IN THE SUPREME COURT OF FLORIDA

HUMANA OF FLORIDA, INC., d/b/a HUMANA WOMEN'S HOSPITAL - TAMPA, et al.

Intervenors/Petitioners,

v. CASE NO.: 85,447

JAIMES MCKAUGHAN AND DARLENE MCKAUGHAN, as parents and natural guardians of Michael McKaughan, a minor child, and JAIMES MCKAUGHAN and DARLENE MCKAUGHAN, individually,

Respondents.
_____/

ON CERTIFIED QUESTION FROM THE SECOND DISTRICT COURT OF APPEAL

PETITIONER HUMANA'S INITIAL BRIEF

RANDY J. OGDEN, ESQ.
Florida Bar No. 351830
TIMON V. SULLIVAN, ESQ.
Florida Bar No. 283010
DANEIL M. McAULIFFE, ESQ.
Florida Bar No. 940062
GUNN, OGDEN & SULLIVAN
P.O. Box 1006
Tampa, Florida 33601
(813) 223-5111

RAYMOND T. ELLIGETT, JR., ESQ.
Florida Bar No. 261939
AMY S. FARRIOR, ESQ.
Florida Bar No. 684147
SCHROPP, BUELL & ELLIGETT, P.A.
Landmark Centre, Suite 2600
401 E. Jackson Street
Tampa, Florida 33602-5226
(813) 221-2600

ATTORNEYS FOR INTERVENOR/PETITIONER HUMANA WOMEN'S HOSPITAL

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

F.A.L.R. CASES

PRELIMINARY STATEMENT

Intervenor/Petitioner, HUMANA OF FLORIDA, INC., d/b/a HUMANA WOMEN'S HOSPITAL TAMPA, refers to itself as "Humana."

Humana refers to Intervenors below/Petitioners here, HUMANA OF FLORIDA, INC., d/b/a HUMANA WOMEN'S HOSPITAL TAMPA, KENNETH D. SOLOMON, M.D., WILLIAM L. CAPPS, M.D., and WILLIAM L. CAPPS, M.D., P.A., collectively as "Intervenors" unless it is necessary to distinguish between them.

Humana refers to the FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, as "NICA."

Humana refers to Petitioners below/Respondents here, JAIMES MCKAUGHAN and DARLENE MCKAUGHAN, as parents and natural guardians of MICHAEL MCKAUGHAN, a minor child, and JAIMES MCKAUGHAN, and DARLENE MCKAUGHAN, individually, as "McKaughan" unless it is necessary to distinguish between them.

Humana refers to the Division of Administrative Hearings as the "Division" or "DOAH."

Humana refers to a "birth-related neurological injury" as defined in § 766.302(2), as a "NICA injury."

Humana refers to § 766.301, *et. seq.*, *Florida Statutes* (1993), collectively as the "NICA statute".

Humana designates references to the record on appeal by the prefix "R".

Deposition transcripts are listed in the index to the administrative record as "ATTACHMENT 1." Humana designates

references to deposition transcripts by the name of the deponent and the page of the transcript.

Hearing transcripts are listed in the index to the administrative record as "ATTACHMENT 1." Humana designates references to hearing transcripts by the court, the hearing date, and the page of the transcript.

Humana designates references to McKaughan's answer brief in the Second District Court of Appeal by the prefix "AB".

STATEMENT OF THE CASE AND FACTS

A. THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN.

In 1988, the legislature officially acknowledged the existence of a medical malpractice crisis in Florida -- a crisis precipitated by dramatic increases in medical malpractice insurance premiums. Chapter 88-1 and 88-277, *Laws of Florida*; § 766.201, *Florida Statutes* (1993).[1] These increased premiums had resulted in increased medical care costs for patients and the functional unavailability of malpractice insurance for some physicians.

The legislature found the crisis resulted from the tremendous increases in the amounts of paid medical malpractice claims and the escalating cost of defending these claims. Section 766.201(1) entitled "Legislative findings and intent" pertains to the medical malpractice reform package as a whole and provides in pertinent part as follows:

* * *

> (b) The primary cause of increased medical malpractice liability insurance premiums have been the substantial increase in loss payments to claimants caused by tremendous increases in the amounts of paid claims.
>
> (c) **The average cost of defending a medical malpractice claim has escalated** to the point where it has become **imperative to control such cost** in the interests of the public need for quality medical services. . . .

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[1] All references are to *Florida Statutes* (1993), unless indicated.

§ 766.201(1)(b) and (c)(emphasis added). *See also, University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993).

In that context, the legislature made specific findings with respect to obstetrical health care providers and birth-related neurological injuries in § 766.301(1). That section provides:

> (a) Physicians practicing obstetrics are high-risk medical specialists for whom malpractice insurance premiums are very costly, and recent increases in such premiums have been greater than for other physicians.
>
> (b) Any birth other than a normal birth frequently leads to a claim against the attending physician, consequently, such physicians are among the physicians most severely affected by the current medical malpractice problems.
>
> (c) Because obstetric services are essential, it is incumbent upon the Legislature to provide a plan designed to result in the stabilization and reduction of malpractice insurance premiums for providers of such services in Florida.
>
> (d) The costs of birth-related neurological injury claims are particularly high and warrant the establishment of a limited system of compensation irrespective of fault.

§ 766.301(1).

Because the legislature feared obstetrical care in Florida was in danger of becoming a scarce commodity, it sought to preserve this area of practice by stabilizing and reducing malpractice insurance premiums for the providers of such services. With this goal in mind, the legislature enacted the NICA statute as part of its comprehensive medical malpractice reform package designed to combat the obstetrical malpractice crisis by reducing the amounts

of claims paid for birth-related neurological injuries as well as the cost of defending those claims.[2]

After defining a "birth-related neurological injury"[3], the legislature created an **exclusive administrative remedy** for such NICA injures. In pertinent part, the NICA statute provides as follows:

> 766.303 Florida Birth-Related Neurological Injury Compensation Plan; **exclusiveness of remedy** --
>
> * * *
>
> (2) The rights and remedies granted by this plan on account of a birth-related neurological injury **shall exclude all other rights and remedies** of such infant, his personal representative, parents, dependents, and next of kin, at common law or otherwise, against any person or entity directly involved with the labor, delivery or immediate postdelivery resuscitation during which such injury occurs, arising out of or related to a medical malpractice claim with respect to such injury . . . .

§ 766.303(2)(emphasis added).

The legislature also created the Florida Birth-Related Neurological Injury Compensation Association ("NICA") to administer these claims. § 766.303(1).

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[2] *See also, Coy v. Florida Birth-Related Neurological Injury Compensation Plan*, 595 So. 2d 943 (Fla. 1992) *cert. denied*, ____ U.S. ____, 113 S.Ct. 194, 121 L.Ed. 2d 137 (1992).

[3] The statute defines a "birth-related neurological injury" as follows:

> injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired.

§ 766.302(2).

