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IN THE SUPREME COURT OF FLORIDA

CENTRAL FLORIDA REGIONAL HOSPITAL, INC., d/b/a CENTRAL FLORIDA REGIONAL HOSPITAL,

Petitioner/Defendant,

v.

PAUL WAGER and WENDY WAGER, as Personal Representatives of the Estate of HENRY PAUL WAGER, III, a Deceased Minor, on behalf of the Estate of HENRY PAUL WAGER, III,

Respondents/Plaintiffs.

_______________________________/

CASE NO. 86,178

District Court of Appeal, 5th District - Nos. 94-2138 and 94-2139 (Consolidated)

ON CERTIFIED QUESTION FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER CENTRAL FLORIDA REGIONAL HOSPITAL, INC., d/b/a CENTRAL FLORIDA REGIONAL HOSPITAL'S INITIAL BRIEF

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TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS i

TABLE OF CITATIONS iii

PRELIMINARY STATEMENT v

STATEMENT OF THE CASE AND FACTS 1

STATEMENT OF THE ISSUE (THE CERTIFIED QUESTION) 9

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 10

ARGUMENT 12

AN ADMINISTRATIVE HEARING OFFICER DOES 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.

A. The Florida Birth-Related Neurological Injury Compensation Plan 12

B. Preemption/Primary Jurisdiction 15

C. Statutory Construction 20

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TABLE OF CONTENTS
(continued...)

Page(s)

CONCLUSION 22

CERTIFICATE OF SERVICE 23

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TABLE OF CITATIONS

Page(s)

CASES

Central Florida Regional Hosp., Inc. v. Wager
20 Fla. L. Weekly D633 (Fla. 5th DCA March 10, 1995) . 7, 17

Hill Top Developers v. Holiday Pines Service Corp.
478 So.2d 368 (Fla. 2d DCA 1985),
review denied, 488 So.2d 68 (Fla. 1986) 18

Humana of Florida, Inc. v. McKaughan
652 So.2d 852 (Fla. 2d DCA 1995) 18

Maxwell v. School Bd. of Broward County
330 So.2d 177 (Fla. 4th DCA 1976) 15, 16

Mercury Motor Express, Inc. v. Brinke
475 F.2d 1086 (5th Cir. 1973) 17

Sheetmetal Workers' Int. Ass'n v. Florida H. & P., Inc.
230 So.2d 154 (Fla. 1970) 16

State v. Webb
398 So.2d 820 (Fla. 1981) 20

White v. Florida Birth-Related Neurological, etc.
20 Fla. L. Weekly D1372 (Fla. 5th DCA June 9, 1995) . . 20

STATUTES

§766.301, Fla. Stat. (1993) 13

§766.301(1)(c), Fla. Stat. (1993) 21

§766.301(2), Fla. Stat. (1993) 11

§766.302(2), Fla. Stat. (1993) 15

§766.302(3), Fla. Stat. (1993) 20

§766.302(7), Fla. Stat. (1993) 14

§766.303(1), Fla. Stat. (1993) 13

§766.303(2), Fla. Stat. (1993) 13, 14

§766.305(1), Fla. Stat. (1993) 20

TABLE OF CITATIONS
(continued...)

Page(s)

§766.307(1), Fla. Stat. (1993) 21

§766.308(1), Fla. Stat. (1993) 18

§766.309, Fla. Stat. (1993) 19

§766.309(1)(a), Fla. Stat. (1993) 10, 15, 20

§766.309(3), Fla. Stat. (1993) 19

§766.31, Fla. Stat. (1993) 14

§766.313, Fla. Stat. (1993) 10

§766.314(4), Fla. Stat. (1993) 14

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PRELIMINARY STATEMENT

References throughout this brief will be made as follows:

1. Defendant below and Petitioner herein, CENTRAL FLORIDA REGIONAL HOSPITAL, INC., d/b/a CENTRAL FLORIDA REGIONAL HOSPITAL, will be referred to as "CFRH."

2. Defendants below and Petitioners in the companion case currently pending before this Court (Case No. 86,201), DAVID C. MOWERE, M.D., DAVID C. MOWERE, M.D., P.A., MID-FLORIDA OB-GYN SPECIALISTS, and PHILLIPS, RAVELO & MOWERE, M.D., P.A., will be referred to collectively as "MOWERE" or individually by name where necessary.

