IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

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

Petitioner,

vs. S.C. CASE NO.: SC08-174

LIFESOUTH COMMUNITY BLOOD CENTERS, INC.,

Respondent.
________________________________/

PETITIONER'S INITIAL BRIEF

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. THE PRESUIT NOTICE AND SCREENING REQUIREMENTS CONTAINED IN CHAPTER 766, FLORIDA STATUTES, CANNOT LOGICALLY APPLY TO A BLOOD BANK THAT IS MERELY SUPPLYING BLOOD TO A BLOOD RECIPIENT 10

A. Standard of Review. 10

B. The 2003 revisions to Chapter 766 did not overrule the holdings in *Silva* and *Damiano* that a blood bank that is merely the supplier of blood does not provide *care* or t*reatment* as defined by Florida's Medical Malpractice Act. 10

1. Florida's two-prong test for inclusion under Florida's Medical Malpractice Act. 11

2. The Chapter 766 presuit notice requirements do not apply to a blood bank that merely supplies blood to an unknown recipient 13

3. The First District's opinion cites no statutory language or legislative history indicating that the legislature intended to overrule *Silva* or *Damiano* on this point 15

4. The First District's opinion gives blood banks more protection under Chapter 766 than any other "health care provider" 17

C. The First District's statutory analysis was flawed 19

1. Medical Negligence and Medical Malpractice mean the same thing 20

2. The First District's inference the legislature "implied" a relationship between a blood bank and a claimant falls short of a clear express change in this Court's holding that a blood bank does not provide treatment or care 22

3. The legislature refused to recognize a blood bank's procurement of blood as a medical service 24

D. The First District relied on out-of-state cases that conflict with *Silva* 25

E. The First District's holding would deny access to the courts. 28

CONCLUSION 34

CERTIFICATE OF SERVICE 35

CERTIFICATE OF COMPLIANCE 36

TABLE OF AUTHORITIES

CASES

Bradway v. American National Red Cross,
263 Ga. 19, 426 S.E. 2d 849 (1993) 25, 26, 27

Community Blood Centers of South Florida v. Damiano,
697 So. 2d 948 (Fla. 4th DCA 1997)... passim

Crescent Miami Center, LLC v. Florida Dept. of Revenue,
903 So. 2d 913 (Fla. 2005) 16, 23

Doe v. American National Red Cross,
176 Wis. 2d 610, 500 N.W.2d 264 (1993) 26

Doe v. American National Red Cross,
796 F.Supp. 395 (W.D. Wis. 1992)... 26, 27

Doe v. American Red Cross,
322 Or. 502, 910 P.2d 364 (1996) 27

Fassy v. Crowley,
884 So. 2d 359 (Fla. 2d DCA 2004)..24

Hillsborough County Board of County Commissioners v. Public Employees Relations Commission,
424 So. 2d 132 (Fla. 1st DCA 1982) 24

J. B. v. Sacred Heart Hospital of Pensacola,
635 So. 2d 945 (Fla. 1994) 11, 14, 16

Lakeland Regional Medical Center, Inc. v. Allen,
944 So. 2d 541 (Fla. 2d DCA 2006)..18

LifeSouth Community Blood Centers, Inc. v. Fitchner,
970 So. 2d 379 (Fla. 1st DCA 2007) 4, 27

McDonald v. State,
957 So. 2d 605 (Fla. 2007) 10

Miller v. The American National Red Cross,
2006 WL 473750 (N.D. W.Va. 2006) 28

Mitchell v. Moore,
786 So. 2d 521 (Fla. 2001) 29

Mobley v. Hirschberg,
915 So. 2d 217 (Fla. 4th DCA 2005)..18

Nigohosian v. American Red Cross,
838 F.Supp. 371 (N.D. Ill. 1993)..27

Pearlstein v. Malunney,
500 So. 2d 585 (Fla. 2d DCA 1986)..33

Republic National Life Insurance Company v. Valdes,
348 So. 2d 566 (Fla. 3d DCA 1977)..2

Samson v. Greenville Hospital System,
295 S.C. 359, 368 S.E.2d 665 (1988)...27

Silva v. Southwest Florida Blood Bank, Inc.,
601 So. 2d 1184 (Fla. 1992) .... passim

State v. Mitro,
700 So. 2d. 643 (Fla. 1997) 15

Weinstock v. Groth,
629 So. 2d 835 (Fla. 1993) 14, 28, 32

OTHER AUTHORITIES

§672.316, Florida Statutes (2005)........24

§766.102, Florida Statutes (2005)........24

§766.106(1)(a), Florida Statutes (1989) 14

§766.106(1)(a), Florida Statutes (2005) 18

§766.106(2)(a), Florida Statutes (2005) 19

§766.106(2), Florida Statutes (2005)........ 4, 21

§766.106, Florida Statutes (1989)........14

§766.106, Florida Statutes (2005)........20

§766.202(4), Florida Statutes (2003)........16

§766.202, Florida Statutes (1989)........14

§766.202, Florida Statutes (2005)........ 14, 15

§766.203(2)(a), Florida Statutes (2005) 13, 31

§766.203(2), Florida Statutes (2005)........19

§768.57(1)(a), Florida Statutes (1985) 21

Chapter 766........ passim

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 as "Chase Fitchner."

Petitioner refers to the donor who donated the blood involved here as "Donor."

Petitioner refers to the record on appeal by the prefix "R," followed by the volume and page number.

All references to statutes are to Florida Statutes (2005), unless noted.

STATEMENT OF THE CASE AND FACTS

Overview and Statement of the Case.

