IN THE SUPREME COURT OF FLORIDA

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.,

Petitioners/Defendants, CASE NO.: 86,201

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

Petitioners/Defendants, CASE NO.: 86,178

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.

ON CERTIFIED QUESTION FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENTS PAUL WAGER AND WENDY WAGER, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF HENRY PAUL WAGER, III, A DECEASED MINOR, REPLY BRIEF

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STATEMENT OF THE CASE

This is a wrongful death action filed by the parents of Henry Paul Wager, III, alleging that their infant son died as a result of negligence on the part of the David C. Mowere, M.D. and the nursing staff at Central Florida Regional Hospital, Defendants herein.

Defendants moved to dismiss alleging that even though the Plaintiffs alleged in their Complaint that their son died from non-neurological injuries sustained at birth, they nevertheless must submit their claim first to the Florida Birth Related Neurological Injury Compensation Plan.

The Trial Court disagreed and refused to dismiss Plaintiff's Complaint. Timely appeal was taken to the Fifth District Court of Appeals where the Trial Court was affirmed.

Subsequently the Second District Court of Appeals decided a similar case holding that the Plaintiffs must submit their original wrongful death claim through NICA. Pursuant to joint agreement, Petitioner asked the Fifth District Court of Appeal to certify this case so that this issue could be resolved by this Court.

STATEMENT OF THE ISSUES

The certified question presented is:

> DOES AN ADMINISTRATIVE OFFICER HAVE THE EXCLUSIVE JURISDICTION TO DETERMINE WHETHER AN INJURY SUFFERED BY A NEWBORN INFANT DOES, OR DOES NOT CONSTITUTE A "BIRTH-RELATED NEUROLOGICAL INJURY" WITHIN THE MEANING OF THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN. §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 PLANNED 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

Petitioners are mistaken that a claim under NICA must be filed within five years of the injury. Under the statute in effect at the time of the birth of Henry Paul Wager, III, the Plaintiffs have seven years within which to present a NICA claim.

Petitioners are also mistaken in their view of the intent of the law. The crux of the issue presented to this Court is whether Respondents' son died as a result of a neurological injury sustained at birth. This case presents the classic example of the Legislature passing a confusing and often incomprehensible law that mixes medical issues with legal questions. Here the Legislature simply provides that compensation is to be paid for any neurological injuries sustained at birth. The act stops at this point and is silent on the issue of whether compensation is to be paid where an infant sustains a neurological injury at birth but later dies as a result of other system failures that were also damaged during the birthing process.

Here Respondents have alleged that their son was negligently managed during the delivery process and subsequently died as a direct result of non-neurological injuries sustained at birth. Petitioners essentially contend that this Court must look behind the pleadings and rule that NICA applies to every birth where any injury is sustained by an infant that subsequently causes the death of that infant.

The law is clear that NICA only applies to compensate for neurological injuries. The fact that the act is poorly worded and

did not take into account situations where, as here, an infant receives injuries at birth, including neurological injuries, but later dies as a result of non-neurological injuries, is a problem for the Legislature to rectify, not the Courts.

In summary, where a Plaintiff can prove that the death of an infant was a result of injuries other than neurological injuries sustained at birth, the Plaintiff is entitled to have that case heard before a jury and not have to waste time going through an administrative process with NICA.

ARGUMENT

I.
STATUTE OF LIMITATIONS

Initially Respondents would point out that F.S. §766.313 provided a seven year statute of limitations at the time of the birth of Henry Paul Wager, III. §766.313 Florida Statutes (1993). The law was amended effective May 15, 1993 substituting five years for seven years.

II.
STATUTORY CONSTRUCTION OF NICA

Petitioners argue extensively matters which completely ignore the crux of the issue presented to this Court. Petitioners essentially argue that any time an infant sustains a neurological injury at birth, all other injuries that flow from that neurological injury or from the birth, are to be compensated under NICA exclusively.

Respondents argue that this is too restrictive an application of NICA. While the statute shows a very clear legislative intent "to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries . . . ", the actual wording limits those injuries to birth-related *neurological* injuries. §766.301(2) Florida Statutes (1993).

The Legislature defined "birth-related neurological injury" very specifically as:

> "an *injury to the brain* or *spinal cord* of a live infant weighing at least 2500 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) Florida Statutes (1993)." (Emphasis Added)

This very narrow definition of a birth-related neurological injury should not be read broadly to include any and all injuries sustained by an infant.

