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 REPLY BRIEF

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SUMMARY OF ARGUMENT

The NICA statute intends for the NICA Plan to be the exclusive remedy for NICA injuries, and for the hearing officer to make the NICA determination before litigation. Permitting plaintiffs to end-run the statute by affirmatively asserting there was no NICA injury would eliminate the intended savings in defense and indemnity costs in virtually all NICA cases. In short, the legislature's major contribution to the cure of the medical malpractice crisis would be judicially eliminated before it ever has a chance to work.

ARGUMENT

I. THE DEATH OF NICA.

If this Court affirms the Second District's determination that NICA's exclusive remedy is an affirmative defense, it will indeed sound the death knell for the NICA statute.[1] McKaughan contends this assertion is mere hyperbole (AB 19), but the predicted result would be inevitable.

As this Court knows, the vast majority of Florida tort suits, including medical malpractice suits, settle before trial. Health care providers who have asserted NICA as an affirmative defense, however, will find themselves between the proverbial rock and a

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[1] Humana uses the same designations as in its initial brief, except that Humana uses "IB" to refer to its initial brief filed in the Supreme Court and "AB" to refer to McKaughan's answer brief filed in the Supreme Court.

hard place. In order to receive the benefit of NICA's exclusive remedy, these defendants will be forced to go to trial, knowing all the while they are exposing themselves to the possibility of astronomical damage awards.

Defendants unwilling to take that risk will settle without ever receiving the benefit of the NICA protection for which they have paid and to which the legislature has determined they are entitled. Those defendants willing to go to trial are likely to face a jury ready to make whatever findings are necessary in order to award damages to the sympathetic, catastrophically injured infant and his family.

The end result will be that few (if any) cases involving disputed but actual NICA injuries will ever find their way out of circuit court. NICA will be required to pay few (if any) claims. At some point, obstetricians will understandably perceive they are receiving no benefit from their contribution to the NICA fund and, because their contributions are voluntary (unlike workers' compensation), will elect not to participate. NICA's collapse will be inevitable.

If, however, the circuit court is required to briefly stay its hand pending a determination by the hearing officer, this entire scenario can be avoided. Both the injured patients and their health care providers can resolve the NICA issue quickly and efficiently. Indemnity and defense costs will be reduced, and legislative intent will be fulfilled.

The legislature intended the NICA statute to address the

causes of the medical malpractice crisis as expressed in §§ 766.201 and 766.301. It did not intend to establish a procedure which would permit NICA's exclusive no-fault remedy to be side-stepped by individuals with potential NICA injuries who would rather be in circuit court. It certainly did not intend courts to interpret the NICA statute in a manner which would lead to the imminent demise of NICA and the Plan. The Second District's interpretation of the NICA statute, however, does exactly that.

Humana's initial brief recognized many plaintiffs would prefer to gamble on the tort lottery rather than accept guaranteed benefits under NICA (IB 15-16). Although Humana notes McKaughan's professed indignation at this observation, labeling it as an ad hominem attack is inaccurate (AB 19-20). Humana is simply echoing and McKaughan is simply following the advice of the plaintiffs' bar in Florida:

> For parents who have suffered the life-consuming tragedy of a brain-damaged child, and who have available government programs supplemented by private health insurance, **the choice is easy: proceed with the more risky, but more substantial claim of malpractice**. Should the claim be successfully avoided on the basis of the NICA exclusion within five years after birth, a NICA claim can still be filed.

Academy of Florida Trial Lawyers Journal, "An Obstetrician's NICA Shield is Dependent on Pre-Natal Notice," F. Shields McManus, No. 392, p. 13 (May, 1995). As this passage makes clear, the plaintiffs' bar perceives only minimal risk to first pursuing the tort lottery, and certainly considers it a risk worth taking. The plaintiff's good faith belief that the injury is **not** within the parameters of the NICA statute never enters into the recommended

litigation strategy evaluation. NICA becomes nothing more than a fallback.