This case seeks review of a First District opinion reversing a jury verdict and judgment in favor of the Petitioner and remanding the Petitioner's case against LifeSouth to the trial court to dismiss the Complaint for failure to comply with the presuit requirements of Chapter 766, Florida Statutes ("Medical Malpractice and Related Matters"). There should not be any dispute in the facts surrounding the statutory construction issue in this case, but to the extent there are, the Petitioner as the prevailing party in the jury trial is entitled to have all conflicts in evidence and inferences therefrom resolved in her favor.[1]

Petitioner sued LifeSouth for negligently collecting diseased blood contaminated with West Nile Virus. LifeSouth then sold this blood to Shands Hospital, which was Chase's treating hospital (R 1/1-4; 13/2417). The contaminated blood was then transfused into Petitioner's seven-year-old son, Chase. The diseased blood put Chase in a coma and ultimately caused his death (R 13/2417).

---

[1] *See, e.g., Republic National Life Insurance Company v. Valdes,* 348 So. 2d 566 (Fla. 3d DCA 1977).

Pursuant to this Court's holding in *Silva*[2] and the Fourth District Court of Appeal's decision in *Damiano*,[3] that a blood bank, sued merely in its capacity as a supplier of blood, does not render *diagnosis, care* or *treatment* to the blood recipient, Petitioner filed her Complaint as a tort action, and not a suit for medical malpractice. She alleged, *inter alia,* that LifeSouth had negligently failed to implement reasonable screening procedures for the individual donor from whom the infected blood was collected that was transfused into Chase (R 1/3).

LifeSouth responded to Petitioner's Complaint by moving to dismiss based on Petitioner's failure to comply with the presuit requirements of Chapter 766 (R 1/14-19). The trial court denied LifeSouth's motion to dismiss. In its ruling, the court recognized that blood banks are health care providers as contemplated by Chapter 766, but ruled that the acts about which the Petitioner complained did not constitute medical malpractice pursuant to the provisions of that Chapter (R 1/62-63).[4]

---

[2] *Silva v. Southwest Florida Blood Bank, Inc.,* 601 So. 2d 1184 (Fla. 1992).

[3] *Community Blood Centers of South Florida v. Damiano,* 697 So. 2d 948 (Fla. 4th DCA 1997).

[4] As noted below, LifeSouth could have obtained appellate review from this ruling, but did not.

After a two-week trial on the stipulated single issue of donor comprehension (see below), the jury found for the Petitioner, and the trial court entered judgment in favor of the Petitioner (R 13/2426; 16/2921).

LifeSouth appealed and the First District reversed in an opinion reported as *LifeSouth Community Blood Centers, Inc. v. Fitchner*, 970 So. 2d 379 (Fla. 1st DCA 2007). The First District remanded the case to the trial court to dismiss the Petitioner's action for failure to comply with the pre-suit requirements of Chapter 766, leaving Petitioner with no remedy due to the expiration of the statute of limitations.

The opinion certified the case to this Court as containing the following question of great public importance: "Did the presuit notice requirements of §766.106(2), Florida Statutes, apply to a blood bank that is supplying blood to a patient?" The Petitioner filed a notice to invoke jurisdiction based on this certification, and on the basis that the First District's decision conflicted with *Silva* and *Damiano*. This Court accepted jurisdiction in its order of April 24, 2008.

Statement of the Facts.

In August 2002, Chase Fitchner, who was then seven years old, was admitted to Shands Hospital to undergo an umbilical cord transplant for the treatment of a genetic condition known as Fanconi's anemia (R 13/2417). After a

successful transplant but during that hospitalization, Chase received blood which the hospital had purchased from LifeSouth (R 13/2417). Chase contracted West Nile Virus from that blood. The virus caused significant damage and ultimately caused Chase's death in July, 2004 (R 13/2417). An investigation was initiated by the Center for Disease Control, once Chase's problem was diagnosed as West Nile Virus. That investigation confirmed Chase had contracted West Nile Virus from infected blood supplied to the hospital by LifeSouth (R 53/5; 57/695).

LifeSouth opposed Petitioner's efforts to obtain information about the blood donation both before[5] and after suit. Over LifeSouth's objection, the circuit court permitted Petitioner to take a limited videotaped deposition of the Donor, pursuant to a confidentiality order (R 1/138-143). This native Spanish-speaking Donor's deposition demonstrated his difficulty in understanding and reading English (R 56/475-545). His testimony established that LifeSouth had breached blood banking standards when it accepted blood from this Donor despite his inability to comprehend all of the questions on the "single donation record" and the written materials regarding blood donor responsibilities, which were given to him in English (R 55/396-399, 462). The five levels of safety for blood banking include donor interviews, a major purpose of which is to minimize the risk of undetectable

[5] Petitioner's letter requesting presuit information is attached to LifeSouth's "Notice of Correction" filed in the First District on December 7, 2007.

or difficult to detect diseases, which West Nile Virus was at that time (R 55/359, 388-394; 57/690; 58/744).

If a blood donor does not have a good, clear understanding of the screening questions and the written instructions, he should be deferred and his blood should not be taken (R 55/395; 58/744). This standard was acknowledged in the pretrial and amended pretrial compliance filed by LifeSouth, which stated:

> The Defendant denies liability in this case, and affirmatively states that *the issue of liability is limited to whether the LifeSouth personnel who interacted with the implicated donor on September 18, 2002 had clear communication with him during the donor screening process.*

(R 12/2283; 13/2356) (emphasis added).