The Florida Birth-Related Neurological Injury Compensation Plan ("Plan") compensates patients suffering from birth-related neurological injuries, irrespective of fault, and applies to births attended by Plan participants which occur on or after January 1, 1989. Under the Plan, an infant who suffers a NICA injury receives medical care without the necessity of proving negligence on the part of any health care provider for the injury. § 766.31(1)(a). In addition, the parents or guardian of the infant are limited to recovering additional damages up to $100,000. § 766.31(1)(b).

The Plan is funded through assessments on physicians and hospitals in the state. Each non-governmental and non-teaching hospital pays an assessment per infant delivered in the hospital. § 766.314(4)(a). A "participating physician" pays an annual assessment of $5,000, which enables that (obstetric) physician to be a participant and receive the exclusive remedy benefits of the Plan for birth-related neurological injuries. §§ 766.302(7), 766.314(4)(c).[4]

B. THE FACTS IN MCKAUGHAN'S CASE.

By all indications, Darlene McKaughan had enjoyed a relatively normal pregnancy (Duchowny, p. 15). However, both she and her

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[4] Other physicians pay an assessment of $250 per year. § 766.314(4)(b). Several physicians practicing in areas other than obstetrics filed suit challenging the constitutionality of the $250 assessment. The Florida Supreme Court found this aspect of the statute constitutional in *Coy, supra*.

obstetrician, William L. Capps, M.D., knew the baby was in the breech position (buttocks rather than head coming first) prior to her presentation at Humana Women's Hospital on May 19, 1989 (Capps, p. 8; R 2). Michael McKaughan was the product of a breech delivery performed on that date by Dr. Capps (R 2, 9).

Following a difficult delivery, Michael was intubated and transported to the Neonatal Unit where he received care and treatment from Humana employees and neonatologist Kenneth Solomon, M.D. (R 9).

Unknown to anyone at the time, complications during the delivery had resulted in injury to the infant's spinal cord (R 13, Capps, pp. 12, 19). That injury went undetected until after the child had been transported to the Neonatal Unit. There, it was discovered the infant's spinal cord had been transected at C4-5 (Duchowny, p. 17).

All parties agree Michael has suffered permanent and substantial physical as well as mental impairment (R 119). The parties disagree, however, as to when the injury occurred for purposes of determining whether Michael has suffered a birth-related neurological injury subject to the Plan's exclusive remedy.

The Intervenors concur with NICA's position that the injury to Michael's spinal cord which occurred during delivery rendered Michael permanently and substantially mentally and physically disabled (R 119). As a consequence, the Intervenors contend Michael has suffered a NICA injury, and is subject to the Plan's exclusive remedy (R 119; Duchowny, pp. 49-50).

McKaughan, on the other hand, asserts the Plan is inapplicable, contending Michael's permanent injury occurred after delivery and after post-delivery resuscitation efforts (R 7). McKaughan believes Michael suffered a cervical ligamentous strain or tear during the birth process which, by itself, does not cause permanent neurologic damage (R 9). McKaughan blames Michael's mental impairment on the failure to stabilize Michael's neck in the Neonatal Unit. McKaughan contends this failure converted the ligamentous injury into a permanent spinal cord/neurological injury (R 9).

C. THE PROCEEDINGS BELOW.

1. The Circuit Court Case.

As a result of Michael's birth, McKaughan notified the Intervenors of his intent to file medical malpractice suits against them. After the presuit screening period, McKaughan filed suit in Hillsborough County Circuit Court against the Intervenors on January 13, 1992 (R 13).

The Intervenors moved for summary judgment based on the exclusivity of the Plan as the sole remedy for infants who have sustained birth-related neurological injuries as defined by § 766.302, and their families. At a hearing held on November 24, 1993, McKaughan argued the Plan did not apply because Michael's injury was not birth-related (circuit court, 11/24/93 hearing, p. 16).

Judge Arnold denied summary judgment, but ordered the case abated pending a determination by a hearing officer for the Division as to whether Michael suffered a compensable claim under the Plan (circuit court, 11/24/93 hearing, pp. 8, 10; R 164).

2. The Initial and Supplementary Petitions for NICA Benefits Filed With DOAH.

McKaughan did not appeal Judge Arnold's ruling that the Division must make a preliminary determination whether the subject injury is a birth-related neurological injury even when the injured party contests the Plan's applicability. Instead, McKaughan elected to comply with the order by filing a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq., in December, 1993 (R 1).

In this initial Petition, McKaughan stated, "It is alleged that Michael McKaughan suffered spinal cord damage as a result of a birth-related neurological injury." (R 1). McKaughan also requested the following relief:

> A. Expense for items that are medically necessary and reasonable for the child's medical and hospital care, habilitation and training, custodial care and services and related care in the past and in the future for the rest of his life.
>
> B. Period payments (or lump sum) of an award to the parents of the minor in an amount not to exceed $100,000.00.
>
> C. All expenses requested hereunder are to be awarded pursuant to the provisions of Sections 766.301-766.316, Florida Statutes, and subject to exclusions contained in said sections.

D. Reasonable expenses incurred in connection with the filing of this claim.

(R 2).

In January, 1994, McKaughan filed a Supplementary Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq., in which he alleged Michael's permanent and substantial mental impairment did **not** occur "in the course of labor, delivery, or resuscitation in the immediate post-delivery period," § 766.302(2), and, therefore, did not meet the definition a birth-related neurological injury (R 6, 7). McKaughan also announced his intention to "oppose inclusion under the terms of the Plan and request this case be sent back to Judge Arnold for resolution." (R 7). McKaughan attached the affidavit of David A. Abramson, M.D, in support of the supplementary petition (R 9-10).

The Intervenors petitioned the Division to intervene in order to protect their substantial interests in the outcome of the administrative proceeding (R 11, 16, 21, 32). The hearing officer granted these petitions (R 30, 88).

NICA filed its response to the petition for benefits. Based on the review of the case by its medical expert, NICA stated that ". . . Michael's spinal cord injury rendered Michael permanently mentally and physically disabled and that as a consequence thereof Michael has suffered a 'birth-related neurological injury' as defined in section 766.302(2), Florida Statutes." (R 118-119). NICA also requested a hearing to address the issue of whether Michael's injury was compensable under the Plan (R 119).

3. The Hearing Officer's Decision.

After reviewing the supplementary petition, the hearing officer ordered the parties to show cause why the petition should not be dismissed for want of jurisdiction based on the petitioners' failure to file a "claim" pursuant to the NICA statute (R 121-122). The parties responded individually to this order (R 138, 144, 149, 200, 207).[5]

In the Final Order of Dismissal Without Prejudice, the hearing officer determined the "Plan does not accord a participating physician or other health care provider any right or opportunity to initiate such a (NICA) claim or to compel the resolution of any dispute regarding the compensability of any injury to an infant, before DOAH." (R 178).

The hearing officer further observed the statute provides an incentive to file a NICA claim if there is any uncertainty as to whether the infant's injury is covered by providing that benefits for birth-related neurological injury "are not recoverable outside that forum (the Division)." (R 179). He recognized a party not proceeding under NICA ran the risk of being barred from recovery (see below), but concluded:

> that election is, however, the exclusive province of the infant's legal representative, and there is no provision in the Plan that requires, as a condition precedent to a medical malpractice claim, that a party first receive a

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[5] In its response to the order to show cause, McKaughan noted his position that Humana and the Intervenors could not claim immunity because of an alleged failure to comply with the notice provision of the § 766.316 (R -- p. 2 ¶3). However, McKaughan recognizes notice is not an issue in this appeal (AB 2, fn. 1).

