IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

ROBERT BAZLEY, M.D.

Petitioners,

vs.

LORI ANN BRANIFF, et al.,

Respondents.
_____/

CASE NO.: 86,486

GALEN OF FLORIDA, INC.,

Petitioner,

vs.

LORI ANN BRANIFF, et al.,

Respondents.
_____/

CASE NO: 86,485

ON DISCRETIONARY REVIEW OF A CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

BRIEF OF ~~PETITIONERS~~ Respondents, LORI ANN BRANIFF AND CHRISTOPHER J. BRANIFF, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF ELIZABETH BRANIFF, A MINOR

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PREFACE

This case is before the Court on a question certified to this Court by the First District Court of Appeal as one of great public importance. Petitioners Robert Bazley, M.D. and Galen of Florida, Inc. d/b/a Humana Hospital Orange Park, were the Defendants in the trial court and Respondents Lori Ann Braniff and Christopher J. Braniff, individually and as parents and natural guardians of Elizabeth Braniff, a minor, were the Plaintiffs. Herein the parties will be referred to as they stood in the lower court or by proper name. Galen of Florida, Inc. d/b/a Humana Hospital Orange Park, will also be referred to as "the Hospital". The following symbols will be used:

(R) - Record-on-Appeal

(A) - Respondents' Appendix

STATEMENT OF THE CASE

The Braniffs agree with Dr. Bazley's Statement of the Case with the following addition The First District's opinion in the present case stated as follows:

> The trial court dismissed the Braniffs' civil action. According to the trial court, $766.3 16 did not specifically require that notification precede delivery, and nowhere in the relevant statutes was pre-delivery notice made a condition precedent to the exclusivity of the NICA administrative remedy.
>
> We are not persuaded by the trial court's reasoning which seems to overlook the purpose to be served by mandatory notification. The defendants have suggested that the required notice is only intended to inform obstetrical

patients of the procedural steps to be taken to assert NICA rights immediately following the delivery of a neurologically injured infant; thus, according to the defendants, the notice may be given post-delivery. We reject this suggestion because the language in §7 16.3 16 indicates that mandatory notification has a much broader purpose. Thus, the notice concerns "the limited no-fault *alternative* for birth-related neurological injuries," and its content consists of "a clear and concise explanation of a patient's rights and limitations under [NICA] ." (Emphasis added). This language indicates that notification is intended to permit an informed choice between "alternatives" before delivery rather than simply as a means of informing potential claimants of NICA's procedural requirements after delivery. It would make little sense to inform an obstetrical patient of her "alternative" after the patient had already utilized the services of a NICA participant and had thus give up her chance to pursue a civil remedy. It would make still less sense to require pre-delivery notice as a means of informing patients of their options, yet not make such notice a condition precedent to the defendants' assertion of NICA exclusivity. In short, we reject the notion that a NICA health care provider can ignore the notice requirement and then assert NICA exclusivity to defeat a civil action.[2]

We note that our interpretation of the notice requirement is consistent with that adopted by the Fifth District in Turner v. Hubrich, 20 Fla.L. Weekly D1529 (Fla. 5th DCA June 30, 1995).

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[2]/The defendants argue that pre-delivery notice must not be a condition precedent because the presence or absence of proper notice is not one of the ten items of information claimants must file when they bring a NICA claim. See §766.305(1)(a) - (j), Fla. Stat. (1993). This misses the point. The presence or absence of notice will neither advance nor defeat the claim of an eligible NICA claimant who has decided to invoke the NICA remedy by making this filing; thus, there is no reason to inquire whether proper notice was given to an individual who has decided to proceed under NICA. Notice is only relevant to the defendants' assertion of

NICA exclusivity where the individual **attempts to invoke a** civil remedy,

STATEMENT OF THE FACTS

The Braniffs accept Dr. Bazley's Statement of the Facts, but expand upon it as follows: The Braniffs' evidence clearly indicated that Mrs. Braniff was not given pre-delivery notice. Mrs. Braniff's affidavit and deposition testimony indicated that during the time she was under the care of Dr. Bazley for prenatal care, she had never received any notice, orally or in writing, from Dr. Bazley, his staff or anyone else, that Dr. Bazley was a participating physician in the NICA Plan (R446). She was totally unaware of the existence of a "NICA Plan" until after her baby's birth (R447). Had Mrs. Braniff been fully informed of the significance of Dr. Bazley's participation in the NICA Plan, she stated that she would have sought further advice regarding whether it was appropriate for her to go forward with obstetrical care by Dr. Bazley in light of the NICA limitations of protection for her baby (R447). Mrs. Braniff had had some concerns about her pregnancy and it had been important to her to have good medical care and the maximum protection available for her baby (R447). Had Mrs. Braniff been advised there would be limitations on that protection if Dr. Bazley was her physician, she stated that she would have chosen a different physician who was not a participant in the NICA Plan (R447).

Although the Defendants' evidence created at least a question of fact as to whether Mrs. Braniff was given pre-delivery notice, they presented no direct testimony that she had been given such notice. Dr. Bazley's affidavit merely stated that his office records

indicated, prior to the delivery of Mrs. Braniff's baby, that NICA materials had been provided to her (R464). And, the affidavit of Dr. Bazley's office manager merely stated that it was their standard office practice to provide NICA materials to obstetrical patients on their first office visit, and that it was Dr. Bazley's practice to discuss NICA with the obstetrical patients on their first visit (R461).

QUESTIONS PRESENTED

POINT. I

(CERTIFIED QUESTION)

WHETHER $766.316, FLORIDA STATUTES (1993), REQUIRES THAT HEALTH CARE PROVIDERS GIVE THEIR OBSTETRICAL PATIENTS PRE-DELIVERY NOTICE OF THEIR PARTICIPATION IN THE FLORIDA BIRTH RELATED NEUROLOGICAL INJURY COMPENSATION PLAN AS A CONDITION PRECEDENT TO THE PROVIDERS' INVOKING NICA AS THE PATIENTS' EXCLUSIVE REMEDY?