3. Plaintiffs below and Respondents herein, PAUL WAGER and WENDY WAGER, as Personal Representatives of the Estate of HENRY PAUL WAGER, III, a Deceased Minor, on behalf of the Estate of HENRY PAUL WAGER, III, will be referred to collectively as "WAGER" or individually by name where necessary.

4. The Florida Birth-Related Neurological Injury Compensation Plan, §§766.301-777.316, Fla. Stat. (1993), will be referred to as the "Act" or the "Plan."

5. The Florida Birth-Related Neurological Injury Compensation Association will be referred to as "NICA."

6. A "birth-related neurological injury," as defined by §766.302(2) of the Act will be referred to as a "NICA injury."

7. The Division of Administrative Hearings of the Department of Management Services will be referred to as the "Division" or "DOAH."

8. References to the Appendix to Initial Brief on the Merits filed by CFRH contemporaneously herewith shall be to "App." followed by the appropriate exhibit letter.

9. All emphasis is supplied by CFRH, unless indicated to the contrary.

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STATEMENT OF THE CASE AND FACTS

I. Circuit Court Proceedings

On or about August 7, 1991, Respondent WENDY WAGER presented in labor for delivery and was admitted to CFRH by her private obstetrician, DAVID C. MOWERE, M.D. HENRY PAUL WAGER, III, was subsequently delivered by emergency cesarean section performed by DR. MOWERE at CFRH. The infant suffered serious injuries during the labor and delivery process and died approximately two weeks after birth on August 26, 1991.

Respondents/Plaintiffs, PAUL WAGER and WENDY WAGER as Personal Representatives of the Estate of HENRY PAUL WAGER, III, a Deceased Minor, on behalf of the Estate of HENRY PAUL WAGER, III, filed their Complaint in the Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida alleging, inter alia, that CFRH and MOWERE failed to meet the prevailing professional standard of care and that such failure constituted negligence which resulted in physical injuries to, and eventually the death of HENRY PAUL WAGER, III. (App. A).

Thereafter, CFRH and MOWERE filed substantially similar motions to dismiss, to strike, and/or to abate the Complaint. (App. B and C, respectively). CFRH supported its motion with a memorandum of law. (App. D). Additionally, MOWERE provided an affidavit from Lynn B. Dickinson, Executive Director of the Florida Birth-Related Neurological Injury Compensation Association, stating that based upon Ms. Dickinson's review of the limited medical information regarding the birth and death of the WAGER infant, the

allegations of the Complaint appear to be covered by the Act. (App. E). Furthermore, she stated that the Division of Administrative Hearings has exclusive jurisdiction to determine compensability of claims covered by the Act. (App. E).[1]

WAGER filed a memorandum of law in opposition to CFRH's motion (App. G) stating, inter alia, that WAGER intended to prove at trial that:

> 1. The Defendants were negligent in the delivery process and through their negligence the Plaintiff's decedent sustained serious injuries to various bodily functions as a result of a combination of a lack of oxygen and lack of adequate blood supply.
>
> 2. Plaintiffs intend to prove that the Decedent died as a result of injuries other than neurological injuries and therefore NICA has no application to the facts of this case.

(App. G, page 2).

Both CFRH's and MOWERE's motions to abate were heard by the Honorable Seymour Benson on July 6, 1994 and denied by an order entered by him that same day. The trial court found that "[t]here's nothing that I see in the pleadings to suggest it's a neurological injury." (App. H, page 5 of Transcript). Judge Benson later stated that:

> You [defendants below] can't push them into determining that it's neurological when there is no allegation that it is. I would suspect that at some point, if your physicians come in

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[1] MOWERE also filed an affidavit of his own indicating, inter alia, that at the time of HENRY PAUL WAGER, III's birth, MOWERE was a participating physician in the Florida Birth-Related Neurological Injury Compensation Plan and had complied with the Act's notice requirements. (App. F).

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> and say that it is a neurological damage, then you might properly move to abate, but at this point, I don't think you can.

(App. H, page 9 of Transcript). In the same vein, the trial court instructed that "[i]f you come up with the evidence to suggest that that's what the claim should be, you're going to have to do it" and that "the motion to abate would not be improper, but it will be an evidentiary hearing." (App. H, page 10 of Transcript). At the conclusion of the hearing, Judge Benson ruled:

> You proceed as you have to proceed. If you then come forward and say, look, all of the evidence suggests it only can be a neurological, or it must be neurological, then you come in on your motion to transfer, or motion to abate, and go back to an administrative proceeding, possibly.

