IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO: 87,233

Lower Case No. 94-2368
(5th DCA)

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY
COMPENSATION ASSOCIATION,

Petitioner

v.

FLORIDA DIVISION OF
ADMINISTRATIVE HEARINGS,
ET AL.,

Respondents.

ON CERTIFIED QUESTION FROM THE FIFTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF
RESPONDENTS, JUDITH BIRNIE and FRED BIRNIE,
LEGAL GUARDIANS FOR ERIC RYAN BIRNIE, AND INDIVIDUALLY.

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STATEMENT OF THE CASE

The underlying action involves a claim for benefits under the Neurologically Injured Infants Compensation Act of 1987, Florida Statutes, Section 766.301, et seq. The claim of the Petitioners (Birnie) was found to be compensable by the Administrative Hearing Officer, and the Neurological Injury Compensation Association appealed that decision to the Fifth District Court of Appeal. The order of the Hearing Officer was affirmed by the Court of Appeal, which certified the following question to this Court:

> IN ORDER TO OBTAIN COVERAGE UNDER THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY PLAN AS PROVIDED IN SECTIONS 766.301-316, FLORIDA STATUTES, MUST AN INFANT SUFFER BOTH SUBSTANTIAL MENTAL AND SUBSTANTIAL PHYSICAL IMPAIRMENT, OR CAN THE DEFINITION BE CONSTRUED TO REQUIRE ONLY SUBSTANTIAL IMPAIRMENT, MENTAL AND/OR PHYSICAL?

In this brief the Respondents will be referred to collectively as the "Birnies". The parents, Judith and Fred Birnie, will be referred to by their full names and their son, the injured claimant, will be referred to as "Eric". The Petitioner, the Neurological Injury Compensation Association, will be referred to as "NICA". References to the transcript of testimony and evidence at the final hearing before the Hearing Officer will be indicated by "TR". References to the medical records will be indicated by "MR", followed by the section of the records and the page number.

STATEMENT OF THE FACTS

Despite a lengthy and self serving preamble, the initial brief of NICA contains a fairly comprehensive statement of the facts pertinent to the issues before this Court. Therefore, the Birnies will not restate those facts in this Answer Brief. However, some additional facts pertinent to specific issues will be cited in the argument on those issues.

ISSUE ON APPEAL

The question certified by the Court of Appeal is:

> IN ORDER TO OBTAIN COVERAGE UNDER THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY PLAN AS PROVIDED IN SECTIONS 766.301-316, FLORIDA STATUTES, MUST AN INFANT SUFFER BOTH SUBSTANTIAL MENTAL AND SUBSTANTIAL PHYSICAL IMPAIRMENT, OR CAN THE DEFINITION BE CONSTRUED TO REQUIRE ONLY SUBSTANTIAL IMPAIRMENT, MENTAL AND/OR PHYSICAL?

However, the decision of the Hearing Officer affording compensation may be sustained on the basis of either of these alternative issues:

1. WAS THERE EVIDENCE IN THE RECORD SUFFICIENT TO SUPPORT THE FINDING OF THE Hearing Officer THAT ERIC BIRNIE SUFFERED PERMANENT AND SUBSTANTIAL **MENTAL** IMPAIRMENT AS WELL AS PERMANENT AND SUBSTANTIAL **PHYSICAL** IMPAIRMENT?

2. IN ORDER TO FULFILL THE INTENT OF THE LEGISLATURE AND TO AVOID AN UNCONSTITUTIONAL CLASSIFICATION, SHOULD THE STATUTE BE CONSTRUED TO PROVIDE COMPENSATION IN EITHER OF THE FOLLOWING SITUATIONS:

(A) WHERE THERE IS PERMANENT AND SUBSTANTIAL IMPAIRMENT WHICH INCLUDES ELEMENTS OF PHYSICAL IMPAIRMENT **AND** ELEMENTS OF MENTAL IMPAIRMENT; OR

(B) WHERE THERE IS PERMANENT AND SUBSTANTIAL PHYSICAL IMPAIRMENT **AND/OR** PERMANENT AND SUBSTANTIAL MENTAL IMPAIRMENT?

SUMMARY OF THE ARGUMENT

The statutes which comprise the "NICA Plan" define a compensable injury as one which renders the subject infant **"permanently and substantially mentally and physically impaired".** In applying this definition to the situation and circumstances of Eric Birnie, at least two questions of construction immediately arise:

1. Does the statute require that Eric be **both** mentally **and** physically impaired?

2. Is it necessary that **both** the mental impairment **and** the physical impairment must be permanent **and** substantial?