POINT II

(ISSUE RAISED BY DEFENDANTS)

FACTUAL ISSUES AS TO WHETHER PRE-DELIVERY NOTICE WAS GIVEN AS REQUIRED BY §766.316 SHOULD BE RFSOLVED BY THE JURY.

SUMMARY OF ARGUMENT

The certified question should be answered in the affirmative. The First District correctly decided that health care providers must give obstetrical patients pre-delivery notice of their participation in NICA as a condition precedent to invoking NICA as the patient's exclusive remedy. The Fourth and Fifth Districts have likewise so decided. The notice requirement was placed in the statute by the Florida Legislature in response to a recommendation of the Academic Task Force to assure that NICA was constitutional. In line with that recommendation, the Legislature's notice provision provides that participating physicians and hospitals with participating physicians are required to give notice to obstetrical patients of the "limited no-fault alternative for birth-related neurological injuries." Fla. Stat. § 766.316. That notice requirement is a condition precedent to invoking the protection of NICA. As indicated by the statutory language and the legislative history, the purpose of that notice provision is to allow an obstetrical patient to make an informed choice regarding the rights and remedies she wishes to have with respect to medical malpractice and birth-related neurological injuries. In order to provide an obstetrical patient with that choice, pre-delivery notice is required. Any other construction of NICA's notice provision violates an obstetrical patient's constitutional right to procedural due process.

The First District also correctly determined that the existing factual issue regarding whether pre-delivery notice was given to Mrs. Braniff is an issue that should be resolved

by the jury. NICA immunity is an affirmative defense which is to be decided as all other affirmative defenses, i.e., by the jury where a factual issue exists, as here.

ARGUMENT

POINT I

(CERTIFIED QUESTION)

WHETHER 5766.316, FLORIDA STATUTES (1993), REQUIRES THAT HEALTH CARE PROVIDERS GIVE THEIR OBSTETRICAL PATIENTS PRE-DELIVERY NOTICE OF THEIR PARTICIPATION IN THE FLORIDA BIRTH RELATED NEUROLOGICAL INJURY COMPENSATION PLAN AS A CONDITION PRECEDENT TO THE PROVIDERS' INVOKING NICA AS THE PATIENTS' EXCLUSIVE REMEDY?

The Relevant NICA Provisions

NICA is intended to provide a plan of compensation for certain birth related neurological injuries, defined as those "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, " Fla. Stat. §766.302(2). This Court described the statutory scheme as follows in COY v. FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, 595 So.2d 943, 944 (Fla. 1992):

> Essentially, the Plan administers a no-fault system to insure against certain types of neurological injuries suffered by infants at birth. However, obstetricians are not required to

> join the Plan, and insurance thus is available only if the obstetrician has elected to join. Those who join pay an annual assessment of at least $5000. §766.314(4)(c) Fla. Stat. (1989).
>
> To further fund the Plan, the statute imposes on all licensed physicians, not merely obstetricians, a mandatory annual assessment of $250. §766.314(4)(b) Fla. Stat. (1989). Although not at issue in this case, licensed hospitals also are assessed $50 per infant delivered §766.314(4)(a), Fla. Stat. (1989). These amounts can be increased by action of the Plan whenever it finds that the Plan cannot otherwise be maintained on an "actuarially sound" basis, subject to oversight by the Department of Insurance. §766.3 14(5), (7), Fla. Stat. (1989).

The Court in COY determined that the state could constitutionally impose a mandatory assessment against all licensed physicians to fund the NICA Plan, and even those who elected not to participate in the Plan were compelled to pay it. [1]

The term "participating physician" is defined in the Act as follows, Fla. Stat. §766.302(7):

> "Participating physician" means a physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full time or part time and who had paid or was exempted from payment at the time of the injury the assessment required for participation in the birth-related neurological injury compensation Plan for the year in which the injury occurred. Such term shall not apply to any physician who practices medicine as an officer, employee, or agent of the Federal Government. [Emphasis supplied.]

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[1]/The Court noted that "only 535 obstetricians elected to join the Plan" in 1989, 595 So.2d at 944-45.

There is no definition, nor use of the phrase "participating hospital" in the Act. The term "hospital" is simply defined as any hospital licensed in Florida, Fla. Stat. §766.302(6).

Fla. Stat. §766.314(4)(c) addresses the assessments to be made against "participating physicians, " which are to be distinguished from the assessments against all physicians licensed in Florida, which is governed by Fla. Stat. §766.314(4)(b). The hospitals' assessment is governed by Fla. Stat. §766.314(4)(a), and is assessed based on the number of infants delivered in the hospital during the preceding calendar year.

NICA provides a claim resolution for birth-related neurological injuries. When a claim is presented to the judge of compensation claims, the judge is required to make a finding whether the obstetrical services were delivered by a participating physician, or a certified nurse/midwife who was supervised by a participating physician. There is no similar provision regarding a participating hospital because hospitals are not "participants" in the plan. Fla. Stat. §766.309(1)(b). Fla. Stat. §766.309(2) provides:

> If the judge of compensation claims determines that the injury alleged is not a birth-related neurological injury or that obstetrical services were not delivered by a participating physician at the birth, he shall enter an order and shall cause a copy of such order to be sent immediately to the parties by registered or certified mail.

Only upon determining that the infant has sustained a birth-related neurological injury, and that "obstetrical services were delivered by a participating physician at birth, " is the judge of compensation claims authorized to award compensation, Fla. Stat. $766.3 l(l). Additionally, Fla. Stat. §766.309(3) provides:

> By becoming a participating physician, a physician shall be bound for all purposes by the finding of the judge of compensation claims or any appeal therefrom with respect to whether such injury is a birth-related neurological injury.

There is no similar provision for non-participating physicians.