(App. H, page 12 of Transcript).

Based upon Judge Benson's instructions during the July 6, 1994, hearing, CFRH filed its Second Motion to Abate (App. I) and noticed the motion for a specially-set evidentiary hearing. (App. J). Contemporaneously therewith, CFRH filed a Motion to Stay (App. K) pending the outcome of the evidentiary hearing on the Second Motion to Abate.[2] In reliance upon Judge Benson's comments during the July 6, 1994, hearing, and his instruction to hold an evidentiary hearing on a motion to abate, CFRH elected not to file a Petition for Writ of Common Law Certiorari seeking review of the July 6th order, but rather filed its Second Motion to Abate and

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[2] DR. MOWERE filed a Motion to Stay Pending Appellate Determination indicating his intention to file a Petition for Writ of Certiorari to the Fifth District Court of Appeal for review of the July 6, 1994, order denying MOWERE's and CFRH's motions to abate.

specially set it for an evidentiary hearing at which CFRH intended to present live expert testimony that the infant WAGER was born with the umbilical cord wrapped around his neck and that condition caused a lack of oxygen to the baby's brain resulting in severe neurological injuries ultimately leading to the baby's death. Moreover, in its Answer, CFRH alleged as an affirmative defense that because the injuries complained of by WAGER were alleged to have occurred during the labor and delivery process and that such injuries were arguably "birth-related neurological injuries," WAGER must exhaust the administrative remedies pursuant to the Act prior to pursuing an action under the Wrongful Death Act in circuit court. (See App. L).

At the August 1, 1994, hearing on CFRH's and MOWERE's motions to stay, the trial court denied the motions to stay stating:

> I think the Plaintiff has the right to choose the for[u]m. An administrative body can only supersede when, in fact, it is a neurological damage.
>
> If they have not alleged neurological damage and they're not founding their case on neurological damage, then I don't think the Plaintiff can be pushed into this administrative proceeding.

(App. M, pages 20-21 of Transcript). Judge Benson stated further that:

> I'm going to try to give you a better appealable order, because <u>I'm denying now the right to an evidentiary hearing</u> to determine if it's neurological. <u>So I'm rescinding that order</u>.

(App. M, page 22 of Transcript).[3] Thus, at the August 1, 1994, hearing on the motions for stay, Judge Benson, sua sponte and without prior notice to the parties, revisited the abatement issue and altered his previous ruling. Prior to his denial of the previously-granted right to an evidentiary hearing on CFRH's Second Motion to Abate, he stated:

> THE COURT: I think I'd like to come back and discuss this a little more because --
>
> MS. SCHWICHTENBERG: The abatement issue, Your Honor?
>
> THE COURT: The whole thing. The whole thing that I ruled on. Maybe because there's some question on abatement, I may want to revisit even the right to an evidentiary hearing.

(App. M, page 8 of Transcript).

Throughout the hearing, Judge Benson made repeated references to his desire to enter an order from which appellate guidance could be obtained:

> Then maybe I haven't given you a good enough order for appeal purposes. Maybe I should give you a different order.
>
> ...
>
> But if we're going to go up on appeal, then I think we should be looking for the help from the appellate court to guide us on whether or not a plaintiff is entitled to file in circuit court not alleging neurological damage, and then have that for[u]m be the for[u]m to be heard rather than this administrative board doing it.
>
> ...

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[3] Following this unexpected pronouncement by the trial court at the August 1, 1994, hearing, Petitioner filed its Notice of Cancellation of Evidentiary Hearing.

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...because if there's an appeal, I want to make sure we have a good appeal that addresses the question.

...

Well, okay, but let's give it some opportunity to develop, so I'll give you a good order so that if you file the appeal, it's appealed from an order that you've got prejudiced terribly or it helps you or whatever.

...

Let me give you the rule book so you can look at it and make sure that if you have an appeal going on, I give you an order that's appealable, okay?

...

So now we're in a posture where you have, I think, an appealable order.

(App. M, pages 7, 8, 9, 10, 22, and 24 of Transcript, respectively).

Judge Benson drafted and entered his own Order Related to Defendants, Central Florida Regional Hospital, Inc.'s and David C. Mowere's, et al, Motions to Stay (the "Order") which denied the motions to stay and included the finding that "Plaintiffs' complaint does not assert or allege any neurological injury and effectively asserts that any death of an infant must proceed under the Florida Birth-Related Neurological Injury Compensation Plan...." (App. N)[4].