Before and at trial, LifeSouth and the Petitioner repeatedly agreed that the sole issue for the jury was whether the Donor and LifeSouth personnel had clear enough communication to qualify him as a donor, or whether he should have been deferred based on his limited ability to communicate in English (R 12/2417; 53/4-5; 70/2248, 2250; 71/2349; 74/2486, 2489, 2496, 2499).[6] Based on the agreed limited scope of the trial, the parties also agreed that the Petitioner would not offer evidence that LifeSouth had received an alert shortly before the donation in

[6] LifeSouth attempted to make a broader causation argument when moving for a directed verdict, arguing it had not stipulated, but had agreed the only issue was whether LifeSouth had developed a rapport with the Donor. The court rejected this attempt saying, "What's the difference between an agreement and a stipulation?" (R 67/1956).

question regarding the dangers associated with blood transfusions and West Nile Virus (R 67/1955; 73/2486, 2496, 2499).

At trial, the jury viewed the Donor's videotaped deposition, where he was assisted over 70 times by his wife in translating questions, and where the Donor testified that he had asked for an interpreter and documents written in Spanish on his first donation, but was told neither was available, yet he was permitted to donate blood anyway (R 56/475-545).

LifeSouth donor screeners testified that if they had known the Donor requested a Spanish interpreter and Spanish documents prior to his first donation, they would have deferred him on subsequent donations, and not doing so violated LifeSouth's own rules (R 56/462; 59/845-846; 64/1547, 1562, 1572; 65/1740; 66/1851; Pl. Ex. 6, pp. 2-3).

When LifeSouth wanted to inform the Donor that he had been exposed to the West Nile Virus, it sent him that letter in Spanish (R 59/841-843).

The jury, on the stipulated single issue of donor comprehension, found that LifeSouth had negligently collected blood from the Donor, and the trial court entered judgment in favor of the Petitioner (R 13/2426; 16/2921).

SUMMARY OF ARGUMENT

This Court held in *Silva* that (1) a blood bank that merely supplied blood was not providing treatment, diagnosis or care, and that (2) a blood bank was not a health care provider as then defined by Florida Statutes. In 2003, the legislature overturned the second holding in *Silva* by defining blood banks as health care providers, but did nothing to change the first holding.

The First District erred by treating the 2003 amendments as reversing *Silva*'s "care or treatment" holding, and by requiring Petitioner to comply with the presuit notice and screening requirements set forth in Chapter 766, when LifeSouth provided no care or treatment to Chase Fitchner. Since Chase Fitchner did not receive care or treatment from LifeSouth, Petitioner had no ability to comply with the Florida medical malpractice presuit requirements.

The First District's opinion gives blood banks more protection under Chapter 766 than that enjoyed by any other health care provider because it eliminates the requirement that the blood banks provide treatment or care to the claimant before enjoying the protections of Florida's Medical Malpractice Act.

As a result, the First District's opinion effectively denies any Florida citizen who is injured as a result of a blood bank's negligent procurement of blood, his or her constitutional right to access the courts. In this case, the First District has left Petitioner with no remedy, despite a jury determination that LifeSouth negligently

collected blood that was ultimately transfused into Chase Fitchner, causing his death.

ARGUMENT

I. THE PRESUIT NOTICE AND SCREENING REQUIREMENTS CONTAINED IN CHAPTER 766, FLORIDA STATUTES, CANNOT LOGICALLY APPLY TO A BLOOD BANK THAT IS MERELY SUPPLYING BLOOD TO A BLOOD RECIPIENT.

A. Standard of Review.

This Court reviews de novo the district court's decision on the issue of statutory interpretation. *McDonald v. State*, 957 So. 2d 605, 610 (Fla. 2007). As noted, the Petitioner as the party who prevailed before the jury is entitled to have any conflicts in the evidence or inferences therefrom resolved in her favor.

B. The 2003 revisions to Chapter 766 did not overrule the holdings in *Silva* and *Damiano* that a blood bank that is merely the supplier of blood does not provide *care* or t*reatment* as defined by Florida's Medical Malpractice Act.

The 2003 revisions of Chapter 766 did not amend the relevant presuit requirements of that chapter, or reverse this Court's holding in *Silva* that a blood bank that is merely the supplier of blood does not provide care or treatment. Therefore, the First District erred when it concluded the 2003 amendments overruled *Silva* and *Damiano*'s holding that a blood bank that merely sells a product does not provide treatment or care to a patient.

It is irrelevant in *this* case that LifeSouth is now defined as a "health care provider" because LifeSouth, sued merely in its capacity as a supplier of blood, still did not provide *care* or *treatment* to *the claimant* (Chase Fitchner). Because LifeSouth did not provide *care* or *treatment* to Chase Fitchner, Petitioner's claim is not one for medical malpractice for Chapter 766 purposes, and the notice and presuit screening requirements are inapplicable. *See J. B. v. Sacred Heart Hospital of Pensacola,* 635 So. 2d 945 (Fla. 1994).

1. Florida's two-prong test for inclusion under Florida's Medical Malpractice Act.

In *Silva,* this Court reviewed consolidated cases involving actions brought against a blood bank to recover damages on behalf of blood recipients who contracted HIV after receiving transfusions with blood products supplied by the defendant blood bank. The issue was whether blood banks are subject to the two-year statute of limitations for medical malpractice suits or the four-year negligence statute of limitations. In resolving this issue, the Court applied a two-prong analysis: (1) whether the action arose out of any medical diagnosis, *care*, or *treatment* and (2) whether such diagnosis, treatment, or care was rendered by a "provider of health care." This Court determined that the second prong need only be addressed in those cases where the first prong was answered in the affirmative.