> determination from DOAH that the claim is not a "birth-related neurological injury."

(R 179).

According to the hearing officer, "the Plan contemplates the filing of such claims at the election of the legal representative, and presumably, as a consequence of the provisions of 766.303(2), they will do so when a good faith evaluation of the case reveals that the injury is compensable under the Plan or they harbor some reasonable uncertainty." (R 180).

In spite of NICA's previously filed response to the petition for benefits acknowledging Michael suffered a birth-related neurological injury (R 119), the hearing officer indicated:

> Where, as here, the legal representatives suffer no . . . uncertainty, and are satisfied that the injury is not compensable under the Plan, there is no rational basis under the existing statutory scheme to compel them to first seek an order from DOAH confirming their opinion before they may proceed with their medical malpractice claim.

(R 180).

The hearing officer determined McKaughan did not file a "claim for compensation" since he affirmatively averred in his supplementary petition "the infant did not suffer a permanent and substantial mental impairment at the time of birth, and therefore does not meet the definition of an infant suffering a birth-related neurological injury as defined in Florida Statute s. 766.302(2)." (R 181).

Finally, the hearing officer concluded he could not accept a petition when McKaughan, having the burden of proof, proposed to

prove a negative (R 181). The hearing officer dismissed the petition without prejudice (R 182).

4. The Second District Decision.

NICA and the Intervenors appealed this final order to the Second District Court of Appeal (R 185, 191, 195, 211). The court consolidated these appeals pursuant to an agreed motion.

After oral argument, the Second District rendered its opinion in *Humana of Florida, Inc. v. McKaughan*, 20 Fla. L. Weekly D565 (Fla. 2d DCA 1995). In response to McKaughan's motions to dismiss the appeals, the Second District held it had jurisdiction over the appeal and NICA had standing. The Second District then affirmed the administrative hearing officer's final order dismissing the supplementary petition.

However, the Second District recognized the case presents a close issue and certified the following question to the Florida Supreme Court as one of great public importance:

> DOES AN ADMINISTRATIVE HEARING OFFICER HAVE THE EXCLUSIVE JURISDICTION TO DETERMINE WHETHER AN INJURY SUFFERED BY A NEW-BORN INFANT DOES OR DOES NOT CONSTITUTE A "BIRTH-RELATED NEUROLOGICAL INJURY" WITHIN THE MEANING OF THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, SECTIONS 766.301-.316, FLORIDA STATUTES (1993), SO THAT A CIRCUIT COURT IN A MEDICAL MALPRACTICE ACTION SPECIFICALLY ALLEGING AN INJURY OUTSIDE THE COVERAGE OF THE PLAN MUST AUTOMATICALLY ABATE THAT ACTION WHEN THE PLAN'S IMMUNITY IS RAISED AS AN AFFIRMATIVE DEFENSE PENDING A DETERMINATION BY THE HEARING OFFICER AS TO THE EXACT NATURE OF THE INFANT'S INJURY?

McKaughan, 20 Fla. L. Weekly at D570.

ISSUE ON APPEAL

DOES AN ADMINISTRATIVE HEARING OFFICER HAVE THE EXCLUSIVE JURISDICTION TO DETERMINE WHETHER AN INJURY SUFFERED BY A NEW-BORN INFANT DOES OR DOES NOT CONSTITUTE A "BIRTH-RELATED NEUROLOGICAL INJURY" WITHIN THE MEANING OF THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, SECTIONS 766.301-.316, FLORIDA STATUTES (1993), SO THAT A CIRCUIT COURT IN A MEDICAL MALPRACTICE ACTION SPECIFICALLY ALLEGING AN INJURY OUTSIDE THE COVERAGE OF THE PLAN MUST AUTOMATICALLY ABATE THAT ACTION WHEN THE PLAN'S IMMUNITY IS RAISED AS AN AFFIRMATIVE DEFENSE PENDING A DETERMINATION BY THE HEARING OFFICER AS TO THE EXACT NATURE OF THE INFANT'S INJURY?

SUMMARY OF ARGUMENT

If the ruling of the Second District is adopted so plaintiffs can avoid the NICA statute in the manner that occurred in this case, it will frustrate the whole statutory plan of NICA. NICA is not designed to be a fallback for plaintiffs who lose in their attempt to hit the tort lottery. One of NICA's major purposes is to control the costs for obstetric services by using a no-fault approach which avoids the substantial costs of defending a tort action.

Section 766.309 says the NICA hearing officer **shall** make a determination as to whether the injury claimed is a NICA injury. Section 766.303(2) says the NICA plan is the exclusive remedy except where a bad faith or a malicious purpose is alleged.

The interaction of the NICA and medical malpractice statutes of limitation demonstrates the legislature's intent that the NICA action should proceed first. The civil statute of limitations is tolled while the NICA claim is proceeding, but the NICA statute of limitations is not tolled during a civil suit. This is a substantial departure from the workers' compensations statute which starts the time for workers' compensation claims running from the date of termination of a civil suit denying recovery to a plaintiff.

Proceeding in NICA first will avoid the potential for a time bar as well as the potential for inconsistent results (the NICA

hearing officer would not be bound by a civil court finding that the infant's injury was a NICA injury).

If parents are permitted to gamble on a tort recovery in NICA cases, even if they prevail, they may not manage the award so as to provide lifetime care and the state's taxpayers could look forward to picking up the future tab.

The Second District's comment that medical malpractice cases are not unique to the Division of Administrative Hearings misses the point. The NICA hearing officers who hear these cases develop an expertise in a narrow, specialized determination: whether an infant has suffered a NICA injury. This expertise will not be present in the random circuit judge who might hear one potential NICA case, much less in the jury in that case.

ARGUMENT

An administrative hearing officer does have the exclusive jurisdiction to determine whether an injury suffered by a new-born infant constitutes a "birth-related neurological injury" within the meaning of the Florida Birth-Related Neurological Injury Compensation Plan, §§ 766.301-.316, so that a circuit court in a medical malpractice action specifically alleging an injury outside the coverage of the Plan must automatically abate that action when the Plan's immunity is raised as an affirmative defense pending a determination by the hearing officer as to the exact nature of the infant's injury.

The legislature enacted the NICA statute to alleviate the medical malpractice crisis in the obstetrical community, and ensure the availability of obstetrical services to the people of Florida. These goals cannot be achieved using the Second District's interpretation of the NICA statute.

I. THE PROCEDURAL FRAMEWORK OF THE NICA STATUTE EVINCES LEGISLATIVE INTENT TO REQUIRE THE DIVISION TO MAKE THE PRELIMINARY DETERMINATION AS TO WHETHER A BIRTH-RELATED NEUROLOGICAL INJURY HAS OCCURRED.