Coy v. Florida Birth-Related Injury Compensation Plan, 595 So. 2d 943 (Fla. 1992), noted the potential of the NICA statute to be ". . . a **major contribution** to the cure (of the medical malpractice crisis)." *Id.*, at 946 (emphasis added). Under the Second District's construction, however, the NICA statute cannot live up to that potential. Affirming the opinion effectively means giving up on the cure before it has a chance to work.

II. THE PROCEDURAL FRAMEWORK OF THE NICA STATUTE EVINCES LEGISLATIVE INTENT TO REQUIRE THE DIVISION TO MAKE THE PRELIMINARY DETERMINATION AS TO WHETHER A NICA INJURY HAS OCCURRED.

McKaughan concedes the NICA statute unequivocally changes the common law for birth-related neurological injuries (AB 18). *Cf. Thornber v. City of Fort Walton Beach*, 568 So. 2d 914 (Fla. 1990).[2] The exclusive remedy provision of that statute provides:

> 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 . . . at common law or otherwise** . . . .

§ 766.303(2)(emphasis added).

Thus, the legislature made it clear that if Michael McKaughan has suffered a NICA injury, McKaughan's common law rights and remedies with respect to that injury no longer exist. This

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[2] Because the legislature expressly stated its intent to change the common law, no abrogation by implication is required. *See Thornber*, at 918. McKaughan's argument that his common law tort remedy could coexist with NICA is true only if McKaughan's injury is **not** a NICA injury (AB 18).

exclusion would include the common law right to a jury trial. However, if a jury ultimately determines Michael suffered a birth-related neurological injury, McKaughan will already have received a common law right to which he was not entitled. § 766.303(2).

The only way to avoid such a violation of the NICA statute is to have the hearing officer make this determination at the beginning of a case, rather than leave it for the jury's determination at the end of trial.

The basic thrust of McKaughan's argument is because the statute is "silent" as to the exact procedure for determining cases in which the injured party contests the applicability of the NICA statute, the legislature must not have considered the situation when it drafted the statute. Therefore, McKaughan reasons, the legislature did not intend to change the common law with respect to these cases (AB 18).

However, McKaughan has not proven the legislature failed to consider these cases when it drafted the NICA statute. McKaughan has not shown the legislature believed plaintiffs with catastrophic injuries would voluntarily forego the opportunity to file malpractice suits and would rush to file NICA petitions, if they could possibly avoid it. It is far more reasonable to assume the legislature **did** consider these cases and drafted the NICA statute accordingly.

In any event, the statute is not silent on this issue. As discussed in the initial brief and below, express statements of legislative intent combined with the procedural framework of the

NICA statute, especially when compared with the provisions of the workers' compensation statute, indicate the legislature intended to vest exclusive jurisdiction in the Division to make the preliminary determination of whether there is a birth-related neurological injury. (IB 17-28).

McKaughan's argument also contains an unsupported leap in logic. The case he cites at AB 18[3] did not hold the Court is prevented from construing a statute with respect to a situation on which it is silent. *Forsythe* held the Court would look solely to the language of the statute where the language is free from ambiguity. Humana argues the statute's plain language says it is the exclusive remedy. The best case for McKaughan is that the statute is ambiguous, and then the Court would construe it to give effect to its broad remedial intent (McKaughan's construction argument at AB 17 ignores the NICA statute's express change in the common law to a no-fault administrative remedy).

A. The statute of limitations evinces clear legislative intent to have the applicability of the NICA Statute administratively determined prior to proceeding in circuit court.

Perhaps the most telling indication of the legislature's intent to vest exclusive jurisdiction to make this preliminary determination in the Division is the statute's tolling provision.

The NICA statute tolls the time for filing a civil action while the claim is pending before the Division or on appeal.

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[3] *Forsythe v. Longboat Key Beach Erosion Control District*, 604 So. 2d 452 (Fla. 1992).

§ 766.306. But, unlike the workers' compensation statute, no provision tolls the statute of limitations to file a claim while the plaintiff pursues a tort action. § 440.19(4).