The Hearing Officer answered both of these questions in the affirmative. More specifically, in finding the facts from the evidence, the Hearing Officer determined that Eric Birnie was "permanently and substantially mentally and physically impaired". This finding is amply supported by the evidence on this issue.

Although the Court of Appeal approved the ultimate conclusion of the Hearing Officer, the Court took a critical legal step further. The Court found ambiguity between the intent and purpose

of the Legislature to reduce the cost of malpractice insurance for obstetricians and the interpretation asserted by NICA that the Plan limited recovery to those infants who suffered both substantial physical impairment and substantial mental impairment. Moreover, the court also concluded that the construction of the statute urged by NICA might very well create an unreasonable classification and render the entire NICA Plan unconstitutional.

> "However, if we construe the "limited class" language to further limit the number who would otherwise qualify under the NICA plan to only those who are both physically and mentally impaired, we would have to ignore the legislative "plan designed to result in the stabilization and reduction of malpractice insurance premiums for [obstetricians]" and the reasonableness of the classification would be in doubt."[1]

Finding these concerns sufficient to require judicial construction of the statute, the Court of Appeals applied standard rules of statutory construction and concluded the meaning and the intent of the statute were satisfied by reading the statute to require permanent and substantial physical impairment **and/or** permanent and substantial mental impairment.

Although the finding of fact by the Hearing Officer was correct and sufficient to establish that this claim is compensable under the statute, the finding of law by the Court of Appeals also is correct and determinative of the claimants' rights under the

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[1] Decision on Rehearing, 20 Fla. Law Weekly D2725-2726.

NICA Plan. However, both the facts and the law **of this case** may also be satisfied by construing the statute to require permanent and substantial impairment composed of elements of both mental impairment and physical impairment.

The terms used in this statute are words of common usage and should be interpreted according to their common and ordinary meaning. Because of the wide variation in the definitions of these terms in common usage, there is necessarily a wide variation in the reading and interpretation of the statute. Considering these possible variations and the grammatical analysis of the phrases used, it is apparent that there are three possible interpretations of the statutory phrase **"permanently and substantially mentally and physically impaired":**

1. The impairment must be permanent and substantial, and it must include elements of mental impairment and physical impairment.
2. The impairment must be permanent and substantial, and it must include elements of substantial mental impairment **and** substantial physical impairment.
3. The impairment must be permanent and substantial, and it must include elements of substantial mental impairment **or** substantial physical impairment.

In briefing and arguing these issues to the Court of Appeal, the Birnies took the position that the first of these three possible interpretations best fulfilled the intent of the Legislature and the ordinary meaning and understanding of these statutory terms. The Court of Appeal, however, determined that only the third of these three possible interpretations would provide a reasonable classification acceptable to the constitution and also satisfy the intent of the Legislature. For the purposes of this brief and argument, the Birnies can accept either the conclusions of the Hearing Officer, the decision of the Court of Appeals, or the middle ground embodied in the first interpretation of the statute described above -- that is, the **impairment** must be permanent and substantial, and it must be composed of elements of mental impairment and elements of physical impairment.

Not only is this the interpretation intended by the Legislature, but this interpretation may preserve the constitutionality of the statute. The classifications attempted by the Legislature are so vague, unreasonable and arbitrary that the statute may be held unconstitutional when that issue is raised in a proper case. Insofar as this case is concerned, the Birnies are claiming compensation under the statute, and they do not challenge the constitutionality of the statute.

ARGUMENT

As indicated above, the real questions raised on this appeal are whether the provisions of the statutory classification are ambiguous, and, if so, what is the appropriate construction of the statute. Why then, does NICA devote so much of its brief to the funding of the Plan and the potential insolvency of the Fund? NICA claims that the extensive provisions of the statute concerning funding show that the Legislature intended to strictly limit the classification of claimants who qualified for compensation.[2]

In the Court of Appeal NICA was joined in this argument by the Florida Medical Association, as amicus curiae. The FMA was not invited and has not applied to participate in these proceedings before this Court. However, the governing Board of NICA is dominated by the health care industry,[3] and NICA obviously speaks for its medical partners in the argument presented in the initial brief.

The preoccupation of the FMA/NICA with the funding of the NICA Plan has a long and undignified history. Initially, the FMA strongly supported the proposed NICA Plan until the legislature

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[2] Initial brief of Petitioner, pages 5-6, 23, 28-29.

[3] Section 766.315(1)(c), Florida Statutes, provides for a five member governing Board composed of one obstetric physician, one non-obstetric physician, one hospital representative (who may be a physician), one casualty insurance representative and one "citizen" representative.

attached funding provisions which required an initial payment of $250 by non-obstetric physicians and the possibility of assessments against physicians, hospitals and insurance carriers in the future.