Because the terms "diagnosis," "care" and "treatment" were not specifically defined in the statutes, this Court held that the 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. This parallels the dictionary definitions of those terms. According to *Webster's Third International Dictionary* (1981), 'diagnosis' means 'the art or act of identifying a disease from its signs and symptoms.' 'Treatment' means 'the action or manner of treating a patient medically or surgically.' 'Care' means 'provide for or attend to needs or perform necessary personal services (as for a patient or child).' Likewise, in medical terms, 'diagnosis' means '[t]he determination of the nature of a disease.' 'Treatment' means '[m]edical or surgical management of a patient.' And 'care' means 'the application of knowledge to the benefit of…[an] individual.

601 So. 2d at 1187 (citations omitted).

In applying the ordinary meaning of the relevant terms to their facts, this Court noted that under the allegations of both cases under review, the defendant blood bank had sold the blood product to the treating hospitals, which in turn sold it to the plaintiffs. Based on those facts (the same facts present for Chase Fitchner) this Court held that a blood bank that is merely a supplier of blood does not provide diagnosis, care or treatment to the blood recipient. This Court explained that:

> Neither the blood bank nor any of its employees had any knowledge or information about the recipients' medical conditions. [The blood

> bank] played no role in determining the nature of the plaintiff patients' illnesses, did not treat those patients, and did not attend to the personal needs of those patients. . . . Although there may be statutes and regulations governing the internal operations of blood banks, as to the specific plaintiffs in this case, [the blood bank] was merely the supplier of a product.

Id. at 1187.

This Court held that its determination that the blood bank did not render diagnosis, care or treatment to the plaintiff blood recipients would be controlling in **all** cases where the blood bank was merely a supplier of blood. *Id.* at 1189.

2. The Chapter 766 presuit notice requirements do not apply to a blood bank that merely supplies blood to an unknown recipient.

Based on the analysis set forth in *Silva*, the Fourth District Court of Appeal in *Damiano* held that the presuit requirements of Chapter 766 do not apply to blood banks that merely supply blood to blood recipients. Relying primarily upon §766.203(2)(a), which provides that a plaintiff "shall conduct an investigation to ascertain that there are reasonable grounds to believe that: any named defendant in the litigation was negligent in the *care and treatment of the claimant* . ..," the court determined that a blood recipient would be unable to comply with presuit requirements in cases against blood banks that were merely suppliers of blood, because the blood banks would have provided neither *care* nor *treatment* to the *claimant*. *Id.* at 952. The court noted that its holding was "in accord with the

principle that statutes restricting access to the courts must be strictly construed in a manner that favors access." *Weinstock v. Groth,* 629 So. 2d 838 (Fla. 1993); *Silva,* 601 So. 2d at 1189." *Id.*. at 952.

Damiano is consistent with *J.B. v. Sacred Health Hospital of Pensacola,* 635 So. 2d 945 (Fla. 1994), where this Court addressed the language of the notice and presuit screening requirements set forth in §766.106, Florida Statutes (1989), which defined "claim for medical malpractice" as a "claim arising out of the rendering of, or the failure to render, medical care or services." It also cited to §766.202, Florida Statutes (1989), which defined "medical negligence," as "medical malpractice, whether grounded in tort or in contract." This Court held that "[r]eading these two sections in conjunction, we conclude that chapter 766's notice and presuit screening requirements apply to claims that 'aris[e] out of the rendering of, or the failure to render, medical care or services.'§766.106(1)(a), Fla. Stat. (1989)." 635 So. 2d at 948-949. The Court concluded that where the plaintiff's complaint did not allege that the defendant *hospital* (a health care provider as defined by §766.202) was negligent in the rendering of, or the failure to render, medical care or services *to the plaintiff*, the complaint did not state a medical malpractice claim for chapter 766 purposes.

3. The First District's opinion cites no statutory language or legislative history indicating that the legislature intended to overrule *Silva* or *Damiano* on this point.

In its decision below, the First District held that neither *Silva* nor *Damiano* controlled Petitioner's case, first because *Silva's* holding was limited to whether the medical malpractice statute of limitations applied to blood banks, and second because the 2003 amendments to Chapter 766 broadened the act's application to blood banks. 970 So. 2d at 379.

The Petitioner has always acknowledged that §766.202 was amended in 2003 to include blood banks within the definition of a "health care provider." However, this amendment did not reverse this Court's additional requirement set forth in *Silva,* requiring that blood banks like LifeSouth also provide "care" or "treatment" to claimants (like Chase Fitchner), before they are entitled to the presuit notice and screening provisions set forth in Chapter 766.

The definition of the terms "*care*" and "*treatment*" were addressed in *Silva.* Because the terms "*care*" and "*treatment*" are not defined in Chapter 766, one looks to this Court's decision regarding the meaning of those terms, and their plain meaning, discussed in *Silva*, as quoted above. *See State v. Mitro,* 700 So. 2d 643, 645 (Fla. 1997).

This case does not involve a factual situation, where LifeSouth rendered "care" or "treatment" to Chase. Indeed, LifeSouth has never suggested that it

provided any service to Chase, other than selling blood products to his treating hospital.[7] Thus, under the two-prong analysis set forth in *Silva* and followed in *Damiano*, it is irrelevant that LifeSouth now meets the definition of a "health care provider" pursuant to §766.202(4), Florida Statutes (2003).

A health care provider who does not render medical care or services to *the claimant* is not entitled to Chapter 766's presuit notice and screening requirements. *J. B. v. Sacred Heart Hospital of Pensacola,* 635 So. 2d at 949. The fact that blood banks are now included in the definition of "health care provider" does not alter the relationship between the blood recipient and the blood bank or otherwise metamorphose the blood bank's activities into "care" or "treatment" of the "claimant," when the blood bank merely supplied its product to the hospital.

