

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 REPLY BRIEF

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ARGUMENT

Introduction.¹

Because LifeSouth failed to record the Donor's language problems in any of its donation records, the trial judge recognized, and LifeSouth's counsel (author of the FABB amicus brief) admitted post-trial, that there was no presuit information available to the Plaintiff that would have exposed the Defendant's negligence (R 75/2689-92). It was only after the Plaintiff was allowed to depose the Donor, over LifeSouth's objection, that the blood bank's failure to comply with prevailing donor screening regulations was revealed.

LifeSouth and its amici revert to arguments this Court rejected in *Silva v. Southwest Florida Blood Bank, Inc.*, 601 So. 2d 1184 (Fla. 1992). LifeSouth also asserts "facts" that were either refuted by the jury verdict, or the record shows are not true. For example, in response to the Plaintiff's presuit request for documents, LifeSouth refused to identify or produce any records related to the unqualified, infected Donor until it was compelled to do so by the trial court (R 72/2410-2411;

¹ Petitioner uses the same references as in her Initial Brief, except that she may also refer to herself as "Plaintiff," and she refers to her Initial Brief by the prefix "IB," LifeSouth's Answer Brief by the prefix "AB," and the amicus briefs by the prefixes "FABB" for the Florida Association of Blood Bank's brief, and "ABC" for the brief on behalf of America's Blood Centers, et al.

AB 6, 32).²

LifeSouth has also chosen to present to this Court the other arguments it asserted in the First District (AB 38-40). This Court has the discretion to review all issues in the appeal. *See, e.g., Tillman v. State*, 471 So. 2d 32 (Fla. 1985). Plaintiff urges it to do so. Six years ago, LifeSouth violated its own safety standards by taking blood from an unqualified donor. It then sold that blood to a hospital. The tainted blood was later infused into an innocent seven-year-old boy. As a result, he suffered for 18 months and then died. The Plaintiffs endured a two-week trial and have waited more than six years for justice. They request that this Court provide them with a final resolution.³

² The amicus briefs both refer to matters outside the record, with the FABB brief including articles in an appendix, presumably so that it can argue facts LifeSouth did not place in the trial record (counsel for the FABB brief was the co-counsel for LifeSouth during the litigation and through the trial. R 53/2; 75/2619). Of course, it is improper for amici to seek to interject new factual material into a record, *e.g., Dade County v. Eastern Air Lines, Inc.*, 212 So. 2d 7 (Fla. 1968), which would warrant this Court disregarding those briefs.

³ To the extent LifeSouth's counsel, in his amicus brief, asserts the verdict threatens the existence of the blood bank, LifeSouth has liability insurance and the record reflects it has \$12 million in unrestricted assets and \$30 million in annual revenues, earned by selling a product for which it pays nothing to the donor suppliers (FABB 6; R 2/357; 14/2598). The damages were supported by unrefuted evidence of a devastating loss. The Plaintiff and her husband sacrificed all they had and provided their son 24-hour-a-day care from the time he was infected with the contaminated blood until he died (R 59/955-957, 962-963, 972-976; 60/1014-1017).

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. Chapter 766 limits the presuit requirements to those cases against health care providers who provided “care” or “treatment” to the claimant.

The requirement for presuit screening and presuit investigation is limited to a defendant who “was negligent in the care or treatment of the claimant.” LifeSouth is wrong when it argues presuit notice is not limited to providers who provide care or treatment to a patient (AB 17).

Section 766.106(2)(a), provides in relevant part: “After completion of presuit investigation *pursuant to s.766.203(2)* and prior to filing a complaint for medical negligence, a claimant shall notify each prospective defendant. . . of intent to initiate litigation for medical negligence.” (emphasis added). In order to complete presuit investigation pursuant to s. 766.203(2), the “claimant 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 or treatment of the claimant.* . .” (emphasis added). Thus, the plain language of §766.106(2)(a), requires presuit notice be given only in those cases where the prospective defendant provided *care or treatment to the claimant.*

B. This Court has already held that blood banks who merely supply blood are providing a product to blood recipients.

In *Silva*, this Court stated that “[a]lthough there may be statutes and

regulations governing the internal operations of blood banks, as to the specific plaintiffs [blood recipients] in this case, [the blood bank] was merely the supplier of a *product*.” *Id.*, at 1187. *Silva* thus rejected the arguments, based on the same statutes and regulations governing the operation of blood banks, that the First District and LifeSouth cite. They have not changed since *Silva* (AB 21; FABB 8; 601 So. 2d at 1187; IB 23).

