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IN THE SUPREME COURT OF FLORIDA

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

and

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.

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
CASE NO. 86,201
(Consolidated)

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 REPLY BRIEF

PAMELA R. KITTRELL, ESQ.
Florida Bar No. 856665
COONEY, HALICZER, MATTSON, LANCE, BLACKBURN, PETTIS & RICHARDS, P.A.
Post Office Box 14546
Fort Lauderdale, FL 33302
(305) 779-1900

Counsel for Petitioner CENTRAL FLORIDA REGIONAL HOSPITAL, INC., d/b/a CENTRAL FLORIDA REGIONAL HOSPITAL

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COONEY, HALICZER, MATTSON, LANCE, BLACKBURN, PETTIS & RICHARDS, P.A.

P.O. BOX 14546, FORT LAUDERDALE, FLORIDA 33302 • TEL. (305) 779-1900

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LAW OFFICES

COONEY, HALICZER, MATTSON, LANCE, BLACKBURN, PETTIS & RICHARDS, P.A.

P.O. BOX 14546, FORT LAUDERDALE, FLORIDA 33302 • TEL. (305) 779-1900

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 herein, 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.

   On September 26, 1995, this Court consolidated Case No. 86,201 (Petitioner MOWERE) and Case No. 86,178 (Petitioner CFRH) for all appellate purposes.

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 Respondents' Brief served on September 13, 1995, will be to "RB" followed by the appropriate page number.

9. References to the Initial Brief served by CFRH on August 28, 1995, will be to "IB" followed by the appropriate page number and references to CFRH's Appendix to Initial Brief on the Merits will be to "App." followed by the appropriate exhibit letter.

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

LAW OFFICES
COONEY, HALICZER, MATTSON, LANCE, BLACKBURN, PETTIS & RICHARDS, P.A.
P.O. BOX 14546, FORT LAUDERDALE, FLORIDA 33302 • TEL. (305) 779-1900

REPLY TO RESPONDENTS' STATEMENT OF THE CASE[1]

Respondents WAGER have not challenged the accuracy of the Statement of the Case and Facts in CFRH's Initial Brief, but have presented their own Statement of the Case. (RB 1). WAGER states as follows:

> 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. (RB 1).

This statement fails to accurately reflect either the motions filed by CFRH (App. B) and MOWERE (App. C) or the Complaint (App. A). In fact, the Complaint contained no allegation whatsoever that Infant WAGER, III, "died from non-neurological injuries sustained at birth." The Complaint, however, did allege that the fetal monitor strips showed "a pattern clearly indicating significant hypoxia of the fetus." (App. A, ¶28). "Hypoxia" is defined as a deficiency of oxygen. See Taber's Cyclopedic Medical Dictionary (14th Ed.). This allegation is, therefore, particularly revealing given the definition of a "birth-related neurological injury" which includes injury to the brain or spinal cord resulting from "oxygen deprivation...." §766.302(2), Fla. Stat. (1993).

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[1]Contrary to Florida Rules of Appellate Procedure 9.210(c) and 9.210(b)(3), WAGER's Statement of the Case (RB 1) contains no record references.

LAW OFFICES
COONEY, HALICZER, MATTSON, LANCE, BLACKBURN, PETTIS & RICHARDS, P.A.
P.O. BOX 14546, FORT LAUDERDALE, FLORIDA 33302 • TEL. (305) 779-1900

SUMMARY OF ARGUMENT

Where, as here, a plaintiff asserts claims which are "arguably covered" by the exclusive provisions of the Act, a trial court should decline to exercise its jurisdiction in deference to the special competence of the DOAH hearing officer aided by a panel of independent medical experts. Such a procedure will permit early resolution of the purely medical question of whether a particular injury is a NICA injury and will eliminate many of the hazards associated with allowing that decision to be made by a jury including, inter alia, the deprivation of a Plan participant's statutorily-conferred benefits and protections, the possibility of inconsistent results, and the possibility of time-barred claims.

LAW OFFICES
COONEY, HALICZER, MATTSON, LANCE, BLACKBURN, PETTIS & RICHARDS, P.A.
P.O. BOX 14546, FORT LAUDERDALE, FLORIDA 33302 • TEL. (305) 779-1900

ARGUMENT

In the Respondents' Brief, WAGER frames the issue as one presuming the existence of a neurological injury:

> [W]hether 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.

(RB 3).

WAGER then makes a concession which should be dispositive of this matter. Specifically, WAGER argues that the Act fails to address cases "where, as here, an infant receives injuries at birth, including neurological injuries, but later dies as a result of non-neurological injuries...." (RB 4). After this unqualified concession that the Infant WAGER suffered "neurological injuries" at birth, WAGER then further concedes for purposes of argument that Infant WAGER "sustained a brain or spinal cord injury at birth caused by oxygen deprivation" (RB 7), but that the neurological injury was not the proximate cause of death.

In light of the allegations of the Complaint regarding, inter alia, "hypoxia" (App. A, ¶28), the affidavit of Lynn B. Dickinson, Executive Director of the Florida Birth-Related Neurological Injury Compensation Association, indicating that the WAGER claim appears to be a claim covered by the Act (App. E), as well as WAGER's concessions, no plausible argument can be made that the medical malpractice claims against CFRH and MOWERE are not "arguably covered" by the Act. Under these circumstances, CFRH submits that application of the preemption doctrine is warranted.