"The legislature is presumed to know the existing law when a statute is enacted, including 'judicial decisions on the subject concerning which it subsequently enacts a statute.'" *Crescent Miami Center, LLC v. Florida Dept. of Revenue,* 903 So. 2d 913, 918 (Fla. 2005). In *Crescent* this Court also held that, "without any clear express changes on the statute's face, the amendment did not recede from our decisions rendered prior to the amendment's enactment." *Id.* Similarly, here there is no clear, express change in Chapter 766 that recedes from

[7] As discussed below, in other situations a blood bank might provide services to the patient, such as blood matching.

Silva's holding that a blood bank acting merely as a supplier of blood does not provide medical care or treatment to the blood recipient. The First District erred when it treated the 2003 amendments as receding from this Court's decision in *Silva* and the Fourth District's decision in *Damiano.*

4. The First District's opinion gives blood banks more protection under Chapter 766 than any other "health care provider."

In reality, as written, the First District's ruling gives blood banks more protection under Chapter 766 then any other "health care provider." A blood bank that is acting merely as the supplier of blood does not have any contact with the claimant, it has no knowledge about the claimant's identity, condition, diagnosis, or treatment, and it renders no care or treatment to the claimant. Despite these facts, the First District held that blood banks, in their capacity as suppliers of blood, are entitled to the presuit protections of Chapter 766.

If a blood bank did provide "care" or "treatment" to "a 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 (for example, if a claim arose from an error a blood bank made in matching blood types for a specific patient). However, as was true in this case and as was recognized in *Damiano,* where a blood bank is acting merely as the supplier of blood, a blood

recipient would 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. Under HIPAA[8] and applicable blood donor confidentiality statutes, a blood recipient has no legal entitlement to records of an implicated blood donor in the absence of a court order issued after a finding of good cause, or a release signed by the donor. The 2003 amendments did nothing to alter these facts.

The 2003 amendment defining blood banks as health care providers did not transform their every act to one of providing care or treatment. "The alleged wrongful act must be directly related to the improper application of medical services to the patient and the use of professional judgment or skill." *Mobley v. Hirschberg,* 915 So. 2d 217 (Fla. 4th DCA 2005). *See also, e.g., Lakeland Regional Medical Center, Inc. v. Allen,* 944 So. 2d 541 (Fla. 2d DCA 2006) (action against hospital for the wrongful death of a patient who developed food poisoning during his hospital admission after being served a tainted sandwich was not premised on medical malpractice, but rather was a general negligence suit, and Chapter 766 presuit requirements did not apply).

Allen cited *Silva* and the definition of medical malpractice in §766.106(1)(a). *Allen* confirms that because LifeSouth did not provide any treatment, diagnosis or

---

[8] Health Insurance Portability and Accountability Act of 1996.

care to Chase Fitchner, but merely supplied a tainted product, Petitioner's claim is not one for medical malpractice.[9]

C. The First District's statutory analysis was flawed.

The First District's reliance on changes to the Medical Malpractice Act, made after the *Silva* and *Damiano* opinions, is misplaced. Before and after the 2003 amendments, claimants must complete a presuit investigation pursuant to §766.203(2) before they can provide presuit notice to a prospective defendant. *See* §766.106(2)(a). The investigation, and hence the notice, requires reasonable grounds to believe that the prospective defendant was negligent in the *care* or *treatment* of the claimant. Failure to comply with the presuit investigation requirements in a medical malpractice case will result in dismissal of the complaint.

[9] A blood bank differs from health care providers who *do* provide treatment, diagnosis or care, but who do not have face-to-face contact with a patient. For example, the pathologist who reads the tissue and the radiologist who reads the x-ray are both participating in the treatment, care and diagnosis of that particular patient. By contrast, as this Court held in *Silva*, LifeSouth sold a product, not knowing who would receive it. As LifeSouth's director testified, confidentiality rules dictated it should not know the name of the patient (R 64/1622). LifeSouth also did not know the identity, or the condition of, two other blood recipients who received portions of this same contaminated blood donation nor did it know what effect this contaminated blood had on their condition (R 62/1297-1298).

1. Medical Negligence and Medical Malpractice mean the same thing.

The First District's analysis of the 2003 revisions to Chapter 766 does not support its holding that *Silva* and *Damiano* do not control the outcome of this case.

The First District began its analysis by describing what it called a change in the scope of Chapter 766 from "medical malpractice" to "medical negligence." 970 So. 2d at 382. The First District misconstrued the definition in §766.106 as something more than the legislative clarification that a claim for "medical negligence" and a claim for "medical malpractice" mean the same thing, *i.e.*, "a claim arising out of the rendering of, or failure to render, medical care or services."[10]

Adding the term "medical negligence" and defining it the same way that "medical malpractice" was defined did not broaden the scope beyond "medical care or services" – which remained the operative terms. In other words, whether called a claim for medical negligence or a claim for medical malpractice, to be subject to presuit a claim must still arise out of the provision of "medical care or

---

[10] The revised section, using the strikethrough and bolding to represent deletions and additions by the First District reads as follows: "(a) 'Claim for medical **negligence**~~malpractice'~~ **or claim for medical malpractice'** means a claim, arising out of the rendering of, or failure to render, medical care or services."

services." LifeSouth provided neither medical care nor medical services to Chase Fitchner. Rather, as this Court held in *Silva*, LifeSouth sold a product.[11]

In its opinion, the First District relied on amendments to §766.106(2) requiring presuit notice, which again simply substituted the term "medical negligence" for "medical malpractice." But the definition remained the same -- namely, a failure to render medical care or services.