LifeSouth and its amici do not cite a single, express reference in the legislative history or the 2003 revisions to Chapter 766 that overrules *Silva*’s holding (as would be required to reverse *Silva*)(IB 16, 22-23). LifeSouth relies on the same preamble of Chapter 69-157, Laws of Fla., characterizing the process of collecting and processing human blood for transfusion purposes as a medical service that this Court rejected in *Silva* (AB 19). This Court held Chapter 69-157 has nothing to do with *medical malpractice*, but rather created a “blood shield” statute within Florida’s Uniform Commercial Code to eliminate strict liability against blood banks. The Court concluded, “there is no evidence to suggest that the legislature intended this legal fiction (that selling blood is a ‘service’ rather than a ‘sale’) to apply in any other context.” 601 So. 2d at 1188.

Contrary to LifeSouth’s argument at AB 30, §672.316 of the UCC does *not* indicate that the process of collecting and processing blood is a *medical* service. Both in 1992 when *Silva* was decided, and in 2003, §672.316(5), provided that for

purposes of the UCC, the process of collecting and processing human blood for transfusion is a service and does not constitute a sale. During the 2003 Legislative Session, blood banks lobbied to amend §672.316, to declare this process to be a *medical* service. The bill as enacted, however, *removed* the term *medical*, so that such activities remain merely services that are excluded from implied warranties of merchantability (R 15/2823-24, 2834-2838).⁴

C. The 2003 Amendments to Chapter 766 did not overrule *Silva* and *Damiano*.

LifeSouth seeks to have this Court do something the Florida Legislature twice rejected: blood bank industry efforts to amend the statutes to achieve the result LifeSouth seeks (IB 24). LifeSouth’s trial counsel, in his amicus brief, says perhaps the Legislature felt further revision was unnecessary (FABB 11). This ignores the context of their second effort, which came after LifeSouth’s motion to dismiss based on presuit was denied in Plaintiff’s case, and the blood bank industry informed the Legislature this was the reason for seeking the amendment (R 15/2823-24, 2834-2838).

Lacking any clear statement overruling *Silva* or *Damiano*, LifeSouth cites the change from “medical malpractice” claims to what it characterizes as a broader

⁴ LifeSouth errs in saying the deletion of the language it cites at AB 30 from the statute has any relevance. Neither *Silva* nor *Community Blood Centers of South Florida, Inc. v. Damiano*, 697 So. 2d 948 (Fla. 4th DCA 1997), nor the *Fitchners*, asserted a breach of implied warranty claim. 601 So. 2d at 1186.

term: claims for “medical negligence” (AB 27, 29). LifeSouth ignores that under §766.106(1), Florida Statutes (2003), the term “medical negligence” is synonymous with the term “medical malpractice.” That statute provides that a “‘a claim for medical negligence’ or ‘claim for medical malpractice’ means a claim, arising out of the rendering of, or the failure to render, medical care or services.” Because “medical malpractice” was defined as a claim “arising out of the rendering, or failure to render, medical care or services” when *Silva* and *Damiano* were decided, the 2003 amendment adding the term “medical negligence” does not express a clear intent by the Legislature to override controlling case law.

LifeSouth asserts the 2003 Legislature adopted the term “medical services,” as a *broader* category of claims than are based on “diagnosis, treatment, or care” (AB 29). The fatal flaws in this argument are that the same term “medical services” was used in Chapter 766 at the time both *Silva* and *Damiano* were decided, and presuit then and now is limited to defendants who are negligent in the “care or treatment” of the claimant.