Since the statute became effective, organized medicine has mounted continuing legal attacks on the funding provisions of the NICA Plan.[4] Failing in these previous attacks, the FMA has performed an impossible balancing act: attempting to limit the rights of children injured by medical negligence during labor and delivery, while at the same time limiting the obligation of physicians to contribute their fair share to the funding of their own legislative scheme.

The current effort of the FMA/NICA to accomplish their objectives is by manipulation of the statutory classification of claims and claimants. At best, the statutory classification of qualified claimants has always been suspect. In its conception and recommendation for this Plan, the Academic Task Force clearly indicated that the Plan should apply primarily to infants whose catastrophic injuries were most likely to be caused by medical

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[4] See, Coy v. Fla. Birth-Related Neurological Injury Compensation Plan, 595 So.2d 943 (Fla. 1992); McGiboney v. Florida Birth-Related Neurological Injury Compensation Plan, 563 So.2d 177 (Fla. 1st DCA 1990), jurisdiction accepted 573 So.2d 3, approved 595 So.2d 943 (Fla. 1992). See also brief of Florida Medical Association, as amicus curiae, in the Court below.

negligence.[5] The Task Force rather cynically pointed out that a true no-fault medical malpractice plan would be "prohibitively expensive".[6] For this reason the classification of qualified claimants was carefully drawn to include only those whose injuries were most likely to be caused by physician negligence. Neither the Academic Task Force nor the Legislature made any effort to conceal the fact that the classifications for the NICA Plan were rigged to catch as many claims caused by medical negligence as possible, while excluding as many non-negligent claims as possible.[7]

The Report of the Academic Task Force and the NICA Plan clearly recognize that the greatest number of catastrophic injuries resulting from physician or hospital negligence occur during labor and delivery or resuscitation immediately following delivery. Consequently the plan was designed to include only injuries occurring during this period.

This would generally exclude the comparatively large number of infants who suffered intrauterine injury from infection, toxicity or toxemia prior to labor and delivery. It would also

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[5] Academic Task Force for Review of the Insurance and Tort Systems, Medical Malpractice Recommendations, page 31-32.

[6] Ibid., pages 31-32.

[7] Report of the Academic Task Force, pages 30-31; Section 766.301, Florida Statutes.

exclude the equally large number of infants who suffer injury from infection or metabolic disorders following delivery.

Since premature infants or growth retarded infants might suffer catastrophic injuries during labor and delivery unrelated to medical negligence, the statute excluded them from recovery by requiring that the infant weigh at least 2500 grams at birth. For much the same reason genetic or congenital abnormalities were expressly excluded as well.

Of course, one of the greatest limitations upon recovery under the Plan was the requirement that the injury be caused only by deprivation of oxygen or mechanical trauma and the injury must affect only the brain and the spinal cord. This effectively eliminated many lesser injuries that probably would not involve physician or hospital negligence.

Finally, the Plan eliminated all lesser injuries by requiring that the infant be "permanently and substantially mentally and physically impaired." This brought about the strange anomaly that an infant with lesser injuries caused by medical negligence would very likely make a much greater recovery at common law than an infant with "catastrophic injuries" could recover under NICA.

This is particularly true when the compensation available under NICA is considered. The parents are compensated for a lifetime of care and anguish by the maximum total sum of $100,000.

There is no recovery for intangible damages, such as the loss of the ability to enjoy life, but, theoretically, the injured infant is entitled to recover:[8]

> "(a) Actual expenses for medically necessary and reasonable medical and hospitalization, habilitative and training, residential, and custodial care and service, for medically necessary drugs, special equipment and facilities, and for related travel."

However, the catch is that the infant must first exhaust all benefits available under private insurance or public welfare.[9] All NICA benefits are excess over any other benefits that might be available to the child, including benefits depending upon indigence.[10]

Obviously, there is a tremendous difference between the benefits available under the NICA Plan and the damages recoverable for these catastrophic injuries at common law. On the other hand, the reduction in malpractice insurance costs to obstetricians has been correspondingly large.

However, in addition to the financial advantages already conferred by the statute, the FMA and NICA want even more. They want an area of subjectivity in the Plan which will allow them to

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[8] Section 766.31(1)(a), Fla. Stat.

[9] Section 766.31(1)(a) 1, 2, and 3, Fla. Stat.

[10] Section 766.31(1)(a), Fla. Stat.

screen compensable cases. They can then tilt the playing field even more favorably to the health care industry.