The opinion quoted the added requirement that the claimant provide each prospective defendant a list of health care providers the claimant saw for the injuries complained of subsequent to the alleged act, and providers the claimant saw during the two-year period before the alleged act of negligence, who "treated or evaluated the claimant." The First District did not offer any explanation as to how this addition overruled *Silva*. In fact, the added language in the statute reinforced that "treatment or evaluation of the claimant" is a required element before a health care provider can enjoy the limitations and protections afforded health care providers under Chapter 766.

After citing these sections, the First District concluded, "It appears that the purpose of the change was to remove the focus of the chapter from traditional

---

[11] The definition of a claim for medical malpractice as a claim arising out of the rendering or failure to render *medical care or services* was a condition precedent of medical malpractice presuit screening long before *Silva* was decided. §768.57(1)(a), Florida Statutes (1985) (emphasis added).

medical malpractice to all situations of medical negligence *involving diagnosis, treatment, and care*." 970 So. 2d at 32 (emphasis added). This conclusion makes Petitioner's point. LifeSouth did not *diagnose* Chase Fitchner, LifeSouth did not *treat* Chase Fitchner, and LifeSouth did not provide any *care* to Chase Fitchner. LifeSouth did not know Chase Fitchner and did not know what was wrong with him or even why he needed blood. In fact, LifeSouth did not know who would be receiving the diseased blood that it sold to the hospital. By merely supplying blood to the hospital, LifeSouth did not provide *treatment* or *care* to Chase Fitchner and, thus, the claim does not constitute "medical malpractice" (medical negligence).

2. The First District's inference the legislature "implied" a relationship between a blood bank and a claimant falls short of a clear express change in this Court's holding that a blood bank does not provide treatment or care.

The First District's conclusion that by 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" is not sufficient to overrule this Court's clear holding in *Silva* that being a health care provider and providing treatment or care are two separate legal issues. 970 So. 2d at 383. Purporting to divine an "implied" relationship falls far short of the "clear express

changes on the statute's face" that this Court requires to recede from its decisions. *Crescent Miami Center*, 903 So. 2d at 918.[12]

The First District also relied on federal regulations, requiring that blood be collected under the supervision of a physician, to support its holding that the screening of blood from a blood donor is part of medical services to the ultimate recipient of that blood product. However, the First District failed to recognize that those same federal regulations existed at the time this Court decided *Silva.* 970 So. 2d at 383. Simply because a physician is involved in the blood collection process does not mean that a blood bank is providing treatment or care to a recipient. This Court rejected such supervision arguments in *Silva*: "Although there may be statutes and regulations governing the internal operations of blood banks, as to the specific plaintiffs in this case, [the blood bank] was merely the supplier of a product." *Id.* at 1187.[13]

---

[12] Petitioner does not, as the First District suggests, maintain that the 2003 amendment adding blood banks to the definition of "health care provider" would only apply to the blood bank-donor relationship. 970 So. 2d at 383. Beyond claims arising from malpractice upon donors, as *Silva* recognized, there are situations in which the blood bank could render treatment or care to a blood recipient. For example, when a blood bank performs the transfusion services, such as blood typing or blood matching, for a particular blood recipient, the blood bank could be a medical negligence defendant if an injury resulted from malpractice in providing those services.

[13] That this Court rejected this argument is evident from the amici briefs and the reply brief in *Silva*, of which this Court may take judicial notice. *See, e.g.,*
(Continued....)

3. The legislature refused to recognize a blood bank's procurement of blood as a medical service.

The First District's flawed statutory analysis is confirmed by the blood banking industry's own realization that the 2003 amendments did not define the collecting of blood as providing medical treatment or care. The blood banking industry repeatedly attempted to have the procurement of blood declared to be the rendering of a "medical" service by the Florida Legislature, but were unsuccessful. A bill was introduced in 2003 that would have amended §672.316 to declare the procurement of blood to be a "medical" service, but the legislature did not so amend the statute (R 15/2823, 2832-33).

After LifeSouth's motion to dismiss based on the presuit statute in this case was denied, rather than exercising its right to appellate review of that issue,[14] LifeSouth and the blood banking industry lobbied for a bill that would have amended §766.102. The sought-after amendment provided that the collection, etc., of blood from donors constituted a professional medical service and any claim of negligence pertaining to these activities was a medical negligence claim (R 15/2823, 2834-2838). Those attempts to amend Chapter 766 also failed.

(Cont'd.)
Hillsborough County Board of County Commissioners v. Public Employees Relations Commission, 424 So. 2d 132 (Fla. 1st DCA 1982).

[14] *See, e.g., Fassy v. Crowley,* 884 So. 2d 359 (Fla. 2d DCA 2004)(certiorari jurisdiction when Chapter 766 presuit requirements are at issue).

Thus, contrary to the First District's opinion, the changes that have been made in Chapter 766 do not demonstrate that the legislature has redefined the blood bank's supplying of a product to be a "medical" service to a patient (or treatment, diagnosis and care). On the contrary, the legislature's refusal to amend the statute as the blood banking industry sought confirms that the legislature rejected this position.

D. The First District relied on out-of-state cases that conflict with *Silva.*

The First District opinion did not explain why it felt it should cite to, and rely upon, decisions from other states given the specific Florida Statutes and Florida case law in *Silva* and *Damiano*, 970 So. 2d 383-384. The out-of-state decisions cited by the First District actually conflict with this Court's holding in *Silva,* and they rely on their own individual state statutes.

The First District quotes extensively from a Georgia decision, *Bradway v. American National Red Cross,* 263 Ga. 19, 426 S.E. 2d 849 (1993). *Bradway* applied Georgia's medical malpractice statutes and used a simplistic analysis to hold that when the collection of blood is overseen by medical professionals, it is a medical malpractice claim in Georgia. 426 S.E.2d at 851. As noted, these oversight requirements existed in Florida at the time *Silva* was decided, and thus provide no basis to deviate from *Silva*.