That *Silva* dealt with the statute of limitation for blood banks does not diminish this Court’s holding where blood banks are sued in their capacity as mere suppliers of blood. Section 766.203(2), provides that prior to issuing a notice of intent to initiate medical negligence litigation pursuant to §766.106, a claimant is required to conduct an investigation to ascertain that reasonable grounds exist to

believe that any named defendant was negligent in the *care or treatment of the claimant*. Because the Legislature did not define *care* and *treatment*, *Silva's* definitions of these terms still control (IB 15).

Where a blood bank was actually providing care or treatment, rather than supplying a product, the statutory revisions would apply to require presuit notice and screening (for example, if the blood bank were providing matching blood type services for a specific patient and made an error)(IB 17). Thus, LifeSouth errs in suggesting that Plaintiff's position would limit the statutory revisions only to claims brought by blood donors (AB 18, 31).

Damiano held that Chapter 766 presuit would not apply to a blood bank being sued merely as a supplier of blood because the blood bank did not provide care and treatment to the Plaintiff and, therefore, the Plaintiff would be unable to comply with presuit (IB 13; 697 So. 2d at 952). The Legislature did not amend §766.203(2) presuit requirements. The 2003 amendment defining a blood bank as a "health care provider" did nothing to enable a blood recipient suing a blood bank, in its capacity as a supplier of blood, to comply with Chapter 766 presuit requirements.

D. A blood donor screener's duty to establish sufficient rapport with a blood donor does not involve medical knowledge and skill.

LifeSouth and Amici have unnecessarily complicated this case. Before the

trial, discovery revealed and the parties agreed that there were five levels of safety that applied to blood collection (R 55/388-394). The parties also agreed that there were many blood-borne diseases and viruses for which there were no available blood tests (R 55/395; 58/744). That is why the first and second level of safety, donor recruitment and donor screening, are so important to safe blood collection. When the Plaintiff was finally able to depose the Donor and discovered his limited ability to communicate in English, a longstanding fact known by and concealed by LifeSouth, the recruitment and screening of the Donor became the central issue in this case. This limited scope of the case was repeatedly addressed and acknowledged by LifeSouth.⁵

At trial, it was undisputed that if a blood donor does not understand all of the questions on the SDR due to issues including, but not limited to, language barriers, the donor should be deferred (R 58/747). As the parties stipulated, Plaintiff's claim was limited to the blood donor interviewer's failure to defer this Donor when

⁵ In multiple pretrial hearings, following denial of LifeSouth's motion for summary judgment, the parties stipulated the sole issue of liability was whether LifeSouth personnel who interacted with the implicated Donor on September 18, 2002, had clear communication with him during the donor screening process (IB 6, *e.g.*, R 13/2356). Liability includes both negligence (failure to use reasonable care) and proximate cause. *See* Fla. Std. Jury Instr. 4.1, 5.1. The parties agreed to this joint statement of the case the court read to the jury: "The question for your determination is whether LifeSouth or its employees were negligent in accepting a blood donation from Mr. Donor on September 18, 2002. If your answer is yes, then you must determine the damages caused by that negligence" (R 13/2417).

language barriers prevented him from understanding the complex questions on the SDR, as well as the written materials he was provided regarding blood donor responsibilities. Reading form questions to a donor, checking off answers, and determining whether clear communication with a donor has been established does not hinge on the application of “medical skill or knowledge.”

The “donor specialist” who asked the Donor the form questions on the SDR on September 18, 2002, Ashley Holt, had graduated high school three months earlier, had worked for LifeSouth for 15 days, and had not completed her interview training (R 64/1542-1545). Holt testified that LifeSouth’s rules required her to defer any donor who did not have complete comprehension of the information in the interviews, yet she received no training on how to assess an individual’s ability to comprehend English, or read (R 64/1545-1549). Holt testified that if she had known the Donor had previously requested a Spanish interpreter and documents in Spanish, she would have deferred him (R 64/1546-1547).

Under the facts of this case, the donor interviewer’s duty to assess the Donor’s level of comprehension does not hinge upon the application of medical skill or knowledge.

E. Blood recipients cannot comply with the presuit standards. LifeSouth is wrong in asserting Plaintiff could have obtained the blood donor record here, and the record shows LifeSouth refused to produce it.