If the participating physician has NICA immunity for a birth-related neurological injury, so does the hospital where the birth occurred. Section 766.303(2) provides that the rights and remedies of the plan exclude other rights and remedies of the injured infant and his parents "against any person or entity directly involved with the labor, delivery or immediate post-delivery resuscitation during which such injury occurs".

For those claimants subject to the Plan, compensation for injuries are limited to actual expenses for medical, rehabilitative, custodial care, including an award, not to exceed $100,000, to the parents or legal guardians of the infant, as well as reasonable expenses and attorney fees incurred in connection with the filing of the administrative claim, Fla. Stat. $766.31. NICA provides that the rights and remedies granted by the Plan exclude all of the rights and remedies of the infant, his parents, personal representatives, etc., Fla. Stat. §766.303(2). Since the judge of compensation claims has no authority to grant any compensation when the treating obstetrician is a non-participating physician, NICA obviously provides no rights nor remedies to infants and parents in that situation

NICA includes a provision requiring notice to obstetrical patients of the physician's election to participate in the Plan. Fla. Stat. $766.3 16 provides:

$766.316 Notice to obstetrical patients of participation in the plan

Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under $766.3 14(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall Provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological iniuries. Such notice shall be provided in forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. [Emphasis added.]

Cases Deciding that Pre-Deliverv Notice Is a Condition Precedent to Application of NICA As the Exclusive Remedv of the Iniured Infant and His Parents

The First District in the instant opinion, the Fourth District and the Fifth District have all held that pre-delivery notice is a condition precedent to a health care provider evoking NICA as the patient's exclusive remedy. In TURNER v. HUBRICH, 656 So.2d 970 (Fla. 5th DCA 1955), the Fifth District approved the trial court's order allowing the plaintiffs to amend their complaint to allege the defendants' failure to give pre-delivery notice stating:

> Here, the plaintiffs/respondents wish to allege in an amended complaint that the defendants/petitioners did not give the notice. If that notice was not given, the plaintiffs/respondents were deprived of an opportunity to seek the services of a health care provider who did not participate in the NICA program and who was free of the administrative remedies and limitations of NICA.
>
> The notice should give the plaintiffs a "clear and concise explanation of a patient's rights and limitations under

> the plan." The statute is quire clear that the burden is on the NICA participants to give the enlightening notice to their patients. The statute is silent as to when the notice is to be given, but it would make little sense to construe the statute to allow the patients to be apprised of rights and limitations after the services leading to the alleged injuries have been performed. Petitioners argue that in an emergency situation it would be difficult to give the required advance notice but it does not appear that an emergency existed in the instant case, as respondents alleged that 16 visits to the physicians preceded the admission to the hospital. Because the instant case does not involve an emergency it is not necessary to rule on the requirements of the statute with regard to such an eventuality.

656 So.2d at 97 1.

And in MILLS v. NORTH BROWARD HOSPITAL DISTRICT, ____ So.2d (Fla. 4th DCA 1995) decision filed December 13, 1995, the Fourth District reversed a final order of dismissal of a patient's medical malpractice complaint against an obstetrician and hospital for birth related neurological injuries to their child, stating:

> . . .We conclude that the failure to give notice to plaintiffs before the provision of medical services that the doctors had elected participation in the Neurological Injury Compensation Act deprives the agency of its exclusive jurisdiction and authorizes the circuit court to hear and adjudicate their claim.
>
> As regards defendants' contention that the agency has exclusive jurisdiction under circumstances where notice was given before the provision of the services giving rise to the suit, we agree with and follow the decisions in Turner v. Hurbrich, 656 So.2d 970 (Fla. 5th DCA 1955), and Braniff v. Galen of Florida, Inc., 20 Fla.L.Weekly D2140 (Fla. 1st DCA September 11, 1995).

It also appears that the Third District would follow the above cases. In SIERRA v. PUBLIC HEALTH TRUST OF DADE COUNTY, 20 Fla.L.Weekly D24489, the court stated in footnote 5:

> 'We have no doubt that the trial court will not find the notice issue as difficult on remand. Since this case was filed, two district courts of appeal have ruled that post-delivery notification of a doctor's participation in NICA does not comport with the intent of the statute - which was to allow patients to be apprised of their rights and limitations under the statute. ***Braniff v. Galen of Florida, Inc.*** , 20 Fla.L. Weekly D2140 (Fla. 1st DCA Sept. 11, 1995); ***Turner v. Hubrich***, 656 So.2d 970 (Fla. 5th DCA 1995)…

There is also one relevant circuit court opinion authored by Judge Oliver L. Green, Jr., Tenth Judicial Circuit, in and for Polk County, wherein the Judge stated (A7-8):

> The statute does require participating doctors to notify obstetrical patients of the plan and the rights and limitations under the plan. The statute also uses the words "no-fault alternative. " This language indicates some kind of choice on the part of doctor (i.e., to participate or not) and/or the patient (i.e., to go to another doctor). Clearly, the plan is not mandatory for obstetricians. Rather, it is something they must choose to participate in.
>
> For this reason, Defendants' comparisons to worker's compensation fail. The worker's compensation system is mandatory unless one opts out. The birth-related neurological compensation plan is optional; one has to choose to participate. Defendant's (sic) try to argue that the plan is mandatory as all doctors, whether they delivery (sic) babies or not, have to pay an assessment. This argument is not persuasive. If that assessment fee made the plan mandatory, why would the legislature go on to set fees for "participating" doctors, and, indeed, use the word "participating" over and over in the statute?