In relying on *Bradway*, the First District may have overlooked that *Bradway* relied on *Doe v. American National Red Cross*, 796 F.Supp. 395 (W.D. Wis. 1992), which dismissed a plaintiff's claim against the blood bank for contracting HIV from tainted blood based on the holding that the claim was one for medical malpractice. The supreme court in Wisconsin, however, reversed the lower court holding in *Doe* when the case was certified, in *Doe v. American National Red Cross,* 176 Wis. 2d 610, 500 N.W.2d 264 (1993). The Wisconsin Supreme Court rejected the blood bank's argument that its activities were tied to the diagnosis, treatment and care of patients who received the blood. 500 N.W.2d at 267. The court also observed that many pharmaceutical companies supply drugs that are vital in helping to ensure the health of patients, yet those patients would not be subject to the medical malpractice statutes.

The Wisconsin Supreme Court said it found persuasive the reasoning of other courts in similar cases that concluded blood banks do not provide health care to blood transfusion recipients. Among the decisions it cited with approval was this Court's opinion in *Silva*. 500 N.W.2d at 267. The Wisconsin court said it found unpersuasive cases reaching a contrary decision, and cited *Bradway*. 500 N.W.2d at 267. Thus, the lead foreign case on which the First District relied was undermined by the Wisconsin Supreme Court's reversal of its lower court decision.

In aligning itself with *Silva* and other cases reaching a similar result, the Wisconsin Supreme Court noted disagreement with other cases besides *Bradway*, most of which are cited in *Bradway* and by the First District in its opinion. *Compare Doe,* 500 N.W. 2d at 267; *Bradway*, 426 S.E.2d at 851; *Fitchner,* 970 So. 2d at 384.[15]

The First District cited *Doe v. American Red Cross Blood Services*, quoting its statement that the transfusion of blood is characterized as a medical service. 970 So. 2d at 384. This South Carolina decision cited to an earlier decision by the court, which relied on South Carolina's blood shield statute. *Samson v. Greenville Hospital System,* 295 S.C. 359, 368 S.E.2d 665 (1988). The statute on which both these opinions rests specifically defines the procurement and distribution of blood as a "*medical* service." 368 S.E.2d at 666. As noted above, this is one of the changes the blood banking industry in Florida unsuccessfully attempted. Florida's

---

[15] *See also, e.g., Doe v. American Red Cross,* 322 Or. 502, 910 P.2d 364, 368 (1996)(a person who provides a prepared product, such as blood, for general use in medical procedures does not thereby undertake medical treatment); *Nigohosian v. American Red Cross,* 838 F.Supp. 371 (N.D. Ill. 1993)(rejecting blood bank's argument that claim against it for providing contaminated blood required the plaintiff to satisfy the statute requiring a malpractice plaintiff to consult with a professional and file an affidavit).

legislature rejected this, when it refused to redefine the procurement of blood as a "medical" service in Florida.[16]

E. The First District's holding would deny access to the courts.

The First District's holding conflicts with this Court's directions on how to construe the medical malpractice presuit notice requirements. A *narrow* construction of the medical malpractice presuit notice requirements is required in order to follow the principle that statutes restricting access to court must be strictly construed in a manner that favors access. *See Weinstock v. Groth,* 629 So. 2d 835, 838 (Fla. 1993).

The practical effect of the First District's interpretation of the 2003 amendments to Chapter 766 will unconstitutionally deny any Floridian who receives diseased blood products from a blood bank, while having no other connection with that blood bank, from any access to the courts, even though the blood received from that blood bank was negligently procured in violation of prevailing safety standards for the collection of blood.

---

[16] The First District also misplaced its reliance on *Miller v. The American National Red Cross,* 2006 WL 473750 (N.D. W.Va. 2006). As even a cursory reading of the cited statutes demonstrate, the West Virginia statute differs from Florida's. Further, *Miller* did not address the blood bank, but rather whether presuit was required for the hospital that provided the blood to the patient.

This Court recognizes that in order to find a violation of the right under the state constitutional guarantee of access to 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). If, as the First District's opinion holds, the legislature intended for blood banks to be entitled to the presuit notice and screening 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. This insurmountable hurdle was recognized in *Damiano:*

> Construing the Medical Malpractice Reform Act as requiring that presuit notice be given to a blood bank, as a condition precedent to maintaining an action arising from supplying contaminated blood, 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 for both plaintiffs and blood banks, even though the action does not involve treatment and care by the blood bank.

Id., 697 So. 2d at 952. The 2003 amendments to Chapter 766 did nothing to remove this hurdle.

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 mere supplier of blood,* are in privity with their patients, and as a result, these

patients/claimants are entitled to their own medical records and can, therefore, comply with the investigative requirements contained in Chapter 766.

However, a blood bank that sells its blood to a hospital and has no other knowledge or connection with the ultimate recipient of that blood, is not in privity with the claimant/recipient. In this case, LifeSouth merely supplied blood to the hospital. LifeSouth had no idea who was going to get the blood that it provided to the hospital and had no knowledge as to why the recipient (Chase Fitchner) needed blood. Thus, the claimant/blood recipient (in this case, Chase Fitchner) had no similar entitlement to the evidence necessary to conduct a reasonable investigation of the blood collection process, including, but not limited to, whether the blood donor was properly screened by the blood bank.

