017

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.		

FILED
SID J. WHITE
FEB 19 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

ON REVIEW OF A QUESTION CERTIFIED
BY THE FTRST DISTRICT COURT OF APPEAL
To BE A MATTER OF GREAT **PUBLIC IMPORTANCE**

REPLY BRIEF OF PETITIONER, GALEN OF FLORIDA, INC.

MARKS, GRAY, CONROY & GIBBS, P.A.
Robert E. Broach, Esquire
Florida Bar No. 754609
Alan K. Ragan, Esquire
Florida Bar No. 821616
P.O. Box 447
Jacksonville, Florida 32201
(904) 398-0900
Attorneys for Petitioner,
Galen of Florida, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGES

STATUTES & RULES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

In this Reply Brief, the Respondents will be referred to as "the Braniffs" or "Respondents."[1] Defendant/Petitioner Robert Bazley, M.D., will be identified as "Dr. Bazley" and Defendant/Petitioner Galen of Florida, Inc., will be identified as "the Hospital". Citations to the Braniffs' Brief appear as "(Br.___)". The Florida Birth-Related Neurological Injury compensation Act (Sections 766.301 through 766.316, Florida Statutes) will be referred to as "NICA".

[1] On the cover page of their Answer Brief, the Braniffs have incorrectly characterized themselves as "Petitioners." They are the Respondents in this action.

ARGUMENT

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

In the Respondents' Brief, as well as in the amicus curiae briefs filed in support of the Respondents' position, short shrift is given to the plain language of the Florida Birth-Related Neurological Injury Compensation Act (NICA), Sections 766.301-.316, Florida Statutes (1993). There is no reference in the Act to notice being a condition precedent, nor is there any indication that NTCA establishes a system whereby the plaintiff may elect between NICA's no-fault provision and a common-law recovery. The Braniffs would have this court graft such requirements onto NICA, despite the fact that these are requirements that the legislature neither wrote nor intended.

It is a basic axiom of statutory construction that the courts will not insert language into a statute except where necessary to effect manifest legislative intent. ***Dade County v. Nat'l Bulk Carriers, Inc., 450 So.*** 2d 213 (Fla. 1984). In ***Armstrong v. City of Edgewater, 157 So.*** 2d 422 (Fla. 1963), this court explained:

> Courts are, of course, extremely reluctant to add words to a statute as enacted by the Legislature. They should be extremely cautious in doing so. The recognized rule, however, is that when a word has obviously been omitted and the context of the act otherwise reflects the clear and unequivocal legislative intent, then this intent may be effectuated by supplying the word or words which have been inadvertently omitted. The courts cannot and should not undertake to supply words purposely omitted, ***When there is***

> ***doubt as to the legislative intent or where speculation is necessary, then the doubts should be resolved against the power of the courts to supply missing words.*** On the other hand, when the addition of a word is necessary to prevent an act from being absurd and in order to conform the statute to the obvious intent of the Legislature, then word which were clearly omitted through some clerical or scrivener's misprision may be added by the court.

Armstrong, ***157*** So. 2d at 425 (emphasis added). In *Armstrong*, this court clearly admonished against supplying a "word or words." The only difference between the admonition in *Armstrong* and the Braniffs' requested insertions is that the Braniffs want more than just a word or words inserted. They want this court to add an entire ***provision*** calling for pre-delivery notice.

Section 766.316, Florida Statutes, contains NICA's entire notice provision. The statute confirms the absence **of** a condition precedent that would require pre-delivery notice for NICA to be effective:

> 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 s. 766.314(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 injuries. Such ***notice*** shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan.

§ *766.316,* **FLA. STAT.** (1993) (emphasis added), The plain language of the statute shows that the legislature did not insert a requirement for pre-delivery notice. For the judiciary to insert such a provision would violate this court's principle of statutory construction to

resolve doubts against the insertion of words into a statute.

If the legislature intended the NICA notice provision to be a pre-delivery notice, the legislature easily could have drafted NTCA to include notice as a condition precedent. There is no shortage of enactments in which notice constitutes a condition precedent.[2] If notice were a condition precedent for NICA, then the legislature would have expressly indicated as such. The Braniffs' efforts to include such a condition precedent in NICA would have this court assume the duties of the legislature.