Section 766.204(1), provides that healthcare providers must make available

to any claimant “copies of any *medical* record relevant to any litigation of a *medical* negligence claim.” (emphasis added). A blood bank that merely supplies blood has provided no “care” or “treatment” to a blood recipient, who has had no contact with the blood bank, other than as the ultimate recipient of blood taken from an unqualified donor.

Second, blood banks enjoy explicit confidentiality provisions that apply to no other category of health care providers. These provisions prohibit blood banks from complying with requests for specific information regarding a non-party donor. *See* §§381.004(3) and 381.0041, Florida Statutes (2003), §381.0043, Florida Statutes (2005). The 2003 amendments to Chapter 766 did not change this.

LifeSouth and Amicus FABB allege there is no record evidence supporting Plaintiff’s argument that she would not have been able to comply with pre-suit because of donor confidentiality concerns (AB 32; FABB 12-13). They are wrong. The FABB amicus brief, authored by trial counsel for LifeSouth, *now* states that blood donor confidentiality would not prevent disclosure of the SDR or test results with the donor’s identity redacted, and that the Donor could have been interviewed (FABB 13).

In fact, despite Plaintiff’s pre-suit request for all records regarding the infected blood donor, LifeSouth refused to disclose the redacted SDR, the very document it now argues would have allowed the Plaintiff to obtain a corroborating

expert affidavit. In a hearing held on LifeSouth's Motion for Protective Order, counsel for LifeSouth stated it would provide to the Court "some redacted documents *which we have not yet provided to the plaintiff*, but for purposes of the hearing I'm going to have to allow the Court to look at it. *We are not willing at this point to give these documents to the plaintiff.*" (R 72/2410-2411). Included in the documents not provided was a redacted SDR, the document LifeSouth and FABB now argue the law required LifeSouth to produce in pre-suit (R 72/2411-2412). This record proves LifeSouth had to be judicially compelled to disclose this information during suit. LifeSouth's suggestion it would have arranged a presuit donor interview is likewise refuted by the lengths LifeSouth went to prevent the Donor's deposition during suit (IB 5).

F. Plaintiff argued access to court below.

Plaintiff argued in response to LifeSouth's Motion to Dismiss that because LifeSouth rendered no care or treatment to the claimant (Plaintiff's minor son), she would be unable to comply with the presuit investigation requirements contained in Chapter 766, particularly §766.203(2)(a) (R 1/46). In response to LifeSouth's Motion for Protective Order, Plaintiff argued that her right of access to courts and concomitant right of discovery mandated the disclosure of certain information regarding the specific donor who was identified as having supplied infected blood to LifeSouth, and ultimately caused the death of Plaintiff's minor son (R 1/105;

R 72/2439). Because the trial court ruled in Plaintiff's favor on both the motion to dismiss and the motion for protective order, there was no error for Plaintiff to preserve for appellate review. *See, e.g., Cantor v. Davis*, 489 So. 2d 18 (Fla. 1986). Thus, Plaintiff's arguments were not waived as LifeSouth and FABB assert (AB 38; FABB 14).

Furthermore, the constitutional mandate of access to court affects how this Court will construe a statute, because this Court strives to construe statutes so they are constitutional. Holding that presuit screening does not apply to blood banks who merely supply a product fulfills that goal of statutory construction.

G. LifeSouth failed to exercise its right to interlocutory review of the trial court's denial of its motion to dismiss, and reversal following a fair trial fails to achieve the purposes of Chapter 766 presuit provisions.

LifeSouth argues that Plaintiff made a "conscious and strategic election" not to comply with the presuit notice process, thereby depriving LifeSouth of an opportunity to avoid litigation or to limit its liability through binding arbitration (AB 35). Because LifeSouth provided no care or treatment to Plaintiff's minor child, this is not a medical negligence case. Thus, there was no reason for Plaintiff to attempt the impossible task of complying with presuit requirements.

LifeSouth, however, had the right to seek certiorari review of the denial of its motion to dismiss for failure to comply with the statutory presuit requirements. The courts recognize the right of certiorari to promote the purpose of the statutory

procedures under Chapter 766, which is to alleviate the high cost of medical negligence claims through prompt resolution of claims. *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993). Florida courts observe that after a fundamentally fair trial it would make no sense to remand for compliance with cost-saving procedures. *See Sova Drugs, Inc. v. Barnes*, 661 So. 2d 393, 394 (Fla. 5th DCA 1995); *Pearlstein v. Malunney*, 500 So. 2d 585 (Fla. 2d DCA 1986).