Such subjectivity is readily available in any evaluation of the nature of "mental" impairment, and how much mental impairment is "substantial". Of course, the degree of subjective latitude available in this evaluation is increased by the fact that in the most critical cases the nature and extent of "mental" impairment must be determined before the child is two years old.

Although the limitations period for NICA claims is five years after birth, any claim that might be compensable at common law must be filed with NICA or in the appropriate Circuit Court within two years of the medical incident or the discovery of the injury.[11]

The difficulties in determining the nature and extent of "mental" impairment in a young child are amply demonstrated in the expert testimony in this case and in the order of the Hearing Officer.[12] Of course, at the time of the hearing in this case Eric was four and one-half years old. When the child is much younger at the time this determination must be made, it becomes increasingly difficult to evaluate or to establish "substantial mental impairment".

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[11] Sec. 766.313 and Sec. 95.11(4)(b), Fla. Stat.

[12] Order of the Hearing Officer, pages 20-21.

Since the statute places the burden of proving this element of the classification on the child and his or her parents, it can be virtually impossible to challenge an assertion or a denial of compensability by NICA.

Now that the purpose of the FMA/NICA is better understood, it may be appropriate to consider the purpose of the Legislature in adopting the NICA Plan. The Court of Appeals found that the statutory classification contained in the Plan was ambiguous because the intent and purpose of the Legislature was contrary to the "literal" interpretation of the statute urged by the FMA/NICA.[13] The Court determined that the only intent and purpose expressed by the Legislature and embodied in the statute was to reduce the cost of malpractice insurance to obstetric physicians. As the Court of Appeal observed, this purpose certainly will not be served by further limiting the classification of qualified claimants, unless, of course, NICA intends to expand upon the discriminatory screening process they have used in this case and the other cases described in their brief.[14]

It was further suggested by the Court of Appeals that if the interpretation of the statute asserted by NICA was correct, then

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[13] 664 So. 2d 1016, 1019-1020 (Fla. 5th DCA 1995).

[14] Initial brief of Petitioner, pages 25-26.

"the reasonableness of the classification would be in doubt."[15] In order to fulfill the purpose of the legislature and to preserve the constitutionality of the statute, the Court found it necessary to read the critical phrase in the disjunctive, rather than the conjunctive. That is, the Court held that either substantial mental impairment and/or substantial physical impairment would satisfy the intent of the legislature and provide a reasonable classification sufficient to preserve the constitutionality of the statute.

The Court of Appeal cited considerable authority for the proposition that "the words 'or' and 'and' may be interchanged when it is required to effectuate the obvious intention of the legislature and to accomplish the purpose of the state."[16] Such construction certainly is justified under the circumstances of this case.

However, the critical issues which determine the claim of Eric Birnie may be resolved in an even more simple and direct manner.

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[15] Decision on Rehearing, 20 Fla. Law Weekly D2725, 2726.

[16] 664 So. 2d 1016, 1020-1021, quoting from Pinellas County v. Wooley, 189 So.2d 217, 219 (2nd DCA 1976); Also citing: Winemiller v. Feddish, 568 So.2d 483 (Fla. 4th DCA 1990); Rudd v. State ex rel Christian, 310 So.2d 295 (Fla. 1975); Dotty v. State, 197 So.2d 315 (Fla. 4th DCA 1967); Duncan v. Wiseman Baking Co., 357 SW 2d 694 (Ky. App. 1962); Peacock v. Lubbock Compress Co., 252 F. 2d 892 (C.A. 5th 1958); Comptroller v. Fairchild Industries, 303 Md. 280, 493 A. 2d 341 (1985).

The Hearing Officer did not find it necessary to construe the terms of the classification because he found from the evidence that Eric Birnie had suffered permanent and substantial mental impairment.[17] As finder of the facts of this case, his determination will be sustained if it is supported by competent and substantial evidence.[18] There was more than sufficient evidence to support this finding of the Hearing Officer.

The conclusion of the Hearing Officer awarding compensation may also be sustained by a construction of the statutory classification that is much more reasonable than the interpretation asserted by NICA. It is true that the Legislature intended the statute to apply to a limited class of claims involving catastrophic injuries. However, in creating the classification for such injuries, the Legislature only required that a claimant be "substantially ... impaired". In addition it was provided that a qualified claimant must be "mentally impaired" as well as "physically impaired". Nevertheless the total impairment required was only that the claimant be "substantially ... impaired".

Therefore, it logically follows that the two components of

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[17] Order of the Hearing Officer, pages 23-24

[18] Markham v. Fogg, 458 So. 2d 1122 (Fla. 1984); Shaw v. Shaw, 334 So. 2d 13 (Fla. 1976).

this impairment might be something less than substantial, so long as the total impairment was substantial.