The legislature's ability to create a statutory provision with a condition precedent also is aptly illustrated in the notice provision for medical malpractice actions. § 766.106(2), FLA. STAT. (1993); ***Ingersoll v. Hoffman***, 589 So. 2d 223 (Fla. 1991) (holding that a plaintiff must give notice to defendant prior to filing claim for medical

---

[2] See e.g., § 163.3215(4), FLA. STAT. (1993) (stating that "[a]s a ***condition precedent*** to the institution of an action [challenging an order as to a local comprehensive plan], the complaining party shall first file a verified complaint . . . setting forth the facts upon which the complaint is based and the relief sought . . . . ") (emphasis added); § 220.827(2), FLA. STAT. (1994) (requiring that where an entity is claiming exemption from execution or attachment for tax liability, that "[t]he giving of such notice [(of a claim and the intention to prosecute)] shall be a ***condition precedent*** to any legal action against the sheriff or other authorized person for wrongful levy or seizure . . . . ") (emphasis added); § 378.211(4), FLA. STAT, (1993) (mandating that for violation of the Phosphate Land Reclamation Act, "[a]s a ***condition precedent*** to the institution of any action . . ., the department shall issue a written notice setting forth in detail the alleged violation . . . .") (emphasis added); § 624.155(2)(a), FLA. STAT. (1993) (stating that "[a]s a ***condition precedent*** to bringing an action under this section, the department and the insurer must have been given 60 days' written notice . . . .") (emphasis added); § 674.406(3)-(4), FLA. STAT. (1993) (preventing a bank customer from maintaining suit against the bank for payment of an instrument bearing an unauthorized signature or alteration "[i]f the bank proves that the customer failed" to "promptly notify the bank of the relevant facts" regarding the unauthorized signature or alteration).

malpractice). After presuit investigation, but before filing a claim for medical malpractice, a claimant must notify prospective defendants by certified mail, return receipt requested. § 766.106(2), FLA. STAT, The medical malpractice notice statute also specifies exactly what information must be contained in the notice. Unlike the Medical Malpractice Act, NICA requires only an explanation of patient's rights and limitations under the plan; NICA contains no provision as to ***when*** the notice is to be given.

In the instant case, the Braniffs assert that if pre-delivery notice is not given, then the statute is unconstitutional. They argue that, "It is fundamental to notions of procedural due process that notice be provided before a party can be deprived of vested property rights. " (Br. at 15.) The Braniffs not only fail to explain how they consider an inchoate right to sue to be a "vested property right," but they also try to avoid the effect of this court's decision in *Kluger* v. ***White,*** 281 So. 2d 1 (Fla. 1973), by arguing that their argument involves "procedural due process" rather than "access to courts." (Br. 15-16 n.2.) The only "procedural due process" involved is the Braniffs' access to courts, and NICA passes constitutional muster under the ***Huger*** test.

In *Kluger*, this court held that the legislature cannot abolish a right of redress in the courts unless the legislature (a) provides a reasonable alternative remedy or commensurate benefit, or (b) detnonstrates that overpowering public necessity dictates abolishment of the right and that there is no alternative method of accomplishing this overpowering public necessity. *Kluger*, ***28 1 So.*** 2d at ***4.*** In ***University of Miami*** *v. Echarte*, 618 So. 2d 189 (Fla. 1993), this court applied the *Kluger* test and held that the

Medical Malpractice Reform Act's statutory cap on noneconomic damages in arbitrated medical malpractice actions did not violate a claimant's access to the courts because claimants received a "commensurate benefit. "[3]

As this ***court*** observed in ***Echarte,*** "The Task Force recommended a no-fault alternative in the narrow area of birth related neurological injuries, but rejected it for other types of medical injuries." ***Echarte,*** 618 So. 2d at 194 n.16. This is the NICA no-fault alternative that is at issue in the present action. The "commensurate benefits" provided by NICA ensure the enactment's constitutionality, thereby satisfying the first prong of the ***Kluger*** test."

---

[3] "The claimant benefits from the requirement that a defendant quickly determine the merit of any defenses and the extent of its liability. The claimant also saves the costs of attorney and expert witness fees which would be required to prove liability. Further, a claimant who accepts a defendant's offer to have damages determined by an arbitration panel receives the additional benefits of: 1) the relaxed evidentiary standard . . .; 2) joint and several liability of multiple defendants in arbitration; 3) prompt payment of damages . . .; 4) interest penalties against the defendant for failure to pay the arbitration award; and 5) limited appellate review of the arbitration award requiring a showing of "manifest injustice. " ***Echarte,*** 618 So. 2d at 194.