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[4] CFRH contends that the trial court's finding that the Complaint "effectively asserts that any death of an infant must proceed under the Florida Birth-Related Neurological Injury Compensation Plan" (App. N) is factually unsound. A careful review of the pleadings and transcripts of the hearings below will confirm that no (continued...)

II. Fifth District Court of Appeal Proceedings

Following entry of the Order by Judge Benson on August 23, 1994, both CFRH and MOWERE filed petitions for writ of common law certiorari with the Fifth District Court of Appeal seeking review of the Order. (App. O and P, respectively, without Appendices). The Fifth District Court of Appeal promptly issued Orders to Show Cause in both cases and later consolidated the cases for review. On March 10, 1995, the Court of Appeal issued a written opinion denying the petitions for writ of common law certiorari and holding that:

> We agree with the circuit court that since the plaintiffs have requested that a jury resolve all questions of fact, it would be improper for this factual issue to be resolved by the trial court in an evidentiary hearing (footnote omitted). If the jury determines that the injuries were neurologically related, the jury should be instructed to proceed no further with their deliberations. The trial court must then dismiss the action. 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 then been spared the fees, expenses and time that would have been incurred in a NICA proceeding.

Central Florida Regional Hosp., Inc. v. Wager, 20 Fla. L. Weekly D633 (Fla. 5th DCA March 10, 1995) (App. Q). Both CFRH and MOWERE then filed motions for certification with the Fifth District Court of Appeal. On July 14, 1995, in its Order on Motion for

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[4](...continued)
such assertion was ever made by either Respondents WAGER or Petitioner CFRH during the course of the proceedings before Judge Benson.

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Certification (App. R), the Fifth District Court of Appeal certified to this Court the following question as one of great public importance[5]:

> 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?

By timely-filed Notices to Invoke Discretionary Jurisdiction of this Court, CFRH and MOWERE each seek review by this Court of the Fifth District Court of Appeal's decision and respectfully request an affirmative answer to the certified question.

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[5] The identical certified question is presented in the cases of Humana of Florida, Inc. v. McKaughan, Case No. 85,447, Florida Birth-Related Neurological Injury Compensation Ass'n. v. McKaughan, Case No. 85,455, and Solomon v. McKaughan, Case No. 85,469, currently pending before this Honorable Court.

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STATEMENT OF THE ISSUE (THE CERTIFIED QUESTION)

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?

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SUMMARY OF ARGUMENT

A review of the facts of this case powerfully illustrates the necessity of compelling abatement of a circuit court medical malpractice action where the claimed injury is "arguably covered" by the exclusive remedies provided by the Plan. The procedure proposed by the Fifth District Court of Appeal is unworkable and contrary to, not only the express provisions of the Act, but also to the Legislature's intent.

The Fifth District Court of Appeal holds that where there is a disputed factual issue as to whether an injury is a NICA injury, the jury, not a DOAH hearing officer, must be permitted to decide the issue. However, the Act specifically provides that the DOAH hearing officer shall determine "[w]hether the injury claimed is a birth-related neurological injury." §766.309(1)(a), Fla. Stat. (1993).

The Fifth District Court of Appeal decision further states that where the jury decides that there is a NICA injury, the malpractice action should be dismissed. Presumably the plaintiff must then file a petition under the Act. Not only does this procedure deprive Plan-participants of their legislatively-conferred benefits, it can conceivably--and, in many instances, likely will--deprive plaintiffs/claimants of redress as well.

The Act bars any claim filed more than five years after the birth of an infant alleged to have a NICA injury.[6] §766.313, Fla.

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[6] HENRY PAUL WAGER, III, was born on or about August 9, 1991, over four years ago.

Stat. (1993). Thus, if this case proceeds through discovery and trial only to have the jury determine that HENRY PAUL WAGER, III, suffered a NICA injury, the malpractice action will be dismissed and a claim under the Act will almost certainly be time-barred.

Therefore, a method for early resolution of the disputed issue of the nature of a specific injury is imperative. It cannot be disputed that a scenario in which a plaintiff/claimant is barred from any recovery whatsoever for a NICA injury due to the absence of such a method of early resolution is contrary to the intent of the Legislature "to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation." §766.301(2), Fla. Stat. (1993).