This fundamental difference between Florida's exclusive remedy statutes indicates the legislature intended NICA to have a very different procedure from workers' compensation. Reading § 766.306 together with NICA's other provisions reveals that difference is requiring a determination from the Division before allowing the injured party to proceed with a civil suit.

This interpretation is further supported by *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993). *Echarte* noted the Task Force found differences between medical malpractice and workers' compensation cases made the solutions the legislature implemented to meet the workers' compensation problem ineffective to answer the medical malpractice insurance liability crisis. Noting the legislature did not adopt a no-fault system or mandatory insurance program for the entire medical malpractice crisis, this Court observed, "The unique facts surrounding medical malpractice required the Legislature to tailor a different solution to solve the crisis." *Id.*, at 195. The "different solution" the legislature devised for potential NICA cases was to remove those cases entirely from the tort system by requiring the hearing officer to determine NICA's applicability prior to proceeding in circuit court.

McKaughan, like the Second District, has no real explanation for the NICA tolling provision or the differences between that

provision and the tolling provision in the workers' compensation statute.

In an attempt to provide some explanation, McKaughan suggests that "in view of NICA's relatively long statute of limitations, one could reasonably infer that the Legislature recognized that some plaintiffs might want to file a NICA claim following an unsuccessful civil suit" (AB 28).[4]

Nothing in the statute or the legislative history supports such an inference, while the statute is replete with provisions and statements of legislative intent (in addition to the statute of limitations provision) which support Humana's position. *See* IB 17-19. Moreover, the 1993 amendment to the statute of limitations renders McKaughan's inference patently unreasonable. If the legislature had wanted to ensure unsuccessful plaintiffs still had ample opportunity to pursue NICA benefits, it would not have shortened NICA's statute of limitations from seven to five years. § 766.313.

Under the five-year NICA statute, a plaintiff who files a medical malpractice suit at the very end of the two-year medical

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[4] In a footnote, McKaughan expresses disbelief that an injured infant could be left without recourse if a jury determines a NICA injury has occurred. McKaughan theorizes in the administrative proceeding, NICA would simply "echo" the arguments of the dismissed health care providers (AB 28). However, at that point in the case, NICA would have no reason to be concerned over the fate of its covered health care providers. NICA would be free to make its own determination and would accept the claim only if it determined the claim compensable. Furthermore, the hearing officer would be free to accept or deny the claim regardless of NICA's recommendation. § 766.305(6). And, as Judge Kendrick has demonstrated in this case, the hearing officer is not bound by the determinations made in circuit court, or by NICA's recommendation.

malpractice statute of limitations (as did McKaughan) would have only three years in which to complete the civil suit.[5] If the five-year statute applied to McKaughan's injury, McKaughan (born in May, 1989) would have been time-barred from pursuing NICA benefits over a year ago.

Although McKaughan might argue time was spent litigating NICA issues, both McKaughan and the Second District concede their interpretation of the NICA statute poses substantial risks for an unsuccessful plaintiff who may well face a statute of limitations bar to a subsequent NICA claim. *Humana of Florida, Inc. v. McKaughan*, 652 So. 2d 852 (Fla. 2d DCA 1995); AB 30. Neither McKaughan nor the Second District denies proceeding administratively first poses **no risk** to the injured party. If the hearing officer finds no NICA injury has occurred, the civil suit remains as viable an option as it was before filing the NICA petition.

As McKaughan has demonstrated and the Academy of Florida Trial Lawyers has advised, litigants with disputed NICA injuries left to their own devices will go the circuit court route first. If the legislature had intended litigation strategy in these cases to remain a "personal decision" (AB 30), it would have created a risk-free tolling provision just as it did in the workers' compensation statute. It did not do so. By creating a tolling provision which

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[5] If a plaintiff filed at the very end of the four-year statute of repose, § 95.11(4)(b), that plaintiff would have only one year to complete the medical malpractice case before the NICA statute of limitation ran.

is the antithesis of the workers' compensation provision, the legislature indicated its intent to remove litigation strategy in these cases from the realm of personal preference in order to effect a major contribution to the cure of the medical malpractice crisis in the state of Florida. *See Coy, supra.*

B. A "petition seeking compensation" includes a petition seeking compensation only if the petitioner is unable to avoid NICA's exclusive remedy.

