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IN THE SUPREME COURT OF FLORIDA

GALEN OF FLORIDA, INC., and ROBERT BAZLEY, M.D., Petitioners,	Case Nos.	86,485 86,486
v.		(consolidated)
LORI ANN BRANIFF, and CHRISTOPHER J. BRANIFF, Respondents.		

On Review of a Question Certified
By the First District Court of Appeal
To Be a Matter of Great Public Importance

INITIAL BRIEF
OF PETITIONER **GALEN** OF FLORIDA, INC.

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PRELIMINARY STATEMENT

In this brief, Petitioner/Defendant Robert Bazley, M.D., will be identified as "Dr. Bazley" and Petitioner/Defendant Galen of Florida, Inc., will be identified as "the Hospital." Respondent/Plaintiff Lori Ann Braniff, will be referred to as "Braniff" and Respondent/Plaintiff Christopher J. Braniff, will be referred to as "Mr. Braniff"; Respondents/Plaintiffs will be referred to jointly as "the Braniffs", "Respondents" or "Plaintiffs." References to the Record on Appeal will be indicated by the symbol "(R.)." References to the Appendix appear as "(App.___)."

The Florida Birth-Related Neurological Injury compensation Act (Sections 766.301 through 766.316, Florida Statutes) will be referred to as "NICA" or the "Act."

STATEMENT OF THE CASE

The Hospital adopts the Statement of the Case that appears in the Initial Brief of Petitioner, Dr. Bazley. For the convenience of the Court, Dr. Bazley's Statement of the Case is reproduced in its entirety:

Mr. and Mrs. Braniff filed a medical malpractice action against Dr. Bazley, who was Braniff's obstetrician, and the Hospital, where the Braniff's baby was delivered. They alleged that the child had suffered brain damage as a result of negligence by Hospital employees and Dr. Bazley during delivery. (R.2-13.) Both defendants moved to dismiss on the basis that, since Dr. Bazley was a participating physician under Florida's Birth-Related Neurological Injury Compensation Act, Braniff's exclusive remedy was under the no-fault provisions of the NICA plan. (R.56-60.)

By agreed order, (R.114), Braniff filed an Amended Complaint alleging that the NICA statute did not provide an exclusive remedy because Dr. Bazley and the Hospital had failed to comply with the notice requirements of Section 766.316, Florida Statutes. (R.96-111.) Both defendants again moved to dismiss, asserting that they had met all requirements of the NICA statute and that NICA's no-fault remedy was accordingly Braniff's exclusive remedy. (R.115-119.)

Braniff filed a response alleging that pre-childbirth notification of the physician's NICA participant status was a condition precedent to the exclusive remedy provision of NICA, reiterating the claim that no such notice had been given, and

asserting that the NICA statute deprived Braniff of access to the courts. (R.417-422.)

In opposition to the motions to dismiss, Braniff filed Mr. Braniff's deposition, (R.134-235), Braniff's own deposition, (R.236-416), and her affidavit, (R.446-447), together with some legal materials. Defendants filed Dr. Bazley's affidavit, (R.463-468), and that of his office manager, Bobby Sue Vincent, (R.460-462).

Judge Dearing held that pre-childbirth notification of the physician's status as a NICA participant and of NICA's provisions was not a condition precedent to applicability of NICA's exclusive remedy provision, and held that NICA did not violate the access to courts provision of Florida's Constitution because it provided a sufficient alternative remedy. [(App. B; R.469-472.)] He did not resolve the factual issue of whether pre-childbirth NICA notification had been given, since that issue was irrelevant in light of his ruling. Judge Dearing ruled that NICA was Braniff's exclusive remedy and accordingly dismissed the Amended Complaint with prejudice. (R.469-472.)

On appeal the First District reversed, holding that delivery of the NICA notice prior to childbirth was a condition precedent to applicability of NICA's exclusive remedy provision. [(App. A.)] The First District further held that any factual dispute as to whether such notification had been given must be resolved by the jury, rather than by the trial judge. The First District did not reach the constitutional issues. The First District certified the

following question as being of great public importance:

> Whether Section 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?