This interpretation of the statutory classification is also consistent with the intent of the Legislature expressed in another section of the statute. The NICA Plan contemplates two types of compensable injuries:

1. Brain damage caused by deprivation of oxygen or mechanical injury; or,

2. Injury to the spinal cord caused by deprivation of oxygen or mechanical injury.

Injuries to the spinal cord during labor and delivery usually are caused by mechanical injury, not deprivation of oxygen.[19] Such injuries to the spinal cord frequently are caused by use of excessive force in performing a vaginal delivery of an infant that is in the breech position, or when the fetus is in the vertex position but the position of the head or shoulder makes movement through the birth canal more difficult.[20]

Relatively few injuries to the spinal cord during labor and delivery would result in "substantial mental impairment", at least as defined by NICA.[21] However, many of these spinal cord injuries

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[19] TR: pages 116-117.

[20] TR: pages 116-119.

[21] TR: page 118.

will involve at least some degree of injury and damage to the brain.[22]

Since the Legislature obviously intended that spinal cord injuries also should be eligible for compensation, there must have been a corresponding legislative intent that a lesser degree of "mental" impairment would satisfy the requirements of the statute.

Any such intent of the Legislature would be satisfied by proof of some degree of "mental" impairment coupled with sufficient "physical impairment" to render the child "permanently and substantially ... impaired". This clear and obvious reading of the statute satisfies both good grammar and the apparent intent of the Legislature that the "permanent and substantial ... impairment" should include elements of both "mental" impairment and "physical" impairment.

Since the avowed purpose of the Act was to reduce the cost of malpractice insurance to obstetricians, it seems logical that this purpose can best be accomplished by giving the act an application that is broad enough to include infants who are "substantially impaired" and whose impairment includes both mental and physical components. Assuming that this statute is for the benefit of the public, this interpretation is in accordance with the principle

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[22] TR: pages 117-118.

that statutes for the benefit of the public, or remedial statutes, should be broadly construed.[23]

On the other hand, this interpretation may be contrary to the equally well established principle that statutes in derogation of the common law must be strictly construed. However, the courts seem to ignore that principle when the Legislature uses the magic words "a financial crisis in the medical liability insurance industry," as it did in this instance.[24]

The determination that there is an ambiguity in the statute, or the resolution of such an ambiguity, can also be accomplished by reference to standard principles of grammar and generally accepted definitions of the pertinent statutory terms.

The exact wording of the statute pertinent to the issue on appeal is whether the minor claimant is **"permanently and substantially mentally and physically impaired."** From a grammatical standpoint the question is: Which word or words are modified by the terms "permanently" and "substantially"?

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[23] Dept of Environmental Regulation v. Goldring, 477 So 2d 532 (Fla 1985); State v. Hamilton, 388 So 2d 561 (Fla 1980); 3299 N. Federal Highway, Inc. v. Board of County Commissioners, 646 So 2d 215 (Fla 4th DCA 1994).

[24] Preamble to the Medical Malpractice Reform Act of 1988, Chapter 88-1.

More specifically, did the Legislature intend that the word "substantially" should modify "mentally", or "physically", or "impaired", or all of them?

Returning to fundamental grammar, "substantially" is an adverb; "mentally" is also an adverb; "physically" is an adverb; and "impaired" is a verb.

Usually, adverbs modify verbs. Obviously both the grammatical composition and the "sound" of the phrase are offended by the use of "substantially" to modify "mentally". If that is what the Legislature intended, then the phrase should have been "substantial mental impairment". Considering the phrase actually used by the Legislature, it seems obvious that the adverb "substantially" was used to modify the verb "impaired", while the adverb mentally was used to indicate that the impairment should include mental components or aspects.

In his final order determining compensability the Hearing Officer did not clearly indicate his interpretation of this provision of the NICA Plan. He did determine that the statute requires both mental impairment and physical impairment,[25] and he specifically found as a "Conclusion of Law" that Eric was

[25] Final Order of Hearing Officer, page 26, endnote 2.

"substantially mentally and physically impaired", within the meaning of the statute.[26]

In making this factual determination the Hearing Officer necessarily applied his understanding of the statutory terms "substantially" and "mentally". These are words of common usage and neither of them has any special legal or medical meaning. This statute does not undertake to define them. Therefore, these words must be given their plain and ordinary meaning.[27]

The Legislature has suggested its understanding of the term "mental" in its definition of the phrase "mental illness" in two separate statutes. In the "Florida Mental Health Act" and in the statutes providing facilities and procedures for the criminally insane the Legislature used the following identical definition:

> "Mentally ill" means having an impairment of the emotional processes...."[28]

Therefore, it may be assumed that the Legislature conceives that the term "mentally" may refer to emotional impairment as well as cognitive or intellectual impairment.