McKaughan admits the plain words of the statute provide, "a claimant seeking no-fault benefits for a NICA birth-related neurological injury (§ 766.302(2)) has an **exclusive administrative remedy, and must seek and receive** those benefits through the DOAH" (AB 20, emphasis added). McKaughan asserts that in order to trigger the exclusive remedy, one must file a petition seeking compensation (AB 22). In other words, McKaughan argues there is no exclusive remedy unless and until the injured individual wants it.

McKaughan is wrong. Filing a claim for compensation does not "trigger the exclusive remedy provisions" (AB 22). NICA **is** the exclusive remedy for birth-related neurological injuries whether or not a NICA claim is ever filed.

The triggering event is the injury, not the procedure. Because the remedy applies to a NICA injury whether the injured party wants it or not, a "petition seeking compensation" must include petitions seeking compensation only if the petitioners are

unable to avoid the Plan's exclusive remedy.[6] § 766.305(1).

In fact, if an injured infant's representative is the only party who may file such a petition, this interpretation reconciles the express goals of the legislature while breathing life into the statute since many potential claimants will attempt to avoid NICA's exclusive remedy if at all possible.[7] Even *Wager* recognized a restrictive literal interpretation which prevents health care providers from initiating administrative proceedings under the NICA statute renders the statute defective.[8]

Interpreting a statute so as to render it defective when other interpretations are possible violates long-standing rules of statutory construction. *See Radio Telephone Communications, Inc. v. Southeastern Telephone Company*, 170 So. 2d 577, 580 (Fla. 1964)(courts obligated to avoid construing a statute so as to

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[6] Here, McKaughan has never denied he would have accepted NICA benefits if the hearing officer had determined Michael suffered a NICA injury (R 1-2, 6-7).

[7] *See Central Florida Regional Hospital, Inc. v. Wager*, 20 Fla. L. Weekly D633 (Fla. 5th DCA, March 10, 1995). Humana notes, however, that even under a restrictive interpretation of the definition of "claimant," a court-appointed guardian ad litem would qualify (IB 36-37).

[8] The Fifth District has certified *Wager* to this Court on the same question presented here. 20 Fla. L. Weekly D1638 (Fla. 5th DCA July 14, 1995). In another case, it again interpreted the NICA statute in a manner which denies health care providers the ability to initiate proceedings before the Division. *White v. Florida Birth Related Neurological, etc.*, 20 Fla. L. Weekly D1372 (Fla. 5th DCA, June 9, 1995), held health care providers who are not the legal representative of the injured infant do not have the right to initiate a NICA claim on the infant's behalf. Humana also notes the Fifth District has, for the second time, amended its opinion in *Turner v. Hubrich*, 20 Fla. L. Weekly D1529 (Fla. 5th DCA, June 30, 1995).

achieve an unreasonable result). McKaughan's argument for a construction deferring to the common law ignores the rule calling for a construction consistent with the legislature's intent which seeks a reduction in **defense** and indemnity costs for obstetrical health care providers (IB 3-5).

McKaughan contends his petition (including the supplementary petition) cannot be considered a "petition seeking compensation" because it makes no affirmation that a NICA injury occurred and, in fact, states his intention to prove one did not occur (AB 21). However, the legislature specified in detail what information should be included in the petition. § 766.305(1)(a)-(j). That information does **not** include a statement that the petitioner believes a birth-related neurological injury has occurred. Thus, neither the statute nor the circuit court's procedure requires plaintiffs to file any "dishonest pleadings" (AB 15).

Nothing in the NICA statute prohibits interpreting a "petition seeking compensation" in the less restrictive manner urged by Humana. Because this is the only interpretation which allows the legislature's medical malpractice cure to work instead of rendering the statute defective, this is the interpretation which should be adopted.