[(App. A.)]

Dr. Bazley and the Hospital each timely filed a Notice Invoking Discretionary Jurisdiction. By order dated September 25, 1995, the Court entered its Order Postponing Decision on Jurisdiction and Briefing Schedule. By order dated October 11, 1995, the two appeals were consolidated for all appellate purposes.

STATEMENT OF THE FACTS

The Hospital adopts the Statement of the Facts that appears in the Initial Brief of Petitioner, Dr. Bazley. For the convenience of the Court, Dr. Bazley's Statement of the Facts is reproduced in its entirety:

There was conflicting evidence as to whether Dr. Bazley provided Braniff, prior to childbirth, with notice that he was a participant in NICA. Braniff testified that she never received such notice from Dr. Bazley or anyone on his staff, and that she was totally unaware of the NICA plan until after her baby's birth. (R.446-447.) Dr. Bazley's affidavit stated that he was a NICA participating physician at all relevant times and that he had noted in his records, prior to this birth, that the required NICA materials had been provided to Braniff. (R.464.) The affidavit of Dr. Bazley's office manager states that it was their standard office procedure to provide the NICA materials to obstetrical patients on the first office visit, and that it was Dr. Bazley's practice to discuss NICA with his obstetrical patients on the first visit. (R.461.)

SUMMARY OF ARGUMENT

The plain wording of the NICA notice provision confirms that notice is not a condition precedent to the application of NICA's exclusive remedy. The legislature knows how to draft conditions precedent and has done so in numerous other pieces of legislation. That the legislature chose not to do so for NICA is apparent from the face of the statute.

NICA sets up a no-fault system that provides compensation for birth-related neurological injuries. The legislature made specific findings regarding the medical malpractice crisis among physicians practicing obstetrics. None of the legislative findings, nor any provisions of NICA, establish a requirement that obstetrical patients be allowed to make a choice before delivery of whether to shop for a NICA doctor or a non-NICA doctor. Absent an ability to predict the future, a patient before delivery could never know which choice would be better. If she could predict that her child would be born with birth-related neurological injury not caused by malpractice, then she would want the no-fault provisions of NICA. On the other hand, if she could predict that her physician's malpractice would cause birth-related neurological injuries, this hypothetical prescient mother would change doctors. Failing that, she would opt for a non-NICA doctor.

The trial court properly concluded that providing the NICA notice prior to childbirth was not a condition precedent to availability of the exclusive remedy provision. The district court's reversal of the trial court's decision represents an

attempt to legislate a pre-delivery notice requirement, where NICA is purposefully silent on that issue.

ARGUMENT[1]

I. THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL, WHICH CERTIFIED A QUESTION OF GREAT PUBLIC IMPORTANCE.

In its decision, the First District Court of Appeal certified the following as a question of great public importance:

> WHETHER SECTION 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?

The district court erroneously decided that pre-delivery notice was a condition precedent, despite the lack of any language in NICA regarding pre-delivery notice. Braniff v. Galen of Florida, Inc., 20 Fla. L. Weekly D2140 (Fla. 1st DCA Sept. 11, 1995).

In rewriting NICA's statutory language to create a pre-delivery notice requirement, the district court significantly altered the statute from the original intent of the legislature. Because the legislature enacted NICA as a response to the "medical malpractice insurance crisis," the rewriting of NICA constitutes a matter of great public importance.

As part of NICA, the legislature made four specific findings regarding the obstetrical malpractice crisis that NICA was intended to remedy. § 766.301, Fla. Stat. (1993). The legislature first observed that obstetrics was a "high-risk" specialty and that "very costly" obstetrical malpractice premiums were increasing at a rate

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[1] The Hospital also adopts the arguments set forth by Dr. Bazely in his Initial Brief.

greater than premiums for other physicians. § 766.301(1)(a), Fla. Stat. The legislature next found that physicians who practice obstetrics were among the physicians "most severely affected by current medical malpractice problems." § 766.301(1)(b), Fla. Stat. Third, recognizing that "obstetric services are essential," the legislature created NICA to stabilize and reduce malpractice insurance premiums. § 766.301(1)(c), Fla. Stat. (1993). Fourth, the legislature concluded that the "particularly high" costs of birth-related neurological injury claims warranted "the establishment of a limited system of compensation irrespective of fault." § 766.301(1)(d), Fla. Stat. (1993).