A claim of immunity by a Plan-participant involves the type of protection that cannot be adequately restored once lost by exposure to the trial of a medical malpractice action. However, the abatement of an action in which the injury is arguably a NICA injury to allow the satisfaction of the requirement that a DOAH hearing officer determine whether there is a NICA injury offers an expeditious and less costly method of resolving the issue. Moreover, abatement provides that the compensation guaranteed by the Plan will not be lost due to the unavoidable delay inherent in awaiting the completion of a jury trial before filing a petition for compensation under the Act.

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ARGUMENT

AN ADMINISTRATIVE HEARING OFFICER DOES 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.

A. The Florida Birth-Related Neurological Injury Compensation Plan

In response to the medical care crisis which threatened the availability of affordable obstetrical care, the Florida Legislature created a limited, no-fault compensation plan for birth-related neurological injuries. In creating the Florida Birth-Related Neurological Injury Compensation Plan, the Legislature specifically addressed the need for such a plan and its intention in establishing the plan:

> **766.301 Legislative findings and intent.--** (1) The Legislative makes the following findings:
>
> (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 for such physicians than for other physicians.
>
> (b) Any birth other than a normal birth, frequently leads to a claim against the attending physician; consequently, such

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> physicians are among the physicians most severely affected by 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.
>
> (2) It is the intent of the Legislature to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation. This plan shall apply only to birth-related neurological injuries.

§766.301, Fla. Stat. (1993). The Act provides for the administration of the claims by the Florida Birth-Related Neurological Injury Compensation Association, also known as NICA. §766.303(1), Fla. Stat. (1993).

Within the Act, the Florida Legislature provides the exclusive administrative remedy where an infant suffers a birth-related neurological injury during the labor, delivery, or immediate postdelivery period. Section 766.303(2) of the Act expressly mandates that:

> 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

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> <u>malpractice claim</u> with respect to such injury; <u>except</u> that a civil action shall not be foreclosed where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property, provided that such suit is filed prior to and in lieu of payment of an award under ss. 766.301-766.316.

§766.303(2), Fla. Stat. (1993). WAGER has made no allegations of bad faith or malicious purpose on the part of CFRH or MOWERE, much less presented clear and convincing evidence of such. Thus, if HENRY PAUL WAGER, III, suffered a birth-related neurological injury during the delivery of obstetrical services by a participating physician, WAGER is limited to the exclusive remedy presented by the Act in §766.31.[7]

WAGER asserted and the trial court and the intermediate appellate court agreed that the trial court is vested with jurisdiction to determine the preliminary issue of whether or not the injury suffered by the infant WAGER is a birth-related neurological injury as defined by the Act.[8] This finding is

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[7] The uncontroverted record below demonstrates that DR. MOWERE was a "participating physician" at the time of HENRY PAUL WAGER, III's, birth, having paid the assessments required for participation. See §766.302(7), Fla. Stat. (1993) for the definition of "participating physician.

Hospital participation is mandatory. The Act provides that CFRH, as a licensed Florida hospital, must participate in the plan and pay the appropriate assessments to NICA. See §766.314(4), Fla. Stat. (1993).

[8] "Birth-related neurological injury" means 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, (continued...)

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wholly unsupported by the plain language of the Act, which specifically provides that a hearing officer appointed by the Division of Administrative Hearings of the Department of Management Services shall make that very determination. The Act mandates that:

> (1) The hearing officer shall make the following determinations based upon all available evidence:
>
> (a) Whether the injury claimed is a birth-related neurological injury. If the claimant has demonstrated, to the satisfaction, of the hearing officer, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and that the infant was thereby rendered permanently and substantially impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in s. 766.302(2).

§766.309(1)(a), Fla. Stat. (1993).

B. Preemption/Primary Jurisdiction

The preemption doctrine, as recognized by the Fourth District Court of Appeal in Maxwell v. School Bd. of Broward County, 330 So.2d 177 (Fla. 4th DCA 1976), operates to maintain the proper allocation of jurisdiction between the judiciary and administrative agencies and thereby prevent the two from colliding as a result of judicial intervention in a matter within the special competency of

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[8](...continued) delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality. §766.302(2), Fla. Stat. (1993).

