

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

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

S.C. CASE NO.: SC08-

Petitioner,

APPEAL CASE NO.: 1D06-4475

vs.

LIFESOUTH COMMUNITY BLOOD
CENTERS, INC.,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

RAYMOND T. ELLIGETT, JR.
Florida Bar No. 261939
AMY S. FARRIOR
Florida Bar No. 684174
Buell & Elligett, P.A.
3003 W. Azeele Street
Suite 100
Tampa, Florida 33609
813-874-2600 (telephone)
813-874-1760 (facsimile)

DEAN R. LeBOEUF
Florida Bar No. 0328715
RHONDA S. BENNETT
Florida Bar No. 0854360
Brooks, LeBoeuf, Bennett, Foster
& Gwartney, P.A.
909 East Park Avenue
Tallahassee, Florida 32301
850-222-2000 (telephone)
850-222-9757 (facsimile)

COUNSEL FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, Kaynan Fitchner, as Personal Representative of the Estate of Chase Fitchner, deceased, refers to herself as the “Petitioner.”

Petitioner refers to Respondent, LifeSouth Community Blood Centers, Inc., as “LifeSouth.”

Petitioner refers to her deceased child, Chase Fitchner, as “Chase Fitchner.”

Petitioner refers to the October 30, 2007 opinion of the First District, included in the Appendix hereto, by the prefix “A.”

STATEMENT OF THE CASE AND FACTS

Introduction

The First District panel has certified its opinion as containing a question of great public importance, and Petitioner Fitchner has filed a notice to invoke jurisdiction on that basis. Petitioner believes the First District decision also conflicts with opinions of this Court and the Fourth District Court of Appeal, and files her motion for leave to file this jurisdictional brief to demonstrate that conflict, as an additional basis for this Court’s jurisdiction.

Facts

The following facts are taken from the First District’s description of the case. Kaynan Fitchner’s seven-year-old child, Chase Fitchner, contracted West

Nile virus and then died due to complications associated with West Nile virus. According to the CDC, Chase acquired West Nile virus from blood that LifeSouth provided to the hospital where Chase Fitchner was a patient (A 3). Kaynan Fitchner sued LifeSouth for negligently screening the donor who supplied the blood that infected Chase Fitchner with West Nile virus and ultimately killed him (A 3-4).

LifeSouth moved to dismiss because Fitchner had not complied with the presuit notice requirements of Chapter 766. The trial court denied the motion, finding that even though blood banks were (now) defined as healthcare providers, the complaint was not one for medical malpractice (A 4). The First District panel reversed, finding that the 2003 revisions to the medial malpractice statutes require an individual who has no contact with or relationship with a blood bank, other than as a recipient of their blood, to comply with presuit requirements. Fitchner filed a motion to certify asserting an inability to comply with presuit resulting in a denial of access to courts.

The First District certified the case to this Court as containing a question of great public importance by its order of December 26, 2007. Petitioner agrees, and believes the opinion also conflicts with this Court's decision in *Silva v. Southwest Florida Blood Bank, Inc.*, 601 So. 2d 1184 (Fla. 1992), and with *Community Blood Centers of South Florida v. Damiano*, 697 So. 2d 948 (Fla. 4th DCA 1997).

SUMMARY OF ARGUMENT

The First District's opinion, in effect, overrules this Court's holding in *Silva* that a blood bank that acts merely as a supplier of blood does not provide medical treatment or care to a recipient of the blood. The First District's opinion conflicts with *Damiano*, which followed *Silva*. The First District's opinion also conflicts with the principle that presuit notice requirements should be narrowly construed. The result here would deny the constitutionally guaranteed right of access to court to individuals who have no contact or relationship with a blood bank other than as recipients of a blood banks' tainted blood.

ARGUMENT

The First District's decision that individuals who receive contaminated blood from blood banks must comply with medical malpractice presuit requirements conflicts with *Silva* and *Damiano*.

A. Standard of Review.

This Court determines as a matter of law if there is jurisdiction. The district court opinion does not have to identify the conflict to create jurisdiction. *Ford Motor Company v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981).

B. The decision conflicts with *Silva* and *Damiano*.

In *Silva*, this Court made two holdings in determining whether the medical malpractice statute of limitations applied when a blood bank, acting as "merely a

supplier of blood,” is sued. This Court’s analysis began with the recognition that a health care provider is entitled to the two year statute of limitations applicable to medical malpractice actions only if the health care provider is being sued for negligent diagnosis, treatment, or care of a patient. This Court held that blood banks who merely supply blood products to a treating hospital do not provide diagnosis, treatment, or care to the blood recipient.