As written by the legislature, there is no requirement that hospitals give obstetric patients notice of NICA before the patient delivers her child. Realistically, such notice would be both impractical and meaningless. First, in many circumstances, obstetric patients arrive at the hospital well after the onset of labor, having had little or no prior contact with the hospital. When an obstetrical emergency exists, there simply is no time for the hospital to counsel the patient as to the no-fault provisions of NICA. Second, all hospitals are subject to NICA. The determining factor in requiring the hospital to provide notice is whether the hospital has on its staff a physician participating in the NICA plan. §§ 766.314, 766.316, Fla. Stat. (1993). It is unreasonable to assume that a patient in labor would wish to shop around at that point for a hospital without a staff physician who is participating in NICA.

Because this case presents issues of great public importance, this Court should exercise its discretionary jurisdiction to answer the certified question in the negative.

II. SECTION 766.316, FLORIDA STATUTES, DOES NOT REQUIRE PRE-DELIVERY NOTICE AS A CONDITION PRECEDENT TO APPLICATION OF THE EXCLUSIVE REMEDY PROVISION OF NICA.

The clear wording of Section 766.316 confirms the absence of any language stating either (1) that the notice must be given before delivery, or (2) that pre-delivery notice is a condition precedent for a defendant health care provider to invoke the exclusive remedy provisions of NICA. Moreover, nowhere in any of NICA's provisions is there any indication that pre-delivery notice is a condition precedent. The terms "pre-delivery," "pre-birth," and "condition precedent" are not contained in any NICA section.

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The logical purpose of the notice provision in Section 766.316 is to inform the patient of her remedy under the legislatively created compensation system, i.e., to advise the patient that she has a remedy to recover for the injury to her child without regard to a showing of fault, when no such remedy was previously available under the common law. For the court to read more into the statute and to conclude that the statute requires pre-delivery notice as a condition precedent to application of the exclusive remedy provisions of the statute would amount to judicial legislation in an area in which the legislature has already acted.

The purpose of the notice provision is not to provide the patient a basis on which to choose a NICA or non-NICA physician for

the delivery of her baby. First, the word "choice" or its equivalent is never mentioned in Section 766.316. As expressed by this Court in Shelby Mutual Ins. v. Smith, 556 So. 2d 393 (Fla. 1990), "In matters requiring statutory construction, courts always seek to effectuate legislative intent." The legislative intent of NICA is "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) (emphasis added). There is no indication of legislative intent or statutory language in the Act to provide for a mechanism of pre-delivery "choice" between a no-fault remedy and a quiescent civil action.

Second, the phrase "limited no-fault alternative" refers to an alternative exercised by the legislature when it created the NICA plan for no-fault compensation, similar to the workers compensation no-fault alternative. To say that this phrase embodies a legislative requirement of pre-delivery notice as a condition precedent for applying NICA as a remedy stretches the bounds of statutory construction and interpretation.

Third, injecting this argument of choice of a NICA or non-NICA physician before delivery only clouds the issue because it is not possible to make a truly informed choice before delivery. The primary factor that would affect this "choice" is whether medical negligence is implicated in the delivery of the child - something that cannot be known until after delivery. Without negligence, the patient certainly would select a NICA physician for delivery

because NICA allows no-fault recovery; with negligence, the patient may or may not select a non-NICA physician, depending on other factors that could affect the outcome of medical negligence litigation. But the fact remains that the existence of negligence cannot be known before delivery, hence making an "informed choice" of a NICA or non-NICA physician impossible. To conclude, as did the district court, that the phrase "limited no-fault alternative" in Section 766.316 means that a patient must receive pre-delivery notice of her physician's participation in NICA so she can choose between delivery by a NICA or non-NICA physician implies that an informed choice on this question can be made, when, in fact, the information necessary for such a choice cannot be known before delivery.