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an agency. This doctrine suggests that the judiciary refrain from interfering with an area delegated by the Legislature to a special agency in order to ensure the uniform application and interpretation of legislative policy. In Maxwell, the court found that jurisdiction over labor activities is preempted in favor of the Public Employees Relations Committee if the activities are "arguably covered" by the provisions establishing guidelines governing collective bargaining by public employees. Id. at 179. Citing Sheetmetal Workers' Int. Ass'n v. Florida H. & P., Inc., 230 So.2d 154 (Fla. 1970), the Maxwell court noted that Florida courts are permitted to determine only whether the activities were "arguably covered." If the court finds that the activities were "arguably covered," then the state court must decline jurisdiction, and the determination of whether the activities were, in fact, covered, must be made by the administrative agency. Maxwell, 330 So.2d at 179.

In the instant case, the court below was presented with the affidavit of Lynn B. Dickinson, the Executive Director of NICA, the very entity statutorily created to administer claims under the Act. In her affidavit, Executive Director Dickinson asserted, inter alia, that:

> 3. If a claim is filed by Wendy Wager and Paul Henry Wager, II, then NICA would have the medical records reviewed to confirm whether, in NICA's opinion, it qualifies as a valid claim.
>
> 4. From the limited medical information that has been shared with me, this appears to be a covered claim.

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> 5. Only the Division of Administrative Hearings has jurisdiction to determine compensability on these claims.

(App. E). Thus, the sworn testimony of Ms. Dickinson serves as some evidence that the medical malpractice claims against CFRH and MOWERE are "arguably" covered by the Act. In addition, had the trial court not denied the previously-granted right to an evidentiary hearing on CFRH's Second Motion to Abate, CFRH would have presented the expert opinion testimony of a pediatric neurologist that the injuries suffered by HENRY PAUL WAGER, III, did constitute birth-related neurological injuries as contemplated by the Act. In light of an action involving injuries arguably covered by the Act[9], the trial court should have abated the action pending a determination by a DOAH hearing officer of whether the injuries suffered by the infant WAGER were, in fact, NICA injuries.

Florida courts also recognize the doctrine of primary jurisdiction which, like preemption, operates to maintain the proper relationship between the judiciary and administrative agencies. Quoting Mercury Motor Express, Inc. v. Brinke, 475 F.2d 1086 (5th Cir. 1973), the Second District Court of Appeal of Florida explained that:

> The doctrine operates, when applicable, to postpone judicial consideration of a case to administrative determination of important questions involved by an agency with special competence in the area. It does not defeat

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[9] Indeed, even the Fifth District Court of Appeal noted that CFRH and MOWERE supported their motions to abate with supporting affidavits "containing some indication that the birth-related injuries were neurological." Wager, 20 Fla. L. Weekly at D633.

> the court's jurisdiction over the case, but coordinates the work of the court and the agency by permitting the agency to rule first and giving the court the benefit of the agency's views.

Hill Top Developers v. Holiday Pines Service Corp., 478 So.2d 368 (Fla. 2d DCA 1985), review denied, 488 So.2d 68 (Fla. 1986).

Each claim filed pursuant to the Act is reviewed by a "medical advisory panel of three qualified physicians appointed by the Insurance Commissioner." §766.308(1), Fla. Stat. (1993). The panel shall consist of one pediatric neurologist or a neurosurgeon, one obstetrician, and one neonatologist or pediatrician. Id. After review of the claim, the panel files with the administrative hearing officer its report and recommendation "as to whether the injury for which the claim is filed is a birth-related neurological injury." Id. The hearing officer must consider the recommendation of the panel in making the determination of whether the claim is a covered claim. The statutorily-mandated panel of medical experts unquestionably possesses special competence in assisting the administrative hearing officer in making this determination.[10]

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[10] But see Humana of Florida, Inc. v. McKaughan, 652 So.2d 852, 860 (Fla. 2d DCA 1995), in which the Second District Court of Appeal stated that:

> 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.

(continued...)

The Legislature never intended for circuit court judges or juries to make this determination. This is evident from the express language of the Act. Section 766.309, Fla. Stat. (1993), does not provide that the hearing officer shall make the determination of whether a particular injury is a NICA injury based upon an advisory opinion rendered by a jury. Indeed, there is no provision in the Act whatsoever that suggests that the Legislature intended that a hearing officer be bound in any way by a jury's factual finding as to the existence of a NICA injury. Thus, if a jury is permitted to decide this question, there is the unacceptable possibility of inconsistent results.