> Defendants also argue that notice is not a condition precedent because the legislature did not expressly state that it was a condition precedent. They then cite to several statutes which expressly contain conditions precedent to suit. However, the statutes relied on by defendants serve a different purpose than the instant statute. There is a distinction between a statute which provides procedural hoops to jump through before suit can be filed and one which limits a claimant, who would otherwise be entitled to file suit, to an administrative remedy only.
>
> Additionally, the language of the statute cannot be ignored. Section 766.3 16 requires participating doctors to notify their patients of the plan and of the patient's rights and limitations under the plan. The statute itself describes the plan as an "alternative. " If notice is not a condition precedent to the applicability of the statutory remedy, the notice provision would be meaningless. This Court cannot find that the Legislature would intend for the notice provision to have no meaning.
>
> Therefore, the Court concludes that notice is a condition precedent to the application of the act.

The First, Fourth and Fifth District Courts of Appeal Have Each Correctly Held that Pre-Delivery Notice Is a Condition Precedent to Invoking NICA as a Patient's Exclusive Remedy

Fla. Stat. $766.316 specifically directs that each participating physician and each hospital with a participating physician on its staff shall provide notice "to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injuries. " This notice requirement was included in the statutory scheme by the Florida legislature upon the recommendation of the Academic Task Force for Review of the Insurance and Tort System, Medical Malpractice Recommendations (November 6, 1987),

page 34. That requirement was not contained within the Virginia statute upon which NICA was modeled, but was specifically added by the Florida Legislature. The Academic Task Force stated in its report (A17):

> The Virginia statute does not require participating physicians and hospitals to give notice to obstetrical patients that they are participating in the limited no-fault alternative for birth-related neurological injuries. The Task Force recommends that health care providers who participate under this plan should be required to provide reasonable notice to patients of their participation. This notice reauirement is justified on fairness grounds and arguably may be required in order to assure that limited no fault alternative is constitutional. [Emphasis supplied.]

The Academic Task Force was correctly concerned that NICA would be unconstitutional without a notice provision. While the First District in the instant case found it unnecessary in construing the NICA statute to address the Braniffs' constitutional due process argument, obviously that argument must be considered in determining whether pre-delivery notice is required. The Braniffs also raised other separate constitutional issues relating to other provisions of the NICA Act. If this Court were to find that the notice provision does not require pre-delivery notice and that post-delivery notice is constitutional, then the Braniff's agree with Dr. Bazley's suggestion in footnote 1 that the case would need to be remanded for the First District to consider the Braniffs' other constitutional arguments. The Braniffs do not agree, however, that their constitutional due process argument as it relates to the notice provision should be decided

later by the First District. That argument should be decided by this Court in this proceeding.

In construing the NICA statute, the First District was undoubtedly aware that it has a duty to construe legislation so as to save it from constitutional infirmities, CHATLOC v. OVERSTREET, 124 So.2d 1 (Fla. 1960), and to adopt a construction that will render a statutory scheme constitutional, rather than unconstitutional. See, e.g., SANDLIN v. CRIMINAL JUSTICE STANDARDS & TRAINING COMMISSION, 531 So.2d 1344 (Fla. 1988); LLOYD v. NORTH BROWARD HOSPITAL DISTRICT, 570 So.2d 984 (Fla. 3d DCA 1990); EMHART CORP. v. BRANTLEY, 257 So.2d 273 (Fla. 3d DCA 1972).

The court was also aware that if it construed the notice provision as not requiring pre-delivery notice it would be ruling that the State could deprive obstetrical patients of their existing common law rights without notice before the deprivation occurred, merely by allowing their physician to elect to become participating members in NICA. There is no authority that would permit the State to allow a private person [obstetrical patient's physician) to, without advance notice, deprive another private person (obstetrical patient) of rights merely by allowing the physician to make an election to participate or not in NICA. It is fundamental to notions of procedural due process that notice be provided before a party can be deprived of vested property rights. In PEOPLES BANK OF INDIAN RIVER COUNTY v. STATE, 395 So.2d 521,524 (Fla. 1981), this Court stated that the legislature can determine that procedure, "provided that the procedure adopted

is reasonable notice and a fair opportunity to be heard before rights are decided". GOODRICH v. THOMPSON, 118 So. 60 (Fla. 1928).[2]

In this case, the First District's construction of the NICA Act affords procedural due process because it provides the requisite notice prior to the deprivation of an obstetrical patient's rights. To construe the notice provision as not requiring pre-delivery notice would unconstitutionally deprive an obstetrical patient of her existing common law rights without due process. Without advance notice, the obstetrical patient would be prevented from choosing to retain those rights by electing to be cared for by a physician who has decided not to become a NICA participant,

In addition to the constitutional infirmities of Defendants' suggestion that the NICA statute should be construed as not requiring pre-delivery notice, the only reasonable and legitimate reading of the statute based upon its language and its statutory scheme is that pre-delivery notice is required, First, the statute explicitly states that NICA participants "shall provide notice to the obstetrical patients thereof" (Emphasis supplied). A pregnant woman is an "obstetrical patient" throughout her pregnancy and during the birthing process, but she ceases to be an "obstetrical patient" thereafter. The plain language of the statute therefore requires that "notice" be provided before any child-birth that might be subject to the drastic limitations upon recovery imposed by the "limited no-fault alternative" of NICA. This reading of the statute is also fairly implicit in the Task

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[2]The test of KLUGER v. WHITE, 281 So.2d 1 (Fla. 1973) is not applicable because it pertains to access to courts, not procedural due process.

Force's stated reason for recommending this provision to the legislature, which was "fairness" to the patient who might be stuck with NICA if she chose to remain a patient of a participating physician.

Second, the NICA Act provides obstetrical patients with an alternative remedy. The NICA statute does not require obstetricians to become participating members in the NICA Plan. COY v. FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, 595 So.2d 943, 944 (Fla. 1992). Some obstetricians are members while others are not. Accordingly, under Florida law today, an obstetrical patient has a common law right to sue her obstetrician for malpractice as a result of birth-related neurological injuries to her baby, [which right is only limited by the Medical Malpractice Reform Act, §766.101-766.212 Fla. Stat.] if her obstetrician is not a "paid up" participating member in the NICA Plan established by §766.303. If the obstetrical patient's obstetrician is a member of the NICA Plan, then the patient has a choice of either going to an obstetrician who is not a member of the Plan (and thus retaining her common law medical malpractice rights), or waiving her common law medical malpractice rights by choosing to be cared for by a participating member of the alternative no-fault NICA Plan.