A. The NICA Plan.

The legislature created NICA and the Plan as part of a comprehensive medical malpractice reform package designed to combat the malpractice crisis by reducing the amounts of paid claims and, importantly, the cost of defending these claims. §§ 766.201,

766.301. For the providers of obstetrical services in particular, all of these factors were magnified by the extraordinarily high costs associated with birth-related neurological injury claims. § 766.301.

The legislature intended to ease the obstetrical crisis by removing this entire category of claims from the tort arena with its enormous awards and enormous defense costs. It sought to accomplish this goal by making the Plan the exclusive remedy for all birth-related neurological injury claims. § 766.303(2).

The legislature also designed the procedural framework of the NICA statute to accomplish this goal by requiring a determination of NICA's applicability to the injury **before** allowing the parties to continue in circuit court. This procedure weeds out those claims covered by the Plan **before** massive defense costs are incurred. Plaintiffs forced to suspend their circuit court actions pending these preliminary determinations by the Division also benefit from the savings in litigation costs in the event the Division concludes their injuries are compensable exclusively under the Plan.

The only exception to the exclusivity of this remedy is a suit for bad faith, malicious purpose or willful or wanton disregard of human rights which must be established by clear and convincing evidence. § 766.303. Even under these circumstances, the NICA statute requires the Division to make a preliminary determination on the Plan's applicability to the injury, but allows an injured party to opt out of the Plan by filing a civil suit **before** the

award of the Division becomes conclusive and binding. § 766.311 (McKaughan made no such assertion of bad faith here).

The legislative directive that potential NICA cases receive a preliminary administrative determination before proceeding in circuit court is demonstrated by § 766.309(1), which says the hearing officer **shall** determine whether an injury claimed is a NICA injury.

Other statutory provisions implementing the Plan further demonstrate this legislative directive. For example, § 766.304 states the hearing officer **shall** determine all claims filed. Additionally, § 766.309(1) provides the hearing officer's determination (or any appeal therefrom) as to the qualification of a claim under NICA **shall** be conclusive and binding on the respective health care providers. The binding effect of this determination could only be relevant to a **subsequent** civil suit.

B. The Statutes of Limitations and Tolling.

Perhaps most telling is the provision which tolls the statute of limitations for bringing a civil action while the claim is pending before the Division or on appeal. § 766.306. Thus, if the Division determines the injury is not a NICA injury, no additional time has run for filing a civil suit by the petitioner. No similar provision tolls the statute of limitations to file a claim under the Plan while the plaintiff pursues a medical malpractice action. This demonstrates the legislature intended the issue of whether a

claim is a NICA claim be resolved before pursuing a civil malpractice suit.

Comparing the NICA statute's tolling provision with the tolling provision found in Florida's other exclusive administrative remedy statute -- the workers' compensation statute -- indicates the legislature intended the NICA statute to operate in a completely different way from the workers' compensation system.

As noted, the NICA statute tolls the statute of limitations for filing a civil suit while a NICA claim is pending before the Division or on appeal. § 766.306. The workers' compensation statute does just the opposite, tolling the time for filing a workers' compensation claim while the injured individual pursues a civil remedy:

> When recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, **the limitation of time prescribed in subsection (1) shall begin to run only from the date of termination of such suit**; but in such an event, the employer shall be allowed a credit of his actual cost in defending such suit in a sum not exceeding $250, which shall be deducted from any compensation allowed or awarded to such employee under this chapter.

§ 440.19(4)(emphasis added).

Thus, the legislature expressly provided the mechanism for a plaintiff to proceed in circuit court without jeopardizing his or her ability to pursue a workers' compensation claim in the event the civil suit is unsuccessful. § 440.19(4). It also expressly provided the exclusive remedy of workers' compensation would be

asserted by a defendant in such a civil suit as an affirmative defense for the trial court's determination. § 440.19(4). *See also, Mandico v. Taos Construction, Inc.*, 605 So. 2d 850, 854 (Fla. 1992) (affirmative defense of workers' compensation exclusive remedy must be determined in course of litigation).

On the other hand, the legislature provided no express protection to a civil litigant with a potential NICA injury. It also made no express provision for asserting the NICA statute's exclusive remedy as an affirmative defense.

These fundamental differences between Florida's two exclusive administrative remedy statutes indicate the legislature intended the NICA statute to have a very different procedure from that in the workers' compensation statute. Reading § 766.306 together with the other NICA statutory provisions discussed above reveals that difference is requiring a determination from the Division **before** allowing the civil suit to continue.

In its analysis of the NICA statute, the Second District also looked for assistance to "case law concerning the analogous system of workers' compensation." *Id.*, at D567. After pointing out some similarities between the two statutes, the Second District concluded that like workers' compensation, the exclusive remedy afforded by the NICA statute is an affirmative defense. *Id.*, at D568. It further concluded that the assertion of this affirmative defense does not require an automatic abatement and referral to an administrative hearing officer for a threshold determination of whether the injury alleged is covered by the Plan. *Id.*

The problem with the Second District's analysis is while it identifies some similarities between the two statutes, it has no explanation for their fundamental differences. In light of the differences discussed above, the Second District's construction of the NICA statute and the workers' compensation statute *in para materia* is incorrect.

It is because of the similarities between these statutes that the differences between them assume greater significance. If the legislature had wanted NICA's procedure to follow that of workers' compensation, it could easily have drafted a statute following the well-established workers' compensation pattern. Instead, it made the statutes differ with respect to an issue as fundamental as the means to preserve the right to pursue a civil cause of action.

The import of the difference in the tolling provisions becomes clear when one realizes the consequence of pursuing the civil remedy first in the NICA context may be the inability of an infant with a NICA injury to receive compensation from either NICA or a civil damage award. The price of adopting a workers' compensation-type procedure in the NICA context is the very real potential for inconsistent results and time-barred NICA claims.[6]

Consider the consequences. A plaintiff files a medical malpractice action in circuit court. Because filing a civil action

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[6] The potential for time-barred claims under the Second District's interpretation increased when the legislature shortened the statute of limitations for filing a NICA claim from seven to five years from the date of birth. § 766.306, *Fla. Stat.* (1988); § 766.306, *Fla. Stat.* (1993). As noted, Michael McKaughan was born in May, 1989.

does not toll the statute of limitations for filing a NICA claim, the NICA limitations statute would continue to run during the pendency of the civil suit. The defendants would then be required to defend in a full-blown malpractice jury trial, and in doing so, would assert NICA as an affirmative defense. If the jury determined a birth-related neurological injury had occurred, the plaintiff's civil recovery would be barred. If the NICA statute of limitations had run in the mean time, the plaintiff would have lost the chance to petition for compensation under the Plan.[7] The result would be the same if the jury found for the defendant health care providers in the civil suit based on liability.

Assuming the time for filing a NICA claim had not run, the unsuccessful plaintiff could still file a petition for compensation under the Plan. However, the petitioner might then be unsuccessful in convincing a hearing officer, who would not be bound by the jury's determination that a NICA injury had occurred, that the injury **is** compensable under the Plan since the hearing officer **alone** makes that determination. § 766.301 and § 766.309(1). The injured infant would be left entirely without recourse -- a result unintended by the legislature.[8]

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[7] The hearing officer recognized, "should a party elect to proceed with a medical malpractice claim, as opposed to seeking the benefits under the Plan, that party faces the risk that a defense will be raised in the malpractice action regarding the exclusivity of the remedies afforded by the Plan and, if sustained, be barred from recovery." (R 179).