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[26] Final Order of Hearing Officer, page 24, paragraph 61.

[27] Smith v. United States, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993); Zuckerman v. Alter, 615 So 2d 661 (Fla 1993); Martin v. Ocean Reef Villas Ass'n, Inc., 547 So 2d 1237 (Fla 5th DCA 1989).

[28] F.S., Section 395.455(3); F.S., Section 916.106(7).

Webster's New Collegiate Dictionary gives the following definitions of "mental":

> "1. a. of or relating to the mind; specif.: of or relating to the total emotional and intellectual response of an individual to his environment;
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> b. of or related to intellectual as contrasted with emotional activity;
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> c. of, relating to, or being intellectual as contrasted with overt physical activity;
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> 2. a. of, relating to, or affected by a psychiatric disorder;
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> b. intended for the care or treatment of persons affected by psychiatric disorders;
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> ***"

Dorland's Medical Dictionary, 25th Edition, defines "mental" as :

> "pertaining to the mind; psychic."

Black's Law Dictionary, Sixth Edition, gives this definition of "mental":

> "Relating to or existing in the mind; intellectual, emotional, or psychic, as distinguished from bodily or physical."

It is certainly significant that in his testimony in this case Dr. Leon Charash, a noted pediatric neurologist, described his understanding of the word "mental" as follows:[29]

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[29] Dep of Dr. Charash (read into evidence), page 68.

"Q. What is mental condition? Is that purely IQ?

A. That's a definition that may prove to be more legal than neurologic. To me, he's had brain damage; therefore, he's had mental changes." (emphasis supplied)

Even the expert for NICA, Dr. Duchowney, generally agreed that the term "mental" includes emotional components. He also agreed that Eric Birnie is likely to suffer some emotional impact as a result of his physical handicaps.[30]

NICA claims that the phrase "mentally ... impaired" must be limited to impairment of cognitive or intellectual function. This limited definition is not supported by any of the sources cited above. This simply is not the common usage of that term. If the statutory phrase were "mentally ... retarded", then NICA's argument probably would be correct. But if the Legislature meant "mentally ... retarded", then that phrase should have been used. The fact that the much broader phrase "mentally... impaired" was used in this statute certainly suggests that the Legislature intended a much broader meaning than mere impairment of intellectual function.

The statutory term "substantially" is even more difficult to define than "mentally". This is also a word of common usage, rather than a legal or medical term. However, "substantial" or

[30] TR: pages 121-123.

"substantially" may mean different things to different people. For example, a "substantial amount of potatoes" would be interpreted in substantially different fashion by a housewife and a grocer. A "substantial impairment" might well receive significantly differing interpretations from a social worker and a physical therapist. This Court can judicially know that different juries and different Judges of Industrial Claims can evaluate the term "substantially disabled" in vastly different fashions.

The broad usage of this term is certainly reflected in the definitions contained in standard reference books. Webster's New Collegiate Dictionary defines "substantial" as:

> "1. a. consisting of or relating to substance;
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> b. not imaginary or illusory;
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> 3. a. possessed of means;
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> b. considerable in quantity; significantly large.
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> ***"

Black's Law Dictionary, Sixth Edition, gives this definition of "substantial":

> "Of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable. (citing case) Something worth while,

> as distinguished from something without value or merely nominal. (citing cases)"

The Fourth District Court of Appeal cited this same definition of "substantial" from the Fourth Edition of Black's in the case of Sterling Village Condominium, Inc. v. Breitenbach.[31]

The current edition of Black's defines "substantially" as:

> "Essentially; without material qualification; in the main; in substance; materially; in a substantial manner; (citing cases) About, actually, competently, and essentially. (citing case)"

According to these definitions, the terms "substantial" or "substantially" may range in quality or quantity from something that really exists and is not nominal to something that is considerable in quantity and significantly large.

The statutory term "impaired" may also be significant in this evaluation. In the first place it appears that a person may be "impaired" without the impairment rising to the level of a "disability". For instance, the definition of the verb "to impair" in Black's[32] is:

> "To weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner. ***"

On the other hand Black's describes "disability" as:

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[31] 251 So 2d 685, 687 (Fla 4th DCA 1971).

[32] Blacks Law Dictionary, 6th Edition.