Because an obstetrician's participation in NICA is entirely voluntary, the statutory scheme clearly contemplates that only some physicians will enjoy immunity from suit under its provisions, and that others will not. This notion is reinforced by the statute's explicit description of NICA as a "limited no-fault alternative" (Emphasis supplied). And

because the statute is clearly designed to require notice to the patient of the physician's participation in this alternative, as well as provide the patient with "a clear and concise explanation of [her] rights and limitations under the plan, " the obvious purpose of the notice requirement is to ensure that the "obstetrical patient" gives an informed consent to continued care by such a physician.

Put another way, the clear purpose of the "notice" requirement is to ensure that the patient can make an informed decision as to whether to forego her legal rights and continue under the care of a participating physician whose liability is limited, or to choose instead to seek the care of a non-participating physician who has elected to have his liability for birth-related injuries depend upon proof of negligence by opting out of NICA. Why would the statute even mention notice, if notice can be given after the fact? The only point in time at which an obstetrical patient can make such a decision is before delivery of her baby, of course, and to read the statute as authorizing notice after the fact is to render its notice requirement altogether meaningless. Post-delivery notice is no notice at all. Unless the patient is given pre-delivery notice, she is deprived of the right of choosing her and her baby's rights and remedies, where a choice is provided under the law. Without pre-delivery notice, the patient is accorded the alternative no-fault remedy as a result of the unilateral action of her obstetrician. The decision is hers, not his.

Third, NICA's notice provision must be construed to require pre-delivery notice because the only justification for the statute's express notice provision is to provide obstetrical patients with an opportunity to make a choice regarding their potential

remedies in the event of malpractice or birth-related neurological injuries. The NICA statute mandatorily requires notice to be given by each hospital and each participating physician: "shall provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injuries. §766.316. It should be emphasized that the statute utilizes the word "shall" and not "may. " And, it is important that it states that the obstetrical patients are to be provided notice of the "limited no-fault alternative" which clearly indicates that the obstetrical patients are to be given the opportunity to make a decision between that alternative and their common law rights. This is consistent with the last sentence in the statute, which states that the notice "shall include a clear and concise explanation of a patient's rights and limitations under the plan. "

Non-participating NICA physicians are obviously not required to give the notice required by the NICA statute, because their patients' rights and remedies are not limited, but rather are those that exist at common law, as modified by the Medical Malpractice Act. The Task Force Report stated that the NICA notice provision was justified on " fairness grounds, " and referred to the "limited no fault alternative. " Clearly, the statute reflects the concern that the obstetrical patients have the opportunity to choose their rights and remedies, rather than having those issues decided solely by their treating physician.

Fourth, the ability to make the decision to retain or waive those common law rights is, however, totally dependent upon the obstetrical patient receiving notice, pre-delivery , from the obstetrician that: he is a member of the NICA Plan, which means that the

obstetrical patient's rights and remedies will be limited to no-fault compensation in an administrative proceeding as an alternative to pursuing her existing common law rights in a court of law for any birth-related neurological injuries. Without being provided that notice, pre-delivery, the obstetrical patient is unknowingly denied procedural due process because her existing common law rights are taken from her without notice or consent.

The point is that the NICA plan is not mandatory for obstetricians. The obstetrical patient has a choice of going to another obstetrician, i.e., a non-NICA member. But she has no choice without being notified that the obstetrician whose care she is seeking is a NICA plan member. Without that notice, she is deprived of the right to retain her existing common law medical malpractice remedy over the alternative NICA no-fault remedy. In effect, she is denied procedural due process. Her right to retain and pursue her common law rights in the court system is taken from her without her ever knowing about it or ever agreeing to it. And, importantly, §766.3 16 places the burden of giving that crucial notice upon NICA Plan members. It does not place the burden of finding out that information upon obstetrical patients.

Reading the Medical Malpractice Reform Act [which allows an obstetrical patient to pursue her common law remedy in a court of law, so long as she is not treated and cared for by a NICA obstetrician] in conjunction with the NICA statute [which relegates an obstetrical patient to an administrative no-fault remedy if she is treated and cared for by a NICA obstetrician] in effect provides the patient with an election of remedies. However, under the trial court's construction of NICA's notice provision the information

necessary for the patient to make an informed election does not have to be disclosed, and can even be intentionally withheld. An election can be unknowingly made for the patient as a result of being treated by a NICA obstetrician when she has never been placed on notice that that treatment constitutes an election of remedies and, more importantly, she has never been told that her obstetrician is a NICA obstetrician. The patient's rights are surreptitiously taken from her without her ever knowing about it until after she has given birth to a birth-related neurologically damaged baby at which time she is handed a NICA pamphlet.

Given the fact that the apparent purpose of NICA's notice provision is to inform obstetrical patients that their legal rights will be limited by being cared for by a NICA participating physician, so as to allow them to choose, if they so desire, a non-participating physician and thereby retain their common law rights, Defendants' asserted construction of the statute results in the following scenario: When an obstetrical patient goes to an obstetrician for care and treatment in her pregnancy and for delivery of her baby, even if there is never any mention to her that she is waiving her existing common law rights by being cared for by that obstetrician because he is a participating member of NICA, if he delivers her baby with neurological injuries as a result of his negligence, she can be told post-delivery for the first time that she has been deprived of the right to retain and pursue her common law rights in the court system by having been treated by that obstetrician. Under Defendants' asserted construction of the statute, an obstetrical patient is denied procedural due process, i.e., she is denied, without notice or consent,

the opportunity to retain and pursue her available comrnon law remedy in a court of law instead of being relegated to the alternative no-fault NICA administrative remedy.