C. Interlocutory review of summary judgment denying applicability of NICA Statute as exclusive remedy will not work.

Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994), cited by McKaughan (AB 24), like *Mandico v. Taos Construction, Inc.*, 605 So. 2d 850 (Fla. 1992), reaffirms the importance of determining issues

involving tort immunity at the earliest possible point in the litigation. *Resha* observed, "if orders denying summary judgment based upon claims of qualified immunity are not subject to interlocutory review, the qualified immunity of public officials is illusory and the very policy that animates the decision to afford such immunity is thwarted." *Id.*, at 1190.

Unless the applicability of NICA's exclusive remedy is determined when the defendant health care providers raise the defense, the legislature's decision to exclude all common law rights and remedies for individuals who suffer NICA injuries is similarly thwarted.

Unlike cases involving qualified immunity or the workers' compensation statute, however, the applicability of the NICA statute to any disputed injury will virtually **never** turn on an issue of law.[9]

Workers' compensation contemplates a circuit court action first (IB 20-21), and there is no administrative body to decide qualified immunity questions (*Resha*). By contrast, the NICA statute provides an administrative mechanism to make the necessary factual determinations at the earliest possible point in the litigation. The non-final appeal solution fashioned by this Court to deal with the concerns in *Mandico* and *Resha* will not work in NICA.

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[9] Hence, McKaughan's statement that while interlocutory review might be desirable, it is not always possible, grossly understates the situation with respect to NICA (AB 24).

III. THE HEARING OFFICER HAS PRIMARY JURISDICTION TO DETERMINE WHETHER THE ALLEGED INJURY IS COMPENSABLE UNDER THE PLAN.

Both McKaughan and the Second District contend circuit courts have long decided medical malpractice issues without the assistance of administrative expertise and, therefore, need no such assistance now (AB 31). The question is not whether circuit courts are as experienced as the administrative agency in determining medical malpractice cases in general, but whether the agency has expert and specialized knowledge specifically with regard to whether there is a NICA injury. As demonstrated at IB 39-40, the Division is unquestionably more experienced in this narrow area than is a circuit court or jury. The legislature has made it clear that it is no longer litigation as usual when NICA injuries are involved.

The doctrine of primary jurisdiction operates not only to bring technical expertise to bear on these cases, but also to ensure uniformity of result. *See Hill Top Developers v. Holiday Pines Service Corporation*, 478 So. 2d 368, 370 (Fla. 2d DCA 1985), *rev. den.*, 488 So. 2d 68 (Fla. 1986). The NICA statute's intended restriction of alternative legal recourse to compensate individuals suffering from birth-related neurological injuries makes it imperative these cases receive uniform treatment.

Finally, McKaughan claims the doctrine of primary jurisdiction may operate to "deprive" him of the remedies and damages that would have been available only in circuit court (AB 33). Use of the doctrine of primary jurisdiction will not deprive McKaughan of anything to which he is now entitled. If the hearing officer

determines Michael McKaughan has **not** suffered a NICA injury, McKaughan may pursue any and all common law remedies (and damages) available in circuit court. *See Hill Top Developers*, 478 So. 2d at 370 (access to judiciary not foreclosed; still available following utilization of administrative process). If, however, the hearing officer determines a birth-related neurological injury has occurred, it is the legislature, not the doctrine of primary jurisdiction, which has excluded McKaughan's common law rights and remedies in favor of the Plan's exclusive no-fault compensation remedy.

CONCLUSION

Based on the foregoing, Humana requests this Court answer the certified question in the affirmative, and remand the case for an administrative hearing to determine the Plan's applicability to Michael McKaughan's injury.

Respectfully submitted,

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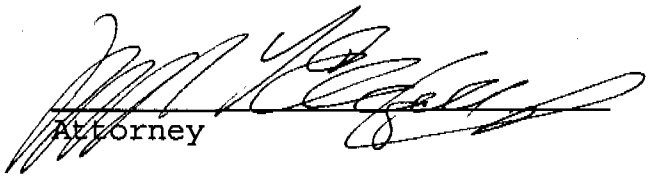
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the following counsel by U.S. Mail, this 25th day of July, 1995.



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