"a crippled condition".[33]

In construing the statute, the Court may consider principles of grammar, definitions of ordinary usage and the expressed or implied intent of the Legislature.[34] Another principle of statutory construction which may be relevant to this situation is that a statute will be construed in a manner that will preserve its constitutionality, if possible.[35]

Applying these common usage definitions to the statutory terms involved in this issue, the statute would be satisfied by a real, existing, and not nominal or illusory, weakening or diminution of either the emotional, psychological, cognitive or intellectual capacity of an individual. Therefore, according to these terms of common usage fashion, the requirements of the NICA Plan are certainly satisfied by the evidence in this case.

As previously indicated, this Order does not clearly indicate whether the Hearing Officer found Eric Birnie was "substantially mentally impaired" and "substantially physically impaired", or whether he simply found that Eric was "substantially impaired" and

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[33] Ibid.

[34] Zuckerman v. Alter, 615 So. 2d 661 (Fla. 1993); Green v. State, 604 So. 2d 471 (Fla. 1992); City of Miami Beach v. Galbut, 626 So. 2d 192 (Fla. 1993).

[35] State ex rel. Register v. Safer, 368 So. 2d 620 (Fla. 1st DCA 1979).

his impairment included both mental and physical components. The latter seems more likely in view of these express findings:

> "In view of these factors, it is concluded that the results of specially selected and administered intelligence tests should not be given conclusive weight in deciding whether Eric's injury falls within the scope of the NICA Plan. Instead, the nature, extent and implications of Eric's injury should all be taken into account in determining whether Eric has been permanently and substantially physically and mentally impaired.[36] (Emphasis supplied)
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> ***
>
> *** The contention that Eric is not "mentally impaired" ignores the totality and pervasiveness of his injury."[37] (Emphasis supplied)

This conclusion of the Hearing Officer is certainly supported by the evidence. Even if the Hearing Officer based his Order on a determination that Eric was "substantially mentally impaired", that finding would be within his discretion, based upon the ordinary meaning of the pertinent statutory terms and the following facts of this case:

1. Dr. Charash testified that Eric's motor dysfunction was exacerbated or aggravated by feelings of excitement, pleasure, fear or almost any emotion. This was confirmed by Mrs. Birnie.[38]

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[36] Final Order of Hearing Officer, page 21, paragraph 55.

[37] Final Order of Hearing Officer, page 23, paragraph 60.

[38] Dep of Dr. Charash, pages 14-16; TR page 47.

2. Dr. Charash testified that Eric's brain damage probably included damage to pathways "which would involve difficulties in processing information and what we call perceptual functions."[39]

3. Dr. Charash testified that Eric "is going to have major problems with feelings of self-esteem and confidence and self-worth and ego strength, and it's going to affect his learning also."[40]

4. He also indicated Eric would "absolutely" be more susceptible to emotional disorders such as depression.[41]

5. Mrs. Birnie testified that at four and one-half years old Eric is already showing strong signs of frustration and anger when he is unable to do something or say something.[42]

6. Joseph White, the school psychologist, testified that because of the degree of damage to Eric's brain affecting his motor function, Mr. White believed he probably also suffered some degree of injury to his intellectual or mental function."[43]

7. Even Dr. Duchowney, the NICA expert, finally admitted that Eric's physical

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[39] Dep of Dr. Charash, page 18, lines 19-24, page 43, lines 7-9.

[40] Dep Dr Charash, page 44, lines 5-8.

[41] Dep Dr. Charash, page 45, lines 20-22.

[42] TR: pages 43-44, 48-49.

[43] Dep of Jos. White, page 22, lines 1-13.

limitations have "got to have some impact" on his emotional well-being.[44]

There was also evidence that his delay in forming and expressing his answers or other speech is probably the result of damage or interruption of cognitive pathways as well as motor pathways in the brain.[45] In addition, he has dyskinesia, or involuntary and excessive movements of the extremities.[46] This movement disorder is exacerbated and aggravated by excitement, fear, pleasure or almost any other emotion.[47]

Eric already experiences apparent frustration because of his considerable handicaps and the fact that he has the capacity to understand that he is handicapped.[48] In the future it is likely that he will be subject to depression and loss of self esteem, self confidence and ego-strength resulting from his inability to lead a normal life.[49]

The totality of these facts certainly support a finding that Eric is "substantially mentally ... impaired." However, the

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[44] TR: page 122, lines 15-16.

[45] TR: Dep of Dr. Charash, pages 43, 67-70; TR 46-48.

[46] Dep of Dr. Charash, page 15-16.

[47] Dep of Dr. Charash, pages 14-16; TR: page 47.

[48] TR: pages 43-44, 48-49.

[49] Dep of Dr. Charash, pages 43-45; Dep of Jos. White, page 21.

Birnies earnestly submit that such an interpretation of the statute should not be required in this case or in any case. The statute can and should be read to require only substantial impairment which includes both mental and physical components. To accept NICA's interpretation of this statute would lead inevitably to a determination that the statute is unconstitutional in its operation and application. In fact, the construction argued in this brief or the construction applied by the Court of Appeal may be the only way to preserve the constitutionality of this statute.

The statute may very well be in violation of the "equal protection" and "due process" provisions of the Constitutions of the United States and the State of Florida, as well as the "access to courts" requirements of the Florida Constitution.[50] When a statute is challenged as a denial of "equal protection" under either State or National Constitutions, the first determination should be whether the class of persons claiming discrimination is a "suspect class" or whether the statute is an abridgment of "fundamental rights".[51] If either of these requirements is

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[50] Constitution of the United States, Fourteenth Amendment; Constitution of the State of Florida, Article I, Sections 2, 9 and 21.

[51] De Ayala v. Florida Farm Bureau Casualty Insurance Co., 543 So 2d 204 (Fla 1989); State of Florida v. McInnis, 581 So 2d 1370 (Fla 5th DCA 1991).

present, then the constitutionality of the statute must be subjected to "strict scrutiny".[52]

However, if there is no suspect class or fundamental right involved, then the statute is only subject to the "rational basis" test.[53] Under this test the statute will be found constitutional if it has a legitimate legislative purpose and there is a reasonable basis for the classification provided in the statute.[54]

The classification contained in the NICA Plan is "a limited class" of new born infants with "catastrophic injuries".[55] More specifically, the Plan applies only to infants who are "permanently and substantially mentally and physically impaired."[56] This certainly describes a person who is handicapped within any definition of that term. Article I, Section 2 of the Florida Constitution affords "basic rights" to handicapped persons:

> "SECTION 2: All natural persons are equal before the law... No person shall be deprived of any right because of race, religion or physical handicap."

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[52] Lite v. State, 617 So 2d 1058, 1060 footnote 2 (Fla 1993); Pinillos v. Cedars of Lebanon, 403 So 2d 365 (Fla 1981); In re Estate of Greenberg, 390 So 2d 40 (Fla 1980).

[53] Ibid.

[54] Ibid.

[55] F.S., section 766.301(2).

[56] F.S., section 766.302(2).

The Florida courts have acknowledged that this provision makes the handicapped a "suspect class" for the purposes of determining any State action in violation of their right of equal protection under the law.[57]

In addition this statute clearly abridges the right of this suspect class to "access to the courts", within the meaning of Article I, Section 21 of the Florida Constitution. The Florida Supreme Court has held that this is a "fundamental right" and any abridgment is subject to strict scrutiny for violation of the right of equal protection of the laws.[58] Without question, this statute must be evaluated with strict scrutiny to determine its constitutionality.

The description of "strict scrutiny" provided by our Supreme Court in In re Estate of Greenberg is as follows:[59]

> "The strict scrutiny analysis requires careful examination of the governmental interest claimed to justify the classification in order to determine whether that interest is substantial and compelling and requires inquiry as to whether the means adopted to achieve the legislative goal are necessarily and precisely drawn. Examining Board v. Flores De Otero, 426 U.S. 572 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976). This test, which is almost always fatal in its

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[57] Schreiner v. McKenzie Tank Lines, 408 So 2d 711,716-717 (Fla 1st DCA 1982).

[58] Psychiatric Associates v. Siegel, 610 So 2d 419 (Fla 1992).

[59] In re Estate of Greenberg, 390 So 2d 40, 42-43 (Fla 1980).

> application, imposes a heavy burden of justification upon the state and applies only when the statute operates to the disadvantage of some suspect class such as race, nationality, or alienage or impinges upon a fundamental right explicitly or implicitly protected by the constitution."

For the purposes of the Birnies on this appeal, there will be no significant evaluation or argument of the "substantial and compelling" interest of the Legislature in the enactment of this statute. The potential unconstitutionality of the statute is more readily apparent in an examination of the means "adopted to achieve the legislative goal" and whether the critical classification embodied in the statute is "necessarily and precisely drawn".

The Legislature has frankly stated the purpose of the statute: to reduce liability insurance premiums for obstetric physicians. In order to accomplish this purpose the Legislature has abolished the common law rights of certain infants to recover compensation from obstetricians and hospitals for medical negligence occurring during labor and delivery. There is no stated benefit to this class of claimants who would otherwise be entitled to recover at common law. In fact, the statute represents a monumental infringement upon their common law rights and grants