On the other hand, the Act provides that a participating physician "shall be bound for all purposes by the finding of the hearing officer or any appeal therefrom with respect to whether such injury is a birth-related neurological injury." §766.309(3), Fla. Stat. (1993). Therefore, if a DOAH hearing officer determines that a particular injury is not a NICA injury, a Plan-participant is barred from contesting that fact during the course of any subsequent medical malpractice trial proceedings. Thus, the statute and logic dictate that the trial court abate the malpractice action until the Division has had the opportunity to

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[10](...continued)
This pronouncement begs the question, however. What has been done traditionally is not the issue. The Act now provides a specialized forum in which an administrative hearing officer is advised by a panel of specialists on a discrete and, given the Wager and McKaughan cases, apparently not so straightforward medical issue.

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exercise its exclusive jurisdiction to make the determination of whether the injury claimed is a birth-related neurological injury. §766.309(1)(a), Fla. Stat. (1993).

C. Statutory Construction

Pursuant to the Act, a claim may be filed only by a "legal representative on behalf of an injured infant" or "an administrator, personal representative, or other legal representative" of a deceased infant. §766.302(3), Fla. Stat. (1993); see also §766.305(1), Fla. Stat. (1993). A participating hospital or physician has no standing to commence a claim under the Act. White v. Florida Birth-Related Neurological, etc., 20 Fla. L. Weekly D1372 (Fla. 5th DCA June 9, 1995). Thus, if the courts below are correct that the plaintiff has the unfettered right to choose the forum in which to bring a medical malpractice action, then the Act will, in all likelihood, be rendered meaningless. Plaintiffs, like in the instant case, will seek to avoid the cap on non-economic damages imposed by the Act by simply drafting their complaints to allege "physical" rather than "neurological" injuries. Surely the Florida Legislature did not intend to provide an exclusive administrative remedy whose exclusivity depends on such a semantic "non-distinction."

In construing a statute, an appellate court must seek to arrive at a construction which effectuates the beneficial purpose for which a statute was adopted and to avoid any construction which would lead to an unreasonable or ridiculous result. State v. Webb, 398 So.2d 820, 824 (Fla. 1981). Should the circuit court

proceedings not be abated, CFRH will be irreparably deprived of the protection and exclusivity of remedy afforded participating hospitals and physicians under the Act.[11] It is, indeed, an unreasonable and absurd result, for physicians and hospitals to pay their assessments to NICA to obtain the protections provided by the Act, only to have those protections denied by virtue of artful pleading by plaintiffs. The immense cost to Plan-participants and their insurance carriers of defending a malpractice action to jury verdict and through appeal prior to resolution of the applicability of the Act would eviscerate one of the stated purposes of the Act, i.e., stabilization and reduction of malpractice insurance premiums. §766.301(1)(c), Fla. Stat. (1993).

Physicians will not voluntarily elect to participate in a plan which takes their money and offers no real benefit in return. Under such circumstances, the Florida Legislature's plan to provide guaranteed compensation, on a no-fault basis, for catastrophic

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[11] It is important to note that WAGER will not be prejudiced by an abatement of the circuit court action. If the administrative hearing officer determines that HENRY PAUL WAGER, III, suffered a birth-related neurological injury, then WAGER is guaranteed compensation pursuant to §766.31 of the Act. On the other hand, if the administrative hearing officer determines that HENRY PAUL WAGER, III, did not suffer a birth-related neurological injury, then WAGER is free to pursue the medical malpractice action in circuit court. Significantly, §766.307(1) of the Act provides that the hearing officer shall set the date for hearing "no later than 120 days after the filing by a claimant of a petition...." Thus, the hearing officer's determination can proceed on a far more expedited basis than the usual course of discovery and trial in a medical malpractice action.

birth-related neurological injuries will be defeated by the simple lack of physician participation.

CONCLUSION

For the foregoing reasons, Petitioner CENTRAL FLORIDA REGIONAL HOSPITAL, INC., d/b/a CENTRAL FLORIDA REGIONAL HOSPITAL respectfully requests that this Court (1) answer the certified question in the affirmative, (2) reverse the Fifth District Court of Appeal's affirmance of the trial court's Order Related to Defendants, Central Florida Regional Hospital, Inc.'s and David C. Mowere's, et al, Motions to Stay, and (3) remand the case for appropriate administrative proceedings in which a hearing officer shall determine whether the injury claimed is a "birth-related neurological injury."

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by U.S. Mail this 28th day of August, 1995, to all counsel of record on the following list.

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