In contrast, the effect of the First District's ruling that pre-delivery notice is a condition precedent to an obstetrician having NICA immunity is as follows: When an obstetrical patient goes to an obstetrician for care and treatment during her pregnancy and for delivery of her baby, she retains the right to pursue her common law rights against him for birth-related injuries in a court of law unless she is given pre-delivery notice that he is a NICA Plan member, and she nonetheless chooses the care and treatment of that obstetrician. Any other result constitutes a denial of the obstetrical patients' due process.

Construing the NICA statute to require notice as a precondition to application of the statutory immunity provided therein is consistent with the construction of other statutory notice requirements in other contexts, see LEVINE v. DADE COUNTY SCHOOL BOARD, 442 So.2d 2 10 (Fla. 1983) (plaintiff's notice to governmental entity is condition precedent in sovereign immunity case); HOSPITAL CORPORATION OF AMERICA v. LINDBERG, 5 11 So.2d 446 (Fla. 1990) (plaintiff's notice of intent to initiate litigation is condition precedent to medical malpractice suit); OSTEEN v. MORRIS, 48 1 So.2d 1287 (Fla. 5th DCA 1986) (delivering written repair estimate is condition precedent to mechanic's right to be paid for completed repairs). Such notice requirements have been applied to potential defendants as well as potential plaintiffs, see, BILL ADER, INC. v. MAULE INDUSTRIES, INC., 230 So.2d 182 (Fla. 4th DCA 1969) (property owner must file "notice of commencement" in order to protect himself

against claims of subcontractors who have not been paid by general contractor, who has received full payment from the owner"; see also, CLIMATROL CORPORATION v. KENT, 370 So.2d 394 (Fla. 3d DCA 1979), cert. dismissed, 383 So.2d 1197 (Fla. 1980).

In conclusion, the language of the NICA statute, the legislative history, basic fairness, and constitutional requirements compel the conclusion that Mrs. Braniff was statutorily entitled to be informed of the alternatives available to her in the event of injury to her baby. She cannot be deprived of her common law rights without having had the opportunity to participate in that election of remedies. Accordingly, the First District correctly construed the NICA statute as requiring pre-delivery notice as a condition precedent to Defendants being entitled to the immunity provided by the statute. Any other construction would violate obstetrical patients' constitutional right to due process.

Defendants' Arguments

Defendants first argue that the purpose of providing notice to an obstetrical patient is to allow her to change physicians. They claim that the patient can never make an informed pre-delivery decision on whether to change to a non-participating physician because she does not know whether a neurological injury to her child will occur and/or whether it will be due to the physician's negligence or due to non-negligent factors.[3] If

[3]/Defendants' argument is essentially that there is never enough information to (continued.. .)

neurological injury is due to non-negligent factors, Defendants argue, then it would be preferable to be cared for by a NICA physician because the patient could recover expenses, plus $100,000 and attorney's fees. Defendants claim that since an obstetrical patient cannot make a true informed pre-delivery decision as to whether to change physicians based on her physician's NICA status, notice of that status is irrelevant.

Defendants' argument is devoid of merit. No one can predict future events. Obviously, an obstetrical patient is going to assume that her physician is not going to be negligent. If she thought otherwise, she would undoubtedly change physicians. Also, most women are going to assume that their babies will not suffer any neurological injury in the birthing process. With those assumptions in mind, the issue is whether an obstetrical patient would want to be covered under NICA or retain her common law medical malpractice remedies in case her physician is, in fact, negligent. On the other hand, an obstetrical patient might be experiencing a "high risk" pregnancy with a high risk of neurological injury to her baby without negligence. Whichever scenario, the obstetrical patient is prevented from making any decision to be cared for by a NICA participating physicians, or non-NICA participating physician, unless she is advised in advance of her physician's NICA status.

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3 (. . . continued)
make an informed decision because we cannot foresee or predict the future. They would undoubtedly argue that no one could ever make an informed decision to purchase health insurance or life insurance because they would never know if they were going to be sick or when they were going to die.

Defendants next conclude that the purpose of the notice provision is to advise the patient whose baby has already sustained a neurological injury of the benefits available under NICA. If that were the purpose, there would be no need for a notice provision whatsoever. Obstetrical patients are presumed to know the law that applies to them, The problem is that without knowing their physician's NICA status, the patient cannot elect or choose which law they want to be applied to them: whether they want the NICA statute to apply or whether they want the corm-non law to apply. Without being provided that information, obstetrical patients cannot elect or choose the law that will be applied to them.

Also, as stated in the Academic Task Force report, the notice provision was included in NICA "on fairness grounds and to assure that the 'limited no-fault alternative' is constitutional. " If, as the Defendants in this case argue, the notice provision was only intended to advise the patient and child of their administrative rights after the relevant injury, it would have no constitutional impact. Therefore, obviously consistent with the legislative intent, the notice provision was correctly construed to require that notice be given prior to the treatment so that the patient has the right to make an election with respect to the "no-fault alternative," i.e., NICA.