[8] The problem of inconsistent results should not arise in the workers' compensation context. The principle of judicial estoppel prevents a defendant who successfully raises workers' compensation (continued...)

Had that same individual filed a petition with the Division as soon as the defense raised the issue, the hearing officer's determination would be binding with respect to whether the injury is a birth-related neurological injury. § 766.309(3). The defendants would be unable to raise the NICA statute as a defense to the subsequent medical malpractice suit, and the plaintiff, if successful in proving malpractice, would be entitled to recover a tort award.

The legislature's use of a different procedure for NICA when contrasted to workers' compensation may reflect a concern similar to the one expressed in *Mandico, supra*. *Mandico* held a writ of prohibition may not be used to test the correctness of a lower court's ruling on the defense of workers' compensation immunity.

This Court, however, recognized its decision would result in "the necessity of requiring the trial to proceed to its conclusion when it was evident from a construction of the relevant statutes that the plaintiff's exclusive remedy was to obtain workers' compensation benefits." *Id.* To avoid that result, the Court

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[8](...continued)
as an affirmative defense to a civil suit for personal injury from asserting an inconsistent position before the judge of compensation claims in an attempt to defeat the injured employee's claim for workers' compensation benefits. *See also, Pearson v. Harris*, 449 So. 2d 339 (Fla. 1st DCA 1984)(ordinary principles of estoppel bar plaintiff from maintaining position in civil action inconsistent with position he successfully maintained in workers' compensation proceeding regarding status as employee). Since NICA is usually **not** a party to a medical malpractice action (but must be a party in the administrative proceeding, § 766.307(2)), it would not be estopped to deny the injury alleged is a NICA injury. And, as discussed above, even if NICA does accept the claim, the hearing officer is not bound by NICA's determination. *See* § 766.305(6).

amended Florida Rule of Appellate Procedure 9.130(a)(3), to allow review of a non-final order that "a party is not entitled to workers' compensation immunity as a matter of law." *Id.*, at 855.

Rule 9.130 does not permit review of a non-final order that a health care provider is not entitled to the tort immunity granted by the NICA statute. The Second District's decision will effectively force health care providers to face a full-blown medical malpractice jury trial in any case in which the plaintiff can find an expert to opine the child did not suffer a NICA injury.

In order to avoid the obvious problems with its approach, the Second District suggested this Court amend Rule 9.130(a)(3) as it in did in *Mandico, supra*, with respect to workers' compensation to provide for immediate review of a nonfinal order determining that a party is not entitled to the Plan's immunity. *McKaughan*, 20 Fla. L. Weekly at D570. This suggestion, however, simply highlights another fundamental difference between NICA and workers' compensation -- the nature of the factual issues to be resolved in order to determine applicability of the exclusive remedy to the injury. As demonstrated below, amending the appellate rules would not solve the NICA problem the Second District's ruling creates.

Typically, the issues a court must resolve in order to determine if an employer/defendant is entitled to assert the exclusive remedy of workers' compensation are whether the plaintiff was injured in the course and scope of his employment and whether the employer had secured workers' compensation coverage for that employee. § 440.09. These straightforward determinations are often

appropriate issues for summary judgment. *See Ross v. Baker*, 632 So. 2d 224 (Fla. 2d DCA 1994).

The same cannot be said of the finding necessary to determine if the plaintiff has suffered a birth-related neurological injury. As Judge Lazzara noted during oral argument in this case, summary judgments in medical malpractice cases are rare and those few that are granted are often reversed. The factual conflicts make a Rule 9.130(a)(3) appeal an unworkable solution for NICA cases.[9]

Even though the Second District has no real explanation for the differences between the workers' compensation and the NICA statutes, it rejected Humana's argument based on the differences in the tolling provisions. The court indicated the NICA tolling provision is, on the one hand, ambiguous, and on the other hand, because it is ambiguous it must be construed in accordance with its plain meaning. *McKaughan*, at D569.

In support of this unusual method of statutory construction, the Second District cited *Carlile v. Game & Fresh Water Fish Commission*, 354 So. 2d 362 (Fla. 1977). However, *Carlile* did not involve an ambiguous statute. Rather, it involved an attempt to read into the otherwise unambiguous sovereign immunity statute (§ 768.28), a waiver of the state's venue privilege. *Id.*, at 364.

In that context, this Court stated, "Inference and implication cannot be substituted for clear expression." If, as the Second

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[9] For these same reasons, similarly unworkable is the suggestion of summary judgments in *Central Florida Regional Hospital, Inc. v. Wager*, 20 Fla. L. Weekly D633 (Fla. 5th DCA 1995).

District has asserted, the NICA statute is ambiguous and in need of statutory construction, it can hardly be described as a "clear expression." *See Id. Carlile*, therefore, is inapposite.

"[A]t first glance," the Second District had thought the intent of the Plan's tolling provision was clear and unambiguous: "to ensure a claimant has sufficient time to invoke the remedy of a traditional medical malpractice civil action should a hearing officer or appellate court decide that a claim does not qualify for compensability under the Plan." *McKaughan*, at D569. The court apparently changed its opinion when it realized if the claimant filed a petition for NICA benefits **after** the statute of limitations for filing a malpractice case had run, the claimant would be unable to pursue a civil suit in the event the hearing officer denied the NICA claim. *Id.*

While the Second District considers this result "anomalous," Humana respectfully submits it missed the point. An individual who waits beyond the medical malpractice statute of limitations to file a civil cause of action will be barred in that action, whether or not the individual files a NICA petition with the Division.

However, the legislature has provided the means by which such an individual can preserve both types of claims simply by filing one petition with the Division as long as it is done within the medical malpractice statute of limitations.

If the NICA hearing officer determines the claim presents a NICA injury, the infant is compensated through the NICA Plan. If the hearing officer decides it is not a NICA claim, the infant can

file the civil suit because that statute of limitations has been tolled.

If the medical malpractice statute had already run by the time the claimant filed in NICA, the defendants would have raised that limitations defense in the civil suit anyway.[10]

In other words, the legislature has ensured the injured individual's rights to pursue a subsequent medical malpractice claim are preserved while pursuing a determination of NICA benefits. By contrast, where the NICA infant's representative pursues the civil action first, the time for the no-fault NICA benefits claim may run while the representative pursues the tort recovery.

II. THE COURT SHOULD INTERPRET THE NICA STATUTE IN ORDER TO GIVE EFFECT TO LEGISLATIVE INTENT.

The NICA statute does not spell out every procedural nuance for the NICA statute interacting with a medical malpractice case. However, the legislature provided an adequate procedural road map. As demonstrated above, the provisions of the NICA statute, especially when compared with the provisions of the workers' compensation statute provide ample evidence of the procedure envisioned by the legislature.

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[10] If the plaintiff filed a timely civil suit which was abated, as here, for the NICA proceeding, the plaintiff's civil suit would simply proceed if the hearing officer determined there was not a NICA injury.