A broad reading would effectively deny Plaintiffs access to the courts by forcing Plaintiffs to submit any injuries of a newborn to a NICA panel regardless of the type of injury sustained, as long as some neurological injury also occurred. The Florida Constitution expressly provides that the courts shall be open to every person for redress of any injury. *Psychiatric Assocs. v. Siegel*, 610 So.2d 419, 429 (Fla. 1992). Any judicial construction of a statute should be in favor of and not in restriction of access to the courts. *Swain v. Curry*, 595 So.2d 168 (Fla. 1st DCA 1992). Since NICA is in derogation of the common law, the laws of statutory interpretation require strict construction. *Fl. Steer v. Adaptable Developments*, 503 So.2d 1232 (Fla. 1986).

NICA was intended to compensate *only* for specific neurological injury to the brain or spinal cord. If the same deprivation of oxygen that damaged the brain or spinal cord also caused heart, lung and/or kidney damage, those injuries simply are not covered by the statute. And, if an infant subsequently dies from kidney or heart failure, NICA will not provide compensation.

Indeed, if an infant had to have a heart or kidney transplant because of oxygen deprivation damage to that organ, is there any doubt NICA funds would be unavailable?

In the instant case Plaintiffs have alleged that Henry Paul Wager, III sustained non-neurological injuries at birth that subsequently resulted in his death. For argument purposes, Respondents will concede that Henry Paul Wager, III sustained a brain or spinal cord injury at birth caused by oxygen deprivation but Respondents have alleged in the Complaint, and will prove at trial, the brain injury and spinal cord injury were not the proximate cause of the ultimate death of Henry Paul Wager, III. As stated above, there is no language anywhere in any provision of NICA that speaks to the issue of an infant dying as a result of non-neurological injuries.

Petitioners simply have not come to grips with the fact that this is a case where Plaintiffs have alleged, and can prove, that even if the child did sustain neurological injuries at birth, his death was a direct and proximate result of injuries to other bodily systems. This case unfortunately points out the problems created by the Legislature when it attempts to mix questions of law and medicine together. As tempting as it may be for this Court to correct the obvious discrepancies in the Act, Respondents submit that this is a matter for the Legislature.

III.
INAPPLICABILITY OF THE DOCTRINE OF PRIMARY JURISDICTION

Petitioners' argument that the doctrine of primary jurisdiction requires the matter to be submitted to NICA first is inapplicable to this case. As the petitioners have noted, primary jurisdiction comes into play when the court and an administrative

agency have concurrent jurisdiction over the same matter. *Hill Top Developers v. Holiday Pines Service Corp.*, 478 So.2d 368 (Fla. 2d DCA 1985). There is no concurrent jurisdiction in this case. Plaintiffs are not alleging a "birth-related neurological injury"; therefore, Plaintiffs are not claimants as defined by the statute. The hearing officer is only granted power to determine claims that have been filed pursuant to §766.301-766.316 Florida Statutes (1993). §766.304 Florida Statutes (1993). No claim has been filed pursuant to §766.304-766.316, and since neither Petitioners nor Respondents fall within the statutory definition of claimants, NICA lacks authority over the matter. Since NICA lacks authority, the Circuit Court is the only entity with jurisdiction.

CONCLUSION

Respondents submit that NICA does not apply to a situation where the parents can prove that even if an infant sustained neurological injuries at birth, the death of that infant was a direct and proximate result of injuries to other bodily systems sustained at the birth. In that situation, or in those situations, the Plaintiffs should be allowed to proceed with their action in Circuit Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by U.S. Mail this 13th day of September, 1995 to: Hector More', Esquire, 111 North Orange Avenue, Suite 1700, Post Office Box 538065, Orlando, FL 32853-8065, Counsel for Mowere, M.D., et al, William E. Whitney, Esquire, PENNINGTON & HARBEN, P.A., Post Office Box 10095, Tallahassee, FL 32302-2095, Counsel for NICA, and Pamela R. Kittrell, Esquire, Esquire, Cooney, Haliczer, Mattson, Lance, Blackburn, Pettis & Richards, Post Office Box 14546, Fort Lauderdale, Fl 33302, Counsel for Petitioners/Defendant Central Florida.

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