The Court went on to state that its determination that a blood bank did not provide diagnosis, care, and treatment to a blood recipient would be controlling in *all* cases where the blood bank was “merely a supplier of blood.” 601 So. 2d at 1189. This Court, however, acknowledged that there could be cases where the blood bank did not merely supply blood, but actually provided diagnosis, treatment, or care. The Court held that in *those* cases, the statute’s applicability would depend on whether the blood bank also met the second prong of the analysis; i.e., whether a blood bank is a “health care provider,” and held it was not. 601 So. 2d at 1189.

Relying on *Silva*, the Fourth District Court of Appeal in *Damiano* held that the pre-suit requirements of Chapter 766 do not apply to blood banks in an action arising from supplying contaminated blood to blood recipients. In such cases, the court held that construing the Medical Malpractice Act as requiring that presuit notice be given to a blood bank, would be to engraft a requirement of presuit notice

through section 766.106, with its extensive provisions for informal discovery and a 90-day investigatory procedure, even though the action does not involve treatment and care by the blood bank. *Id.* at 952. The court went on to note that many of the presuit requirements would be inapplicable to a blood bank being sued as a supplier of blood:

For example, subsection 766.203(2)(a) provides that a plaintiff ‘shall conduct an investigation to ascertain that there are reasonable grounds to believe that: (a) Any named defendant in the litigation was negligent in the *care and treatment of the claimant*.... Because a blood bank that only supplies blood is involved in neither care nor treatment, *see Silva*, a plaintiff would be unable to comply with this provision with regard to such blood bank defendants. This is further evidence that the presuit requirements were never intended to apply to a blood bank being sued as a supplier of blood.

Id. at 952.

The Petitioner’s case exemplifies the accuracy of *Damiano*’s reasoning that presuit requirements cannot logically be applied to blood banks serving merely as the suppliers of blood. Health care providers, *other than a blood bank serving as the supplier of blood*, are in privity with their patients and, as a result, these patients/claimants are entitled to their own medical records, and therefore have the ability to comply with the reasonable investigation requirements contained in Chapter 766.

A blood bank, however, that just sells its blood to a hospital, which then sells that blood to a claimant, is not in privity with the claimant. Therefore, the claimant has no similar entitlement to the records necessary to conduct a reasonable investigation of the blood collection process. In this case, prior to her lawsuit, all the Petitioner knew was that the Center for Disease Control believed Chase Fitchner had contracted West Nile virus from contaminated blood, which LifeSouth had collected and provided to the hospital (A 3). Neither Petitioner nor her son had any other relationship with the blood bank or the donor. Since Chase Fitchner had no patient relationship with the defendant blood bank, and in light of Florida's statutory confidentiality provisions regarding blood donors for their donations, there were no records available to the Petitioner in presuit that could have been obtained and provided to an expert for the purpose of complying with § 766.203(2)(a). It was not until the trial court ordered the defendant blood bank to produce confidential information, that the Fitchners were able to obtain records and testimony reflecting the blood bank's failure to comply with federal regulations and its own rules during the blood donation process at issue.

In its opinion reversing the jury verdict rendered in this case, the First District held that neither *Silva* or *Damiano* controlled Petitioner's case, first because *Silva's* holding was limited to whether the two-year statute of limitations applied to blood banks, and second because the 2003 amendments to Chapter 766

broadened the act's application to blood banks. However, the fact that blood banks were added within the definition of a "health care provider" in the 2003 amendments to the Medical Malpractice Act, does not reflect a clear expression of legislative intent that they are now entitled to the limitations of that act when they are sued in their capacity as suppliers of contaminated blood and not as providers of medical care or treatment to the claimant. Section 766.203(2)(2003), which addresses presuit investigation of medical negligence claims, still provides that a plaintiff shall conduct an investigation to ascertain that there are reasonable grounds to believe that: (a) Any named defendant in the litigation was negligent in the *care and treatment of the claimant...*" (Emphasis added).

The First District cited to no specific statement in either the 2003 statutory language, or the extensive legislative history, that the legislature intended to overrule *Silva* and *Damiano's* legal conclusion that a blood bank that merely supplies blood is not providing medical care or treatment to the blood recipient. In fact, nothing in the 2003 amendments or legislative history supports the argument that a blood bank, acting as a mere supplier of a blood product, is entitled to any more protection or limitation under the act than any other health care provider.