But even if this Court determines it cannot discern the precise procedure from these provisions, it then interprets the statute in order to effect legislative intent. *See Lowry v. Parole and Probation Commission,* 473 So. 2d 1248 (Fla. 1985)(where reasonable differences arise as to meaning or application of statute, legislative intent must be polestar of judicial construction); *see also, Catron v. Roger Bohn, D.C., P.A.*, 580 So. 2d 814 (Fla. 2d DCA 1991), *rev. den.*, 591 So. 2d 183 (Fla. 1991)(interpreting another provision of Chapter 766).

Fortunately, the legislature provided guidance in this regard. The detail the legislature neglected to provide in terms of express procedural guidance, it supplied in terms of legislative intent. *See* § 766.201, § 766.301.

First, as discussed above, the legislature's intent that the NICA proceeding precede a tort suit is manifested in the interaction of the respective statutes of limitation.

Second, legislative intent is manifested by the driving forces behind the creation of the NICA statute, namely the plight of obstetrical health care providers, and apprehension over the continued availability of obstetrical services. § 766.301. The legislature did not create NICA solely out of concern that babies with birth-related neurological injuries were not being compensated, but out of concern that the costs of such actions -- **defense and indemnity** -- were making it financially impossible for obstetrical health care providers to continue delivering babies. §§ 766.201, 766.301 (quoted at pages 3-4 above).

The legislature sought to reduce the amounts of paid claims for birth-related neurological injuries as well as the **cost of defending** these claims, and hoped to achieve these goals by entirely removing these claims from the tort arena. § 766.201; § 766.301. These goals -- particularly the goal of reducing defense costs -- cannot be achieved using the workers' compensation model advocated by the Second District.[11] The Second District does not address the legislatively perceived need to reduce costs, much less dispute that going the administrative route first will be substantially less costly for **all** parties concerned (than proceeding in circuit court first and having fact finder determine a NICA injury has occurred), even if the hearing officer determines a NICA injury has not occurred.

In *Wager*, the Fifth District comments, "Unfortunately the defendants would have been subjected to the fees, expenses and time involved in the litigation to arrive at the point urged by them early in the proceedings. However, if the jury finds no NICA-defined injuries, all parties have been spared the fees, expenses and time that would have been incurred in a NICA proceeding." The legislature intended to have the administrative determination made prior to proceeding in circuit court, not because the administrative route has no costs, but because it costs less.

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[11] Under the workers' compensation model, civil and administrative cases may even proceed simultaneously until the injured employee elects to accept worker's compensation benefits. *See Chorak v. Naughton*, 409 So. 2d 35 (Fla. 2d DCA 1981).

The discovery required to determine whether the infant suffered a birth-related neurological injury is much narrower than the discovery required to determine negligence and would need to be done regardless of whether a NICA petition is filed. If the hearing officer finds the injury falls within the province of NICA, then there are no other civil discovery or litigation costs regarding liability (and because of the guarantee of medical care, damage issues are greatly simplified). If, however, the hearing officer finds the infant did not suffer a NICA injury, the discovery taken for the administrative case can be used in the civil case as well.

Third, in addition to the goal of easing the malpractice crisis faced by obstetrical health care providers, legislative intent is manifested by the goal of the legislature to provide a no-fault plan to compensate infants who suffer these injuries. The potential for inconsistent results and time-barred claims discussed above would defeat this legislative intent.

As this Court recognized in *Coy, supra*, in which it upheld the constitutionality of the NICA assessment on all physicians:

> The malpractice crisis severely disrupted the delivery of health care services and all members of the "team" suffered. Since one of the goals of the Plan is to help alleviate the [medical malpractice] crisis and permit the efficient delivery of health care services by all members of the team, Plaintiffs [non-obstetrical physicians] are undeniably related to at least one of the goals of the Plan and stand to benefit from its realization. This act is not a cure all, but will be a major contribution to the cure.

Id., 595 So. 2d at 946. This Court went on to state:

> The record is clear that when there is an unavailability of obstetrical services, the operations of hospitals are seriously disrupted. Emergency rooms are overtaxed and nonspecialists are put in a position of having to treat the patients. Because health care services are delivered by a team of providers, all of whom interact, a breakdown in one area of service impacts the other areas. Moreover, without an adequate number of obstetricians, the ability of other physicians to refer their patients is adversely affected.

Id., at 946-947.

Shortly after the Second District rendered its decision in this case, the Fifth District decided *Wager, supra*, in which it affirmed the trial court's decision to allow the jury to decide whether the infant suffered a NICA injury, rather than require the plaintiff to proceed administratively.[12]

In its decision, however, the Fifth District essentially admits its interpretation of the NICA statute frustrates legislative intent. That court observed the NICA statute is defective in terms of achieving the statutory goal of "foreclosing any civil action against a NICA participant when the injury is of the type defined in section 766.302(2). . . ." *Id.* The "defect" which the court termed unfortunate is the alleged inability of defendant health care providers to initiate administrative proceedings under the NICA statute. The court reached this conclusion based on its interpretation of the statutory definition of "claimant" which states:

> (3) "Claimant" means any person who files a claim pursuant to s. 766.305 for compensation for a birth-related neurological injury to an infant. Such claim **may**

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[12] The defendant health care providers had sought certiorari review in the Fifth District. *Id.*

> be filed by any legal representative on behalf of an injured infant; and, in the case of a deceased infant, the claim may be filed by an administrator, personal representative, or other legal representative thereof.

§ 766.302(3)(emphasis added).

According to the Fifth District, defendant health care providers cannot qualify as claimants because they are not the legal representatives, etc., of the injured infant. Humana notes the statute does not say the claim can **only** be filed by the specified individuals, but that it **may** be filed by these individuals. Thus, there is an interpretation of the statute that does not foreclose other interested parties, such as the health care providers, from filing a claim for compensation for a birth-related neurological injury to an infant.

Courts are obligated to avoid construing a statute so as to achieve "an unreasonable result, plainly at variance with the purpose of the legislation as a whole. . . ." *Radio Telephone Communications, Inc. v. Southeastern Telephone Company*, 170 So. 2d 577, 580 (Fla. 1964); *see also, Catron*, 580 So. 2d at 818 (it is court's "primary duty to give effect to legislative intent and, if a literal interpretation of the statute leads to unreasonable results, then we should exercise our power to interpret the statute in such a way as to impart reason and logic to it."). The Fifth District could have adopted an interpretation which avoids the unreasonable result of rendering the act defective. Had it interpreted the definition of "claimant" in a manner consistent with the express goals of the NICA statute and in such a way as to

prevent the act from being defective, the court would have reached just the opposite conclusion in *Wager*.