[4] Under NICA, claimants benefit from a quick determination by the hearing officer, §§ 766.307-.309, FLA. STAT. (Supp. 1994); by saving the costs of attorney and expert witness fees which would be required to prove liability, § 766.31, FLA. STAT. (Supp. 1994); through a relaxed evidentiary standard, §§ 766.304, 120.58, FLA. STAT. (1993); by the state's waiver of sovereign immunity to ensure payment of compensation awards, § 766.303, FLA. STAT. (1993); in immediate payment of expenses previously incurred and payment of future expenses as they are incurred, § 766.31(2), FLA. STAT. (Supp. 1994); in the right to petition the circuit court for enforcement of a final award by the hearing officer, § 766.312(2), FLA. STAT. (Supp. 1994); and in the limited appellate review of the hearing officer's determination and award, with the hearing officer's determination as to compensability given conclusive and binding effect as to questions of fact, § 766.311(1), FLA. STAT. (1993).

The *Kluger* test's second prong also was satisfied because the legislature demonstrated the existence of an "overpowering public necessity". ***Echarte,*** 618 So. 2d at 196-97 (applying Ch. 88-1, Laws of Fla.). The enactment preamble that was satisfactory under the *Kluger* test's "overpowering public necessity" requirement is the same preamble at issue for NICA. Ch. 88-1, preamble, §§ 48-59 and §§ 60-75, Laws of Fla. Consequently, the legislative finding that an "overpowering public necessity" exists for establishing NICA is just as valid as it was for establishing the statutory provisions at issue in ***Echarte.***

Moreover, as noted in ***Echarta,*** no alternative method exists for meeting this public necessity. This court examined the plan as a whole and concluded that the arbitration statutes were necessary to meet the medical malpractice insurance crisis. ***Echarte, 618*** So. 2d at 197. Both the arbitration statute and NICA were the recommendations of the Academic Task Force for Review of the Insurance and Tort Systems. For both the arbitration statute and NICA, the legislature was seeking to alleviate Florida's medical malpractice crisis. Ch. 88-1, preamble, Laws of Fla.[5] The legislative findings in section

---

[5] "The Legislature makes the following findings: (a) Physicians practicing obstetrics are high-risk medical specialists for whom malpractice insurance premiums are very costly, and recent increases in such premiums have been greater for such physicians than for other physicians. . .; (c) Because obstetric services are essential, it is incumbent upon the Legislature to provide a plan designed to result in the stabilization and reduction of malpractice insurance premiums for providers of such services in Florida; (d) The costs of birth-related neurological injury claims are particularly high and warrant the establishment of a limited system of compensation irrespective of fault. § 766.301, **FLA. STAT.** (1993).

766.301, coupled with the Task Force recommendations, show that no alternative method exists for meeting public necessity. Accordingly, NTCA passes the *Kluger* test and no unconstitutional abridgement of the right to access to courts is present.

NICA, as demonstrated in section 766.316, applies to all hospitals and is not conditional on whether notice is given before delivery. As recognized by the dissent in ***Bradford v. Florida Birth-Related Neurological Injury Compensation Assoc. , 21*** Fla. L. Weekly D51 (Fla. 4th DCA Dec. 27, 1995), this court's rationale involving the notice requirement for the worker's compensation act is analogous to the notice issue for NICA. In ***Allen v. Estate*** of *Carman*, 281 So. 2d 317 (Fla. 1973), an employer with fewer than three employees was not required to have worker's compensation coverage, but did obtain it. He failed to post the notice required by section 440.05, Florida Statutes (1967), which required:

> Every employer who , , . waives such exemption . . . shall post and keep in a conspicuous place or places in and about his place or places of business typewritten or printed notices to such effect in accordance with a form to be prescribed by the commission. He shall file a duplicate of such notice with the commission.

Allen, 281 So. 2d at 322. The claimant contended that the employer's failure to post the statutory notice constituted a waiver of the employer's worker's compensation immunity. This court rejected the clamaint's argument and concluded that, "[T]he critical act contemplated by the statute to secure to employer and employee the benefits thereunder is the purchase and acceptance of the policy, not the posting of notice. " ***Allen, 281*** at

322. In both the worker's compensation act and in NICA, the legislature took away a common law right to sue and provided an administrative remedy for compensation without fault.

