relationship between blood banks and persons needing or receiving health care. A donor is not seeking health care but only donating blood; the party receiving the blood is the one seeking health care.

Id. at 383 (emphasis added).

There is no confusion on this point--the First District's decision does not expressly and directly conflict with either Silva or Damiano. The fact that Petitioner disagrees with the First District's interpretation of the 2003 version of chapter 766 is irrelevant to the question of whether this Court has conflict jurisdiction.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION AND CHOOSE NOT ACCEPT REVIEW OF THIS CASE

A. This Is Not An Appropriate Case For This Court To Accept Discretionary Review

This is the first time this issue--the interpretation of the 2003 changes to Florida law relating to blood banks--has arisen in Florida's appellate courts. As this Court has previously observed, appropriate questions for review are those that have percolated in the district courts of appeal, not those

involving an appellate court's first-time interpretation of a statute. See State v. Barnum, 921 So. 2d 513, 533 (Fla. 2005) (Pariente, C.J., concurring in result). This is not such a question. Indeed, because this is a case of first impression construing a new, substantially amended statutory scheme, it cannot, by definition, be in express and direct conflict with Silva, Damiano, or any other prior Florida appellate decision.

B. Petitioner's Claim That She Had No Entitlement To Any Records From The Blood Bank Is Legally And Factually Wrong

Petitioner claims she could not have complied with the presuit requirements of chapter 766 because she was not in privity with LifeSouth, had no entitlement to records from LifeSouth, and had no contact or relationship with LifeSouth. Pet. Br. at 2, 5, 6. Petitioner is legally and factually wrong.

When the Legislature changed chapter 766 in 2003 to define blood banks as health care providers, it imposed on all blood banks the obligations with which all healthcare providers must comply. Under section 766.204(1), healthcare providers must make available to any claimant "copies of any medical record relevant to any litigation of a medical negligence claim." If a healthcare provider fails to provide the requested information to a claimant within 10 business days, the healthcare provider waives the requirement for written medical corroboration. See §766.204(2), Fla. Stat. (2003).

Consequently, by law, Petitioner was entitled to obtain presuit discovery from LifeSouth within 10 days of a request for documents. If LifeSouth had failed to comply with that request, it would have waived the right to require an accompanying presuit affidavit with the notice of intent.

The new statutory right afforded to blood recipients under chapter 766--i.e., the right to obtain relevant documents from a blood bank--guarantees access to courts for all individuals who may have a potential medical negligence claim against a blood bank. Petitioner suggests that "there were no records available to Petitioner in presuit that could have been obtained and provided to an expert for purposes of complying with section 766.203(2)(a)." Pet. Br. at 6. The First District's decision certainly does not support that claim. And neither does Florida law.

This Petitioner, like every recipient who obtains blood from a blood bank, knew from the hospital's records the precise source of each unit of donated blood that was transfused. Under chapter 766, blood recipients are entitled to obtain from blood banks the details of the blood testing and screening processes for the specific blood units they received, including the blood donation documents--except for any confidential personal information of the donor. See §381.0043, Fla. Stat. (2005)(a blood bank "may not be compelled to disclose the identity or any

identifying characteristics of a person who donates blood"). Had Petitioner complied with the statutory presuit process-- i.e., requested relevant documents from LifeSouth and thereafter established that LifeSouth failed to cooperate with that request during her presuit investigation--then Petitioner would not have needed to obtain an expert before filing a lawsuit. LifeSouth would also have exposed itself to serious sanctions, including the potential striking of LifeSouth's defenses.³ See §§ 766.106(7), 766.205(3), 766.206(3), Fla. Stat. (2003).

C. Petitioner Made A Strategic Decision Not To Comply With Florida's Presuit Requirements

In this case, Petitioner made a strategic decision to ignore her presuit obligations and to argue instead that her lawsuit against LifeSouth was not controlled by chapter 766. By making that argument, Petitioner sought to avoid the statutory limitations that apply to lawsuits against healthcare providers --presuit requirements, limitations on experts, special arbitration provisions, and limits on non-economic damages. In light of her strategic decision, Petitioner cannot now be heard to suggest that she did not--and as a matter of law could not--

³ It bears emphasis that Petitioner never alleged, much less established, that LifeSouth failed to cooperate with her presuit discovery demands. As such, Petitioner's access to courts argument raised in her jurisdiction brief is not preserved for review. That is an additional reason why this Court should decline to accept jurisdiction in this case.

obtain sufficient information to comply with her presuit obligations. The fact is that she never even tried to do so.

Simply put, there is no basis on which this Court should speculate that requiring Petitioner to file a presuit notice unconstitutionally denied her access to courts. Petitioner can hardly argue, after the fact, that she had no ability to comply with Florida's statutory presuit investigation process when it was her own conscious, strategic election to disregard that mandatory process in the first instance.

CONCLUSION

Because no conflict exists between the decision under review and those cited by Petitioner, LifeSouth respectfully requests that this Court deny review of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing notice has been furnished by U.S. Mail on this 17th day of March, 2008, to the following individuals:

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CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the type size and style used throughout this brief is 12-point Courier New double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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