McKaughan argued below that he had not filed a "claim." The NICA statute does not define "claim," but does specify the elements of a "petition for compensation." A claimant invokes jurisdiction of the Division by filing a "petition seeking compensation" under the Plan. § 766.305(1).[13]

The "petition for compensation" does not require a statement of the petitioner's subjective belief that a NICA injury exists. To avoid an interpretation which renders the statute "defective," a "petition seeking compensation" should be construed to include a petition filed with respect to a potential NICA injury. *See Wager, supra*. In accordance with the intent reflected in the NICA statute (as well as the principle of primary jurisdiction discussed below), this provision should be interpreted to include not only petitions seeking to prove entitlement to compensation under the Plan, but also petitions that would result in compensation **only if** the petitioners are unable to avoid the Plan's exclusive remedy.

The Second District stated McKaughan had filed a "petition for benefits" and a "supplementary petition for benefits." D566. Thus,

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[13] Section 766.305 provides in pertinent part:

> **Filing of claims and responses; medical disciplinary review.--**
> (1) All claims filed for compensation under the plan shall commence by the claimant filing with the division a **petition seeking compensation**.

§ 766.305(1), *Fla. Stat.* (emphasis added). The statute then lists the type of information which must be included in the petition.

it apparently rejected (and certainly did not adopt) the hearing officer's view that a petition seeking compensation must contain an affirmative allegation the petitioner believes the infant suffered a NICA injury to be a "claim for compensation." (R 180-181).

Because McKaughan is attempting to avoid the statute's exclusive remedy, the hearing officer held the supplementary petition "cannot reasonably be construed as a claim for compensation under the Plan. . . ." (R 181). Based on this erroneous interpretation of the statute and in contravention of legislative intent, the hearing officer dismissed McKaughan's petition for failure to file a claim for compensation (R 180-182). An administrative petition need not fulfill the technical requirements of a court pleading, but merely needs to inform the opposing party of the general nature of the allegations. *Seminole County Board of County Commissioners v. Long*, 422 So. 2d 938 (Fla. 5th DCA 1982). McKaughan's petition, even as supplemented, satisfies this standard.

The reasonable interpretation of a "petition seeking compensation" should include a petitions, like those filed in this case, which seek or would result in compensation under the Plan in the event the petitioner is unable to avoid the statute's exclusive remedy. This is the only interpretation which breathes life into this statute since many potential claimants would rather gamble on

hitting the tort lottery than accept the Plan's guaranteed no-fault benefits.[14]

Section 766.305(1) does not require that a petition seeking benefits include a statement that the claimant believes the injury is a NICA injury. NICA has noted it has accepted petitions lacking much more than such a standard of belief (NICA Second DCA Reply Brief p. 3).

The extent to which the Fifth and Second District's interpretation of the NICA statute has gutted legislative intent becomes evident when that interpretation is taken to its obvious conclusion. The Plan provides complete medical care for the life of the infant suffering from a NICA injury. An infant who is permanently and substantially mentally and physically impaired such as Michael McKaughan will never know or care about any additional recovery. The interests of such an infant would clearly diverge from the interests of a legal representative who prefers to gamble the infant's guaranteed medical care on the tort lottery.

Consider what will happen if the only individual able to initiate a NICA proceeding on behalf of a NICA infant is the infant's legal representative who refuses to do so. Health care defendants will petition trial courts to appoint a guardian ad litem to protect the interests of the infant. This appointment

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[14] Perhaps potential claimants prefer to view NICA and the Plan as their safety net in the event they lose their tort suits (provided the statute for filing a NICA claim has not run). However, the "safety net" approach would frustrate the legislative purpose behind the NICA statute by requiring a defendant to undergo the expense of a trial before the Plan's applicability is determined.

would simply add another layer of litigation to the suit, thereby increasing costs and further frustrating legislative intent.[15]

As McKaughan has demonstrated, some parties prefer to take their chances on a tort lottery rather than pursue the no-fault remedy afforded by the NICA statute. McKaughan even admits if he is unsuccessful in circuit court, NICA is his fall-back position (AB 17). If the NICA statute is allowed to become nothing more than Plan B, the costs associated with defending these claims will be the same as they have always been, and legislative intent will be defeated.[16]

There are additional ramifications when parents prefer to try the tort system and forego NICA care, or when parents receive a tort recovery which is inadequate or expended while the child still needs care. Except for rare instances of wealthy parents or unlimited noncancelable insurance, the State's taxpayers can look forward to caring for those children. And the plaintiffs' plea to juries to be sure to award enough for a lifetime of care will heighten the prospects of excessive awards which will exacerbate the crisis the legislature sought to address.

As the Florida Supreme Court noted in *Coy, supra*, the disruption of obstetrical services as a result of the medical malpractice crisis has a devastating effect on the delivery of **all**

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[15] Indeed, if the Intervenors are unsuccessful in this Court, they will pursue the appointment of a guardian ad litem in the circuit court who could then file a NICA petition.

[16] And as discussed above, McKaughan cannot count on NICA as a fallback because its statute of limitations is running and because of the potential for inconsistent results.

health care services. *Id.*, 595 So. 2d at 946. Allowing plaintiffs to end-run the NICA statute in the manner McKaughan did here eviscerates the NICA statute, thereby defeating the legislative effort to alleviate the crisis affecting all providers and consumers of medical services.

III. THE HEARING OFFICER HAS PRIMARY JURISDICTION TO MAKE A PRELIMINARY DETERMINATION AS TO WHETHER THE ALLEGED INJURY IS COMPENSABLE UNDER THE PLAN.

Courts apply the doctrine of primary jurisdiction to resolve situations in which a court and an administrative agency have concurrent jurisdiction over the same subject matter, but no express statutory provision coordinates their efforts. *Hill Top Developers v. Holiday Pines Service Corp.*, 478 So. 2d 368 (Fla. 2d DCA 1985).

In those situations, the court allows the administrative agency to act first, thereby maximizing the specialized expertise of the agency and minimizing the potential for inconsistent decisions. *Id.* The administrative agency is said to have primary jurisdiction over the subject matter. *See also, State Department of Revenue v. Brock*, 576 So. 2d 848 (Fla. 1st DCA 1991)(party required to exhaust administrative remedies available before proceeding to court).

The Second District disputed the specialized expertise of the hearing officer to determine whether an infant has suffered a birth-related neurological injury:

> Unquestionably, circuit courts have vast experience and competence in adjudicating medical negligence claims and have traditionally and routinely decided complicated medical issues in such cases without the assistance of administrative expertise.

McKaughan, at D568.

The Second District missed the point by looking too broadly at medical malpractice cases in general. The determination of whether an infant suffered a NICA injury is a narrow, specialized determination which the legislature directed be made exclusively by the hearing officer. With all due respect to the experience and competence of circuit court judges, most of Florida's approximately 450 circuit judges (and the juries) will probably never see more than one (if one) NICA case in their careers. By contrast, the hearing officer in question has already considered at least 29 reported NICA cases in addition to this one.[17] In 23 of those

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[17] *Solorzano v. Florida Birth-Related Neurological Injury Compensation Association*, 15 F.A.L.R. 3553 (September 3, 1993); *Calvo v. Florida Birth-Related Neurological Injury Compensation Association*, 15 F.A.L.R. 3942 (September 3, 1993); *Soto v. Florida Birth-Related Neurological Injury Compensation Association*, 15 F.A.L.R. 4719 (October 14, 1993); *McCargo v. Florida Birth-Related Neurological Injury Compensation Association*, 15 F.A.L.R. 4715 (October 14, 1993); *Story v. Florida Birth-Related Neurological Injury Compensation Association*, 15 F.A.L.R. 4936 (November 3, 1993); *McDonald v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 56 (November 29, 1993); *Taylor v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 435 (November 29, 1993); *Desir v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 1037 (January 25, 1994); *Romero v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 1041 (January 25, 1994); *Bradford v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 1235 (January 11, 1994); *Siravo v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 2014 (February 24, 1994); *Durant v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 1243 (December 28, 1993); *Rodriguez v.*
(continued...)

cases, this hearing officer had to determine whether a NICA injury had occurred.