NICA's notice provision is not limited to pre-delivery notice. The statute mentions notice so that obstetrical patients will be given a "clear and concise explanation of a patient's rights and limitations under the plan." § 766.316, Fla. Stat. (1993). Supplied with this notice, the patient then knows of the basic provisions of NICA and how to avail herself of her statutory benefits.

III. IF PRE-DELIVERY NOTICE CONSTITUTES A CONDITION PRECEDENT TO THE APPLICABILITY OF NICA AS THE PATIENT'S EXCLUSIVE REMEDY, THE THRESHOLD QUESTION OF NOTICE SHOULD BE RESOLVED BY THE TRIAL JUDGE, NOT THE JURY.

If this Court decides that NICA requires pre-delivery notice as a condition precedent, then the issue of whether such notice was given should be resolved by the trial judge, rather than the jury.

Allowing a full jury trial to proceed on the threshold question of whether pre-delivery notice was given would be a cumbersome waste of judicial resources. Although specifically addressing long-arm jurisdiction, this Court's decision in Venetian Salami Co. v. Parthenais, 554 So. 2d 499 (Fla. 1989), serves as an excellent model for NICA. A defendant in a civil action wishing to raise a contention that the Plaintiff's exclusive remedy is under NICA would be required to file affidavits in support of his or her position. The burden would then shift to the plaintiff to prove by affidavit those facts taking her claim outside the ambit of NICA. Where the affidavits could not be reconciled, the trial judge would conduct a limited evidentiary hearing and rule based on that hearing.

To require the litigants to proceed through a jury trial on a fundamental jurisdictional question, such as whether pre-delivery notice has been given, would be contrary to NICA's commensurate benefit of a "prompt payment of damages" addressed by this Court in University of Miami v. Echarte, 618 So. 2d 189, 194 (Fla. 1993). Additionally, protracted litigation would drive up the cost of defending birth-related neurological injury claims, resulting in higher malpractice premiums for physicians practicing obstetrics. This would be directly contrary to the legislature's expressed desire of "stabilization and reduction of malpractice insurance premiums" for providers of obstetric care. § 766.301(1)(c), Fla. Stat. (1993). Accordingly, a jury trial on the issue of whether

pre-delivery notice has been given would defeat the legislative purpose of NICA.

CONCLUSION

The trial judge properly rejected the Braniffs' claim that pre-delivery notice constitutes a condition precedent to the applicability of NICA's exclusive remedy. In reversing the trial court, the First District Court of Appeal acknowledged that its decision presented a question of great public importance. The district court's decision rewrites the legislature's language contained in NICA to require pre-delivery notice as a condition precedent to the applicability of NICA's exclusive remedy provision, when no such language is contained in the statute, either expressly or by fair interpretation. For these reasons, the Hospital respectfully submits that this Court should exercise its discretionary jurisdiction to reverse the decision of the district court and remand with directions to the district court to affirm the trial court's Final Order of Dismissal with Prejudice. If this Court decides not to reverse and remand, then the decision of the First District Court of Appeal should be reversed as to that portion of its holding that the jury should resolve whether pre-delivery notice was given.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **F. Shields McManus, Esquire,** Waterside Professional Building, 221 East Osceola Street, Stuart, FL 34994; **Edna Caruso, Esquire,** Suite 3-A/Barristers Building, 1615 Forum Place, West Palm Beach, FL 33401; **Jack W. Shaw, Jr., Esquire,** Suite 1400, 225 Water Street, Jacksonville, FL 32202; and **Stephen E. Day, Esquire,** 50 North Laura Street, Suite 3500, Jacksonville, FL 32202; by U.S. Mail, this 20th day of October, 1995.

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