Defendants' arguments do not support their conclusion that the purpose of the notice provision is to inform an obstetrical patient, post-delivery, of NICA benefits available to her and her already neurologically injured baby. Defendants first argue that lack of notice is not listed as an "exception" to NICA's applicability. However, notice

is specifically listed as a requirement under §766.316 Fla. Stat. That provision requires notice of participation in the plan, not merely notice of benefits. It also requires notice of a "clear and concise explanation of a patient's rights and limitations under the plan". Giving that information to an obstetrical patient post-delivery would be meaningless,

Defendants next argue that if the Legislature intends a statute's notice provision to be a condition precedent, it expressly uses that terminology or other similar language in the statute. However, the notice provision of one of the very statutes Defendants cite for this proposition, §768.28 Fla. Stat. was held to be a condition precedent even though the statute did not expressly so provide. When the sovereign immunity statute was enacted in 1975, it did not expressly require notice as an exception to the statute, nor did it provide that notice was a condition precedent. Section 768.28 Fla. Stat. (1975). Notwithstanding, the Florida Supreme Court judicially declared the statute's notice requirement to be a "condition precedent" four years later. COMMERCIAL CARRIER CORP. v. INDIAN RIVER COUNTY, 371 So.2d 1010 (Fla. 1979). Thereafter, in 1983, the legislature amended the statute to expressly make notice a "condition precedent. "

Defendants next claim that a hospital with a participating physician on its staff is required to provide NICA notice, which is an impossibility prior to the patient arriving at the hospital in labor, and then it would be too late. Obviously, if a hospital cannot provide pre-delivery notice to an obstetrical patient because it does not know of the patient, then it cannot do so. But it is common knowledge that most obstetrical patients

are required by their physicians to make arrangements with the hospital where the physician intends to deliver their baby long before the baby is due, and prior to the anticipated admission of the obstetrical patient for labor and delivery; and arrangements are made for advance payments, insurance coverage, governmental or subsidized payments, etc. Additionally, under NICA if the physician is immune from common law liability, the hospital is immune. Section 766.303(2) provides that NICA excludes all other rights or remedies of the patient and infant at common law or otherwise "against any person or entity directly involved with the labor, delivery or immediate post-delivery resuscitation",

Defendants argue that the fact that the NICA statute requires that notice be given to "obstetrical patients" does not dictate pre-delivery notice. Defendants rely upon the fact that NICA provides benefits for any neurological injuries which occur "in the course of labor, delivery or resuscitation in the immediate post-delivery period". That fact does not mean that in each of those phases the patient is classified as an obstetrical patient. The patient is an obstetrical patient pre-delivery, not post-delivery. Obstetrics is the branch of medicine relating to pregnancy and child birth. Funk & Wagnall's New Comprehensive International Dictionary. The word "obstetrical" is inapplicable post child-birth.

Defendants argue that the Braniffs place too much emphasis on the word "alternative". They argue that that terminology simply refers to the fact that NICA is an alternative provided by the Legislature's enactment of the statute, and does not refer to

a choice provided to obstetrical patients. Defendants allude to the fact that the Legislature made a similar choice in enacting the worker's compensation law. In making this argument, Defendants ignore the fact that the word "alternative" is utilized in the NICA statute in conjunction with the notice requirement. Section 766.3 16 squarely and clearly requires a participating physician to give notice of the alternative NICA remedy. Section 766.3 16 does not merely refer to the fact that the Legislature has provided an alternative NICA remedy. It did so, but §766.3 16 requires notice to be given the obstetrical patient of that alternative optional remedy.

It is important for the Court to note that with the exception of a passing reference to worker's compensation on page 20 of Dr. Bazley's brief, and on page 11 of the Hospital's brief, there has been no attempt by Defendants to liken NICA to the Worker's Compensation Act. A large portion of Defendants' briefs filed with the First District concerned drawing that analogy. Both Dr. Bazley and the Hospital have now backed off that position in their briefs. It is only the brief of Defendants' Amici Curiae that draws an analogy between NICA and the Workers' Compensation Act and relies upon case law interpreting worker's compensation.[4]

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[4]/The brief of Plaintiffs' Amici Curiae, Athey and Sierra, pages 23-26 inadvertently states that the Defendants' briefs rely upon a worker's compensation analogy. In fact, only their Amici Curiae's brief did so.

Arguments of Defendants' Amici Curiae

Since Defendants have chosen to retreat from their worker's compensation analogy, Defendants' Amici Curiae have been left to advance that position. They argue that the Legislature enacted NICA to establish a no-fault system of compensation similar to the worker's compensation statute. They seek to analogize NICA to the Workers' Compensation Act and argue that the notice provisions in that Act are not construed as being conditions precedent to application of immunity, and therefore NICA's notice provision should not be 'so construed. Their argument overlooks certain statutory provisions in the Workers' Compensation Act which render it unique and distinguishable from NICA.

For example, the Amici Curiae cite HUGHES v. B .F. GOODRICH CO., 11 So.2d 313 (Fla. 1943), for the proposition that statutory notice under the Workers' Compensation Act is not a condition precedent to its exclusive remedy provisions. That argument ignores the fact that under the predecessor statutory scheme in effect when HUGHES was decided, the Workers' Compensation Act provided as follows (quoted in HUGHES, 11 So.2d at 314):

> Section 3. From and after the taking effect of this Act, every employer and every employee, unless otherwise specifically provided, shall be presumed to have accepted the provisions of this Act, respectively to pay and accept compensation for injury or death, arising out of and in the course of employment, and shall be bound thereby, unless he shall have given prior to the injury, notice to the contrary as provided in Section 5.

No such presumption exists in NICA, and as indicated by the legislative history, it is intended to be a no-fault alternative, not a legislatively imposed system.

The Amici Curiae also cite current provisions of the Workers' Compensation Act as supporting their contention that notice is not a condition precedent, but again ignore crucial and distinguishing provisions in the Workers' Compensation Act, As the Amici Curiae note, an employer with less than four employees is not required to provide workers' compensation coverage, but may waive that exemption by purchasing such coverage and posting notice. He then cites ALLEN v. ESTATE OF CARMAN, 281 So.2d 3 17 (Fla. 1973), for the proposition that notice of that election by the employer is not a condition precedent to application of the Act to its employees. This ignores the fact that Fla. Stat. §440.04(2) specifically provides that such notice is not a condition precedent to the Act's application. There is no comparable provision in NICA. The fact that notice is not required under the Workers' Compensation Act does not constitute either a due process violation, or impose any unfairness, because Fla. Stat. $440.03 states, "every employer and employee as defined in § 440.02 shall be bound by the provisions of this Chapter. " Fla. Stat. §440.02(13)(a) defines "employee" as "any person engaged in any employment under any employment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors." Thus, obviously, the Workers' Compensation Act is designed to apply to all employees, regardless of their situation, and the Act itself is intended to constitute notice of its application.