The Third District's interpretation of the NICA statute in *University of Miami v. Klein*, 603 So. 2d 651 (Fla. 3d DCA 1992), *rev. den.*, 613 So. 2d 6 (Fla. 1993), is consistent with the doctrine of primary jurisdiction. The plaintiffs in *Klein* had questioned the constitutionality of the statute as well as the applicability of the Plan to the subject injury which ultimately resulted in the infant's death. The defendants appealed the trial

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[17](...continued)
Florida Birth-Related Neurological Injury Compensation Association, 16 F.A.L.R. 1253 (December 30, 1993); *Ferdinand v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 1248 (January 6, 1994); *Taylor v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 1484 (February 10, 1994); *Mack v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 2021 (February 28, 1994); *Gillis v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 2267 (March 9, 1994); *Denson v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 3048 (July 8, 1994); *Ross v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 3254 (June 6, 1994); *Wojtowicz v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 3258 (July 22, 1994); *Ewing v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 3058 (May 20, 1994); *White v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 3266 (May 17, 1994); *Rodriguez v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 3530 (August 18, 1994); *Dupont v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 3504 (August 26, 1994); *Rennick v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 3096 (June 30, 1994); *Epinoza v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 3510 (August 26, 1994); *Sexton v. Florida Birth-Related Neurological Injury Compensation Association*, 16 F.A.L.R. 3518 (August 18, 1994); *Stutz v. Florida Birth-Related Neurological Injury Compensation Association*, 17 F.A.L.R. 131 (November 1, 1994); *Carreras v. Florida Birth-Related Neurological Injury Compensation Association*, 17 F.A.L.R. 136 (October 28, 1994).

court's determination that the statute did not supersede the wrongful death statute. *Id.*, at 652.

After finding the NICA statute applies to birth-related neurological injuries to infants born alive, but who subsequently die, the Third District remanded the case to the trial court to resolve the constitutionality issue. In doing so, however, the court instructed that a finding of constitutionality would **preclude the trial court from exercising further jurisdiction in the case**. *Id.*, at 653. As that court stated, "permitting parties to litigate in court where there is a legal or contractual obligation to proceed only administratively, constitutes a departure from the essential requirements of law." *Id.*, at 652.

Consistent with the doctrine of primary jurisdiction, Judge Arnold abated Petitioners' civil action to allow the Division to bring its expertise to bear on the determination of whether Michael McKaughan had in fact suffered a NICA injury.

The Second District attempts to distinguish *Klein* because the Third District's jurisdictional analysis was "undertaken in the face of *undisputed facts*." *McKaughan*, 20 Fla. L. Weekly at D569 (emphasis supplied). The principle of primary jurisdiction, however, does not depend on whether the facts of the case are disputed. As discussed above, primary jurisdiction is based on the specialized expertise of the administrative agency. *See Hill Top Developers, supra.* In its attempt to distinguish *Klein*, the Second District has missed the point.

Finally, Humana notes two other NICA topics which are not issues in this appeal. Prior to abating the circuit court action in order to receive an administrative determination as to whether Michael McKaughan suffered a NICA injury, Judge Arnold ruled the NICA statute was constitutional and McKaughan had received notice of the Plan as required by § 766.316 (circuit court, 11/24/93 hearing, p. 6). These are issues which will be litigated in Florida courts. *See Turner v. Hubrich*, 19 Fla. L. Weekly D2239 (Fla. 5th DCA 1994)(withdrawn); substituted *Turner v. Hubrich*, 20 Fla. L. Weekly D703 (Fla. 5th DCA 1995). However, neither the constitutionality of the NICA statute nor the sufficiency of the notice is an issue in this appeal.

CONCLUSION

Based on the foregoing, Humana requests this Court answer the certified question in the affirmative, hold the Second District erred in affirming the hearing officer's dismissal of McKaughan's petition for benefits, and remand the case for an administrative hearing to determine the Plan's applicability to Michael McKaughan's injury.

Respectfully submitted,

RAYMOND T. ELLIGETT, JR., ESQ.
Florida Bar No. 261939
AMY S. FARRIOR, ESQ.
Florida Bar No. 684147
SCHROPP, BUELL & ELLIGETT, P.A.
Landmark Centre, Suite 2600
401 East Jackson Street
Tampa, Florida 33602-5226
(813) 221-2600

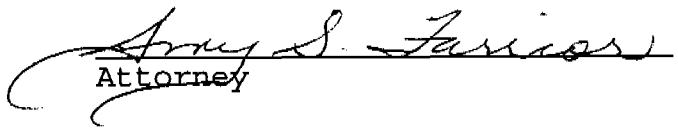
- and -

RANDY J. OGDEN, ESQ.
Florida Bar No. 351830
TIMON V. SULLIVAN, ESQ.
Florida Bar No. 283010
DANEIL M. McAULIFFE, ESQ.
Florida Bar No. 940062
GUNN, OGDEN & SULLIVAN
Post Office Box 1006
Tampa, Florida 33601
(813) 223-5111

ATTORNEYS FOR
INTERVENOR/PETITIONER,
HUMANA OF FLORIDA, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the following counsel by U.S. Mail, this 1st day of May, 1995.



Attorney

Phillip H. Taylor, Esq.
13601 S.E. Flora Avenue
Hobe Sound, FL 33455
(407) 545-3832
COUNSEL FOR MCKAUGHAN

Bruce S. Rogow, Esq.
2441 Southwest 28th Avenue
Fort Lauderdale, Florida 33312
(305) 767-8909
COUNSEL FOR MCKAUGHAN

Bruce M. Culpepper, Esq.
William E. Whitney, Esq.
PENNINGTON & HABEN, P.A.
215 S. Monroe Street, 2nd Floor
P.O. Box 10095 (32302-2905)
Tallahassee, Florida 32301
(904) 222-3533
COUNSEL FOR NICA

Ted R. Manry, III, Esq.
Stephen H. Sears, Esq.
Mark E. McLaughlin, Esq.
MACFARLANE, AUSLEY et al.
P.O. Box 1531
Tampa, FL 33601
(913) 273-4200
COUNSEL FOR WILLIAM L. CAPPS, M.D.

Philip D. Parrish, Esq.
STEPHENS, LYNN et al.
9130 S. Dadeland Blvd., PH2
Two Datran Center
Miami, Florida 33156
(305) 670-3700
COUNSEL FOR KENNETH SOLOMON, M.D.
and NEONATAL SERVICES, INC.