LAW OFFICES
COONEY, HALICZER, MATTSON, LANCE, BLACKBURN, PETTIS & RICHARDS, P.A.
P.O. BOX 14546, FORT LAUDERDALE, FLORIDA 33302 • TEL. (305) 779-1900

The Second District Court of Appeal in Hill Top Developers v. Holiday Pines Service Corp., 478 So.2d 368, 370-371 (Fla. 2d DCA 1985) review denied, 488 So.2d 68 (Fla. 1986), explained that the preemption doctrine insures that:

> a legislatively intended allocation of jurisdiction between administrative agencies and the judiciary is maintained without the disruption which would flow from judicial incursion into the province of the agency.

There can be no doubt that the Florida Legislature intended that jurisdiction over claims filed against Plan participants involving "birth-related neurological injuries" be vested exclusively in the Division of Administrative Hearings of the Department of Management Services with each appointed hearing officer aided by a three-member medical advisory panel. See §§766.301-312, Fla. Stat. (1993). Indeed, the Fifth District Court of Appeal noted that the Act "forecloses any civil action against a NICA participant when the injury is of the type defined in Section 766.302(2)...." Central Florida Regional Hospital, Inc. v. Wager, 20 Fla. L. Weekly D633 (Fla. 5th DCA March 10, 1995).

Following this acknowledgement of the exclusivity of the Act, the Fifth District Court of Appeal identified the following problem in this case:

> Since the nature of the injuries causing the death of the plaintiffs' infant is disputed and apparently cannot be resolved without factual findings, and, since, no claim has been filed with the Division, the circuit court cannot abate or dismiss the action brought by the plaintiffs without determining whether the injuries are neurological in nature. But, how must the circuit court proceed to determine this issue?

LAW OFFICES
COONEY, HALICZER, MATTSON, LANCE, BLACKBURN, PETTIS & RICHARDS, P.A.
P.O. BOX 14546, FORT LAUDERDALE, FLORIDA 33302 • TEL. (305) 779-1900

Id. The answer is that the trial court does not have to determine whether the infant's injuries are NICA injuries. Rather the trial court should apply the preemption doctrine in actions such as this where a plaintiff complains of birth-related injuries which are "arguably" NICA injuries. In applying this doctrine, the trial court need only determine whether the injuries are "arguably covered " by the Act, not whether they are, in fact, NICA injuries. See Maxwell v. School Bd. of Broward County, 330 So.2d 177, 179 (Fla. 4th DCA 1976). Upon its determination that the injuries suffered by HENRY PAUL WAGER, III, are arguably covered by the Act, the trial court must decline to exercise its jurisdiction pending a binding determination by an administrative hearing officer under §766.309(1)(a) of whether the injuries claimed are, in fact, NICA injuries. Id.

Such a procedure will permit an early and less costly resolution of this crucial question and will insure that the determination is made by a DOAH hearing officer who is armed with the statutory mandate to make that determination and who will be aided by the special competence of an independent medical advisory panel. Furthermore, it will eliminate both the possibility of inconsistent results should a jury trial precede the administrative proceedings and the possibility that claims for NICA injuries could be time-barred due to the delays inherent in the litigation of a medical malpractice action in circuit court.

Contrary to what WAGER argues to this Court, CFRH does not contend that "this Court must look behind the pleadings and rule

LAW OFFICES
COONEY, HALICZER, MATTSON, LANCE, BLACKBURN, PETTIS & RICHARDS, P.A.
P.O. BOX 14546, FORT LAUDERDALE, FLORIDA 33302 • TEL. (305) 779-1900

that NICA applies to every birth where any injury is sustained by an infant that subsequently causes the death of that infant." (RB 3). Rather CFRH respectfully submits that where a Plan participant raises the exclusivity of the Act as an affirmative defense, a trial court should make only the initial determination of whether the injuries are arguably covered by the exclusive remedies of the Act. If the trial court finds, based upon the available evidence, that the injuries are arguably covered, then the trial court should decline to exercise its jurisdiction and require the plaintiff to proceed under the Act.

CONCLUSION

For the reasons set forth herein and in CFRH's Initial Brief, 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."

LAW OFFICES
COONEY, HALICZER, MATTSON, LANCE, BLACKBURN, PETTIS & RICHARDS, P.A.
P.O. BOX 14546, FORT LAUDERDALE, FLORIDA 33302 • TEL. (305) 779-1900

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 9th day of October, 1995, to all counsel of record on the following list.

COONEY, HALICZER, MATTSON, LANCE,
BLACKBURN, PETTIS & RICHARDS, P.A.
Post Office Box 14546
Fort Lauderdale, FL 33302
(305) 779-1900

By: Pamela R. Kittrell
PAMELA R. KITTRELL
Florida Bar No. 856665

Nolan Carter, Esq.
LAW OFFICES OF NOLAN CARTER, P.A.
200 E. Robinson Street, Suite 1245
Post Office Box 2229
Orlando, FL 32802
(Counsel for Respondents)

Hector A. Moré, Esq.
TARASKA, GROWER & KETCHAM, P.A.
111 North Orange Avenue, Suite 1700
Post Office Box 538065
Orlando, FL 32853-8065
(Counsel for Mowere, et al.)

William E. Whitney, Esq.
PENNINGTON & HABEN, P.A
Post Office Box 10095
Tallahassee, FL 32302-2095
(Counsel for NICA)