When the legislature included blood banks within the definition of health care providers in 2003, blood banks obtained the protections and limitations associated with the medical malpractice act for claims by a blood donor who they

actually examine and subject to medical procedures, as well as blood recipients where the blood bank is more than a mere supplier of blood. This is logical since this Court in *Silva* recognized that, there are factual scenarios under which a blood bank *could* render treatment or care to a blood recipient. Examples would include where a blood bank performs the transfusion services, such as blood typing or blood matching, and an injury results from malpractice in those services.

In those cases where the blood bank provided medical care or treatment to the claimant, and was not “merely a supplier of blood,” the blood recipient would be entitled to obtain his or her transfusion records in order to conduct an investigation as to whether there was evidence of medical negligence on the part of the blood bank. However, as recognized in *Damiano*, where blood banks act merely as suppliers of blood, blood recipients have no ability to obtain the records needed to comply with Chapter 766’s presuit requirements because they are not in privity with the blood bank. The 2003 amendments did not change that status.

Although the Defendant blood bank argues that it provides medical services to blood recipients, there is nothing in the record to suggest that it was anything other than a “mere supplier of blood” in this case. LifeSouth acknowledged that it had no contact with Chase Fitchner and knew nothing about him until long after the time that he had received the tainted blood. As a result of this lack of privity, Chase Fitchner and every other individual who is merely the recipient of

contaminated blood from a blood bank, has no ability to conduct a presuit investigation against a blood bank.¹ If the Legislature intended to overrule *Silva* and *Damiano*, it needed to be more explicit, as when it included blood banks within the definition of health care providers.

This Court holds that a *narrow* construction of the medical malpractice presuit notice requirements honors the principle that statutes restricting access to the court must be strictly construed in a manner that favors access. *See Weinstock v. Groth*, 629 So. 2d 835 (Fla. 1993). Unfortunately, the practical effect of the First District's interpretation of the 2003 amendments to Chapter 766 will unconstitutionally deny any Floridian who receives blood products from a blood bank, while having no other connection with that blood bank, from any access to court, even though the blood they received from that blood bank was diseased or contaminated as a result of negligent screening by that blood bank.

This Court has recognized that in order to find a violation of the right under the state constitution to access the courts, it is not necessary for the statute to produce a procedural hurdle that is absolutely impossible to surmount, only one that is significantly difficult. *Mitchell v. Moore*, 786 So 2d 521, 527 (Fla. 2001).

¹ Lacking any specific language in the statute overruling the mere supplier holding of *Silva*, the First District cited out-of-state cases (A 11-12). Of course, these cases are not relevant to the Florida statute, or the holding in *Silva*. Some of them predated *Silva* and so, if persuasive, would have produced a different result in *Silva*.

If, as the First District's opinion holds, the Legislature intended for blood banks to be entitled to the presuit requirements set forth in Chapter 766, when they are merely the suppliers of blood, then blood recipients face a procedural hurdle that is impossible to surmount as recognized by the Fourth District Court of Appeal in *Damiano, supra*.

CONCLUSION

Petitioner, Kaynan Fitchner, as Personal Representative of the Estate of Chase Fitchner, respectfully requests this Court accept jurisdiction in this case on the basis of conflict with *Silva* and *Damiano*.

Respectfully submitted,

RAYMOND T. ELLIGETT, JR.
Florida Bar No. 261939
AMY S. FARRIOR
Florida Bar No. 684174
Buell & Elligett, P.A.
3003 W. Azelee Street,
Suite 100
Tampa, Florida 33609
813-874-2600 (telephone)
813-874-1760 (facsimile)

DEAN R. LeBOEUF
Florida Bar No. 0328715
RHONDA S. BENNETT
Florida Bar No. 0854360
Brooks, LeBoeuf, Bennett, Foster
& Gwartney, P.A.
909 East Park Avenue
Tallahassee, Florida 32301
850-222-2000 (telephone)
850-222-9757 (facsimile)

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: ROBERT E. BIASOTTI, ESQ., CHRISTINE R. DAVIS, ESQ., and J. CELESTE BURNS, ESQ., Carlton Fields, P.A., P. O. Box 2861, St. Petersburg, Florida 33731-2861; and THOMAS J. GUILDAY, ESQ. and CATHERINE B. CHAPMAN, ESQ., Guilday, Tucker, Schwartz & Simpson, P.A., P.O. Box 12500, Tallahassee, Florida 32317-2500, on January ____, 2008.

Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared using 14-point Times New Roman type, a font that is proportionately spaced.

Attorney

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