NICA differs because it does not contain comparable provisions making it applicable to all obstetricians. Unlike the Workers' Compensation Act, obstetricians have to opt in, not out, of NICA. Worker's compensation applies to all employers and employees unless employers opt out. Moreover, as noted by the Florida Supreme Court in COY v. FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, 595 So.2d 943 (Fla. 1992), only 535 obstetricians had elected to join the plan in Florida as of that time. Accordingly, unlike workers' compensation which is mandatory, NICA provides both an optional plan which the physicians can elect to participate in, and an alternative remedy, which obstetrical patients can choose in lieu of their common law rights. Additionally, the Act itself recognizes that there may be inadequate funding for it to provide the intended compensation and, thus, it is not a self-funding plan as is the Workers' Compensation Act.

The Amici Curiae incorrectly argue that the First District's construction of the NICA notice provision allows an obstetrical patient to elect, based on lack of notice, between seeking NICA benefits or pursuing a common law action. The Amici Curiae overlook the fact that the failure to give notice is only relevant where a patient seeks her common law remedy and her physician seeks immunity from liability for his negligence.

The Amici Curiae refer at page 17 to the fact that there is a pending appeal in the Fourth District where the trial court found that notice was not a condition precedent to NICA's exclusive remedy. The trial court's decision has since been reversed by the

Fourth District in MILLS v. NORTH BROWARD HOSPITAL DISTRICT, ____ So.2d ____, (Fla. 4th DCA 1995), decision filed December 13, 1995 .

Defendants' reliance upon cases which hold that a court has jurisdiction to determine the question of its own jurisdiction is misplaced. The cases cited involve long arm jurisdiction (minimum contacts) - VENETIAN SALAMI CO. v. PARTHENAIS, 445 So.2d 499 (Fla. 1989) and AMERICAN BASEBALL CAP, INC. v. DUZINSKI, 308 So.2d 639 (Fla. 3d DCA 1975); personal jurisdiction - GLENEAGLE SHIP MANAGEMENT v. LEONARDABOS, 602 So.2d 1282 (Fla. 1992); and a child custody case - BARNES v. OSTRANDER, 450 So.2d 1253 (Fla. 2d DCA 1984). The custody case differs because no jury is involved, unlike here. The personal jurisdiction and long arm jurisdiction cases are distinguishable because Florida Rule of Civil Procedure 1.140(b) specifically allows the defense of lack of personal jurisdiction to be raised by a motion to dismiss which is decided by the court, rather than a jury. Other defenses such as immunity from liability (because of NICA or worker's compensation) or statutes of limitation, etc. must be raised as affirmative defenses, which are decided by the jury if fact issues exist, as here.

POINT II

(ISSUE RAISED BY DEFENDANTS)

FACTUAL ISSUES AS TO WHETHER PRE-DELIVERY NOTICE WAS GIVEN AS REQUIRED BY §766.316 SHOULD BE RESOLVED BY A JURY.

The First District below held that (A5):

> In the instant case, a factual dispute remains as to whether the defendants gave the required pre-delivery notice. The record contains conflicting affidavits on this threshold question, Because the Braniffs requested that a jury resolve all factual disputes, it would seem that this issue must be submitted to the jury.

The Fifth District held to the same effect in CENTRAL FLORIDA REGIONAL HOSP., INC. v. WAGER, 656 So.2d 491 (Fla. 5th DCA 1995). In that case, the plaintiffs filed a complaint alleging that the death of their child was caused by oxygen deprivation prior to birth that in turn caused other fatal injuries. The defendants claimed the infant's injuries were neurological, and therefore NICA provided the exclusive remedy to the plaintiffs. Plaintiffs did not allege, and in fact denied, any neurological injury or damage. The circuit court ruled that the plaintiffs could not be required to proceed under NICA. The trial court also denied the defendants' request for a pre-trial evidentiary hearing to determine the nature of the injuries, leaving the issue to be resolved by the jury. The Fifth District agreed that the jury should determine that factual issue, stating:

> 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. 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.

In HUMANA OF FLORIDA, INC. v. McKAUGHAN, 652 So.2d 852 (Fla. 2d DCA 1995), the Second District held that NICA immunity is an affirmative defense. The court relied upon this Court's opinion in MANDICO v. TAOS CONSTRUCTION, INC., 605 So.2d 850 (Fla. 1992), where the court held that the assertion in a circuit court action that a plaintiff's exclusive remedy was under worker's compensation was an affirmative defense. As in MANDICO, and as with any other affirmative defense, since there is conflicting evidence on whether pre-delivery notice was given, that fact question must be resolved by a jury. This affirmative defense, like all others, is not a matter to be determined by the court where conflicting evidence is presented.

CONCLUSION

The Court should answer the certified question in the affirmative, and should also hold that the factual issue as to whether Mrs. Braniff was given pre-delivery notice is to be decided by the jury, not the trial court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail this 21st day of DECEMBER, 1995, to: JACK W. SHAW, JR., ESQ., and MICHAEL J. ORBRINGER, ESQ., Suite 1400, 225 Water Street, Jacksonville, FL 32202-5147; ROBERT E. BROACH, ESQ., P. 0. Box 447, Jacksonville, FL 32201; VINCENT J. RIO, III, ESQ., 50 North Laura Street, Suite 3500, Jacksonville, FL 32202; DOCK A. BLANCHARD, ESQ., P. 0. Box 1869, Ocala, FL 34478; JOEL D. EATON, ESQ., City National Bank Bldg., Suite 800, 25 West Flagler Street, Miami, FL 33 130-1780; and BEVERLY A. POHL, ESQ., 2441 S.W. 18th Avenue, Ft. Lauderdale, FL 33312.

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