Instead, it was LifeSouth that made a strategic election to litigate for two years and a two-week trial, rather than seek review. Thus, assuming the First District would have issued a similar ruling in response to certiorari review, it is LifeSouth who negated any opportunity it had to avoid litigation, or to resolve Plaintiff's alleged medical negligence claim through arbitration.

H. The jury's final judgment should be reinstated.

The plain language of §766.118 limits caps to a cause of action for personal injury or wrongful death arising from *medical negligence*. Section 766 is in derogation of the common law and must be strictly construed. This case is not a medical negligence case for purposes of the presuit notice requirements in §766.106, so it is not a medical negligence case for the purpose of caps under §766.118. Had the legislature intended for caps to apply to all negligence cases against health care providers it could have easily done so. However, it did not. This Court has not addressed the constitutionality of these caps.

LifeSouth's argument that Plaintiff should not have been permitted to call a linguistics expert who did not meet the definition of an expert witness in §766.102(5) is wrong. First, Plaintiff's claim is not one for medical negligence, so §766.102(5) does not apply. Second, both parties presented linguistic experts because the sole liability issue was the Donor's comprehension level. These experts did not testify to breach of the standard of care by a medical provider. They focused on the stipulated sole issue in this case: whether the Donor had sufficient comprehension of the English language to be a qualified donor.⁶

LifeSouth's arguments regarding proximate causation are equally unavailing. The trial court correctly held that, based on the parties' pretrial stipulations, communication was the sole liability issue, and if the Donor was not qualified to donate blood, his blood would not have been taken and Chase Fitchner would not have died.⁷

⁶ To prove her claim that LifeSouth breached the standard of care for blood banks by negligently screening this Donor, Plaintiff presented the testimony of Dr. Gerald Sandler, a blood banking expert. Even if Chapter 766 applied, Dr. Sandler would have met the criteria of an expert for purposes of §766.102(5).

⁷ LifeSouth did not preserve this proximate cause issue by its pretrial statement referring to its motion for summary judgment because (1) it did not obtain a ruling on that issue (1st DCA AB 3), (2) it later agreed to the statement of the case that was read to the jury, and (3) it repeatedly agreed with the court that communication was the only liability issue (AB 10; IB 6). Even if LifeSouth had preserved this issue, the jury received the standard jury instruction and verdict
(Continued....)

Because Florida law does not require that a defendant know the exact nature of the injury that will occur, the absence of a blood test for West Nile Virus was irrelevant. Both parties' blood banking experts testified that because there was no blood test for West Nile Virus at the time, the primary method of evaluating the safety of donated blood was the donor screening process (R 55/394; R 58/744). LifeSouth admitted to the trial judge that Florida causation law did not require that it foresee the specific manner in which its negligence might cause harm (R 75/2625). Thus, the trial court correctly denied LifeSouth's late arguments on proximate cause.⁸

CONCLUSION

Petitioner, Kaynan Fitchner, as Personal Representative of the Estate of Chase Fitchner, respectfully requests this Court reverse the First District's opinion, and reinstate the judgment pursuant to the jury's verdict.

(Cont'd.)

form on causation, which it answered in the affirmative (R 13/2426; 67/2100). Whether based on LifeSouth's stipulation or the evidence, this decided the issue.

⁸ LifeSouth's assertion that some of its employees could understand and communicate with the Donor must be rejected in light of the evidence and the jury's verdict that *he* lacked sufficient comprehension (AB 5; IB 7). The ABC brief cites some of the same out-of-state cases Plaintiff's initial brief shows conflict with *Silva*. Plaintiff's brief in the First District (at pages 40-41) describes the five reasons LifeSouth misplaces its reliance on *Kipp v. United States*, 88 F.3d 681 (8th Cir. 1996) (AB 40). The First District has forwarded the briefs filed there, if this Court wishes to review anything further on these issues.

Respectfully submitted,

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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