Prior to initiating her lawsuit, which alleged a cause of action based on negligent screening of the infected donor, Petitioner obtained Chase Fitchner's own medical records from the treating hospital. These records confirmed that Chase Fitchner had contracted West Nile Virus from a transfusion of blood supplied to the hospital by LifeSouth (R 60/894). Because neither Petitioner nor her minor son had any relationship with the blood bank or the infected donor, she had no legal right, prior to filing suit, to confidential information in the possession of LifeSouth regarding the individual donor at issue. Thus, there was no presuit

discovery available to the Petitioner that she could obtain and provide to an expert for the purpose of complying with §766.203(2)(a).

The unavailability of this information in presuit is substantiated by the fact that, even after filing her Complaint, LifeSouth sought a protective order preventing the discovery of **any** information, even redacted information, regarding the implicated donor (R 1/30-38). It was not until Petitioner obtained a court order allowing her to depose the implicated donor and obtain confidential documentation from LifeSouth, that she was able to obtain the necessary evidence to support her allegations that LifeSouth had negligently screened the individual donor in violation of prevailing blood bank safety standards.

Even if LifeSouth had provided its pre-donation screening documentation regarding the donor, this documentation standing alone would not have provided notice to the Petitioner that LifeSouth had negligently screened the donor. LifeSouth's pre-donation documentation was void of any references to the Donor's communication difficulties, his request for a Spanish interpreter or even his request for documents in Spanish (R Ex. P, Plaintiff's exhibits 11-24). The Petitioner had no idea that the Donor was Spanish or that he had any communication difficulties until he appeared for his deposition.[17] LifeSouth acknowledged, in a post-trial

[17] LifeSouth knew of the Donor's communication problems from the beginning. It is undisputed that the Donor asked for a translator and Spanish forms

(Continued....)

hearing regarding the applicability of Chapter 766 presuit notice and screening requirements, that Petitioner would not have had presuit access to any information regarding the Donor's comprehension level, the key issue in this case. LifeSouth admitted this information was not discoverable prior to taking the Donor's deposition (R 75/2689-2692).

When the trial court recognized that the Donor was the only person who could provide the Petitioner with relevant information regarding the viability of her claim of negligent screening, the Petitioner was finally able to uncover the facts supporting her claim. If the trial court had required Petitioner to comply with Chapter 766's presuit requirements, an impossible procedural hurdle under the circumstances of the case, she would have been denied her right to access the court, and LifeSouth's negligence would never have been discovered.

In *Weinstock v. Groth,* 629 So. 2d 835 (Fla. 1993), this Court stated that "the purpose of the Chapter 766 presuit requirements is to alleviate the high cost of medical negligence claims through *early determination and prompt resolution of claims, not to deny access to the courts....*" 629 So. 2d at 838 (emphasis added). In this case, LifeSouth, if it truly felt it had a right to Chapter 766 presuit protection,

---

(Cont'd.)
prior to his first donation and that these requests were refused by LifeSouth. Then, after his last donation, when LifeSouth felt it was important for the Donor to understand what it was trying to communicate with him, LifeSouth sent him a letter in Spanish, advising that he had been exposed to the West Nile Virus.

had the right to immediate appellate review of the trial court's denial of its Chapter 766 Motion to Dismiss. Instead, LifeSouth participated in two years of discovery and a two-week jury trial culminating with a jury verdict in favor of Petitioner.

The First District's order to remand this case to the trial court to now dismiss the Complaint for failure to comply with Chapter 766's presuit requirements, does not serve the purpose of Chapter 766, and amounts to a tremendous waste of judicial and individual resources. *See Pearlstein v. Malunney,* 500 So. 2d 585, 587 (Fla. 2d DCA 1986) (after fundamentally fair trial it would make no sense to remand for compliance with cost-saving procedures; thus, non-compliance cannot be remedied on direct appeal). In addition, since the statute of limitations has now run, dismissal of the action would effectively deny the Petitioner any remedy.

Denying a blood recipient who is injured as a result of diseased blood the opportunity to discover the relevant facts surrounding his or her injury will remove significant checks and balances that now exist to ensure that blood banks follow the prevailing standards for the safe collection of blood.

CONCLUSION

Petitioner, Kaynan Fitchner, as Personal Representative of the Estate of Chase Fitchner, respectfully requests this Court reverse the First District's opinion in this case, and answer the certified question in the negative.

Respectfully submitted,

____

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)

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)

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: ROBERT E. BIASOTTI, ESQ., Carlton Fields, P.A., P. O. Box 2861, St. Petersburg, Florida 33731-2861; CHRISTINE R. DAVIS, ESQ., Carlton, Fields, P.A., P.O. Box 190, Tallahassee, Florida 32302, and BENJAMIN W. NEWMAN, ESQ., Bobo, Ciotoli, et al., Landmark Center One, Suite 510, 315 E. Robinson Street, Orlando, Florida 32801-1949, Counsel for Respondent; KIMBERLY E. KINSELL, Corporate Counsel, LifeSouth Community Blood Centers, Inc., 4039 Newberry Road, Gainesville, Florida 32607, Corporate Counsel for Respondent; THOMAS J. GUILDAY, ESQ. and CATHERINE B. CHAPMAN, ESQ., Guilday, Tucker, Schwartz & Simpson, P.A., P.O. Box 12500, Tallahassee, Florida 32317-2500, Local Counsel for Amicus America's Blood Center; EDWARD M. MANSFIELD, ESQ., Belin, Lamson, et al., 666 Walnut Street, Suite 2000, Des Moines, Iowa 50309, Amicus Counsel for America's Blood Centers; and LINCOLN J. CONNOLLY, ESQ., Rossman, Baumberger, Reboso & Spier, P.A., Courthouse Tower, 23rd Floor, 44 W. Flagler Street, Miami, Florida 33130-1808, Amicus Counsel for Florida Association of Justice, on June 18, 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