The Braniffs also insist that the "the only reasonable and legitimate reading of the statute based upon its language and statutory scheme is that pre-delivery notice is required [because a woman] . . . ceases to be an 'obstetrical patient' [after delivery]." (Br. 16.) Despite the Braniffs' definition, the practice of "obstetrics" extends beyond delivery. Even in common usage "obstetrics" is defined as, "The branch of medicine concerned with the care of women during pregnancy, childbirth, ***and the recuperative period following delivery.*** " **AMERICAN HERITAGE DICTIONARY** 859 (2d ed. 1985) (emphasis added); see ***also*** **MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY** 803 (10th ed. 1994) (defining obstetrics as "a branch of medical science that deals with birth and its antecedents and sequels"). Clearly, NICA's notice provision is not limited to pre-delivery notice. Further, 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 NTCA and how to avail herself of her statutory benefits. Contrary to the Braniff s assertions, the statute does not require any "notice" that would describe the plaintiffs "alternatives, " Instead, the statute provides an "alternative" applicable only to the potential NICA participants - those providing obstetrical services. § 766.301, **FLA. STAT.** (1993). This "alternative" is the practitioner's choice of whether

to participate in the NICA plan, § 766.3 14, **FLA. STAT.** (1994); *Coy v. Florida Birth-Related Neurological Injury Compensation Plan, 595 So.* 2d *943,* 944 (Fla. 1992).

The NICA notice requirement is not a condition precedent to application of the statute's exclusive remedy provision. NICA should be subjected to no different treatment than any other legislative enactment. Where, as here, there is no evidence **that the** legislature inadvertently omitted a provision calling for pre-delivery notice, such a provision should not be added by the courts.

II.

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.

The Braniffs object to the Petitioners' suggestion that if this court decides that NTCA 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. (Br. 32-35.) The Braniffs contend that this court's decision in *Venetian Salami Co. v. Parthanais, 554 So.* 2d 499 (Fla. 1989), should not serve as a model for the threshold determination in a NICA case as to the proper method for deciding if pre-delivery notice was given. As grounds for their disagreement, the Braniffs argue that giving pre-delivery notice is an affirmative defense, and "since there is conflicting evidence on whether pre-

delivery notice was given, that fact question must be resolved by a jury." (Br. **34.)**

The Braniffs overlook what this court prescribed in *Venetian Salami:* that the trial court's job was to resolve the conflicting fact questions on whether a basis existed to establish long-arm jurisdiction. Under the holding of *Venetian Salami,* the trial judge resolves conflicting facts raised by the parties' affidavits on the issue of whether the court has proper jurisdiction. If this court holds that pre-suit notice is a condition precedent to a defendant invoking NICA immunity, then whether the appropriate notice was given becomes a jurisdictional question that should be resolved by the judge after an evidentiary hearing. Such a hearing is provided for under Florida Rule of Civil Procedure 1.140(d). Such a procedure would comport with 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). To present the notice question to the jury would be to go through the time and expense of a full trial, which NICA was designed to avoid.

CONCLUSION

The legislature did not include a pre-delivery notice provision in NTCA. This court should reject the Braniffs' attempt to insert words into a plain statutory enactment. If the legislature intended NTCA notice to be given before delivery, then the legislature has the power to amend the statute. It is respectfully submitted that this court should refrain from inserting language into NICA that would add a requirement unintended by the legislature. Accordingly, the question certified by the First District Court of Appeal

should be answered in the negative. Should the court determine otherwise, then it is respectfully submitted that the threshold question of notice should be resolved by the trial judge, rather than the jury.

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; **Bevery A. Pohl, Esquire, 2441** S.W. 28th Ave., Fort Lauderdale, FL 33312,; and **Joel D. Eaton, Esquire,** 25W. Flagler St. Suite 800, Miami, FL 33130; **Dock A. Blanchard, Esquire,** P.O. Box 1869, Ocala, FL 34478; by U.S. Mail, this 16TH day of February, 1996.

MARKS, GRAY, CONROY & GIBBS, P.A.

Robert E. Broach, Esquire
Florida Bar No. 754609
Alan K. Ragan, Esquire
Florida Bar No. 821616
P.O. Box 447
Jacksonville, Florida 32201
(904) 398-0900
Attorneys for Petitioner,
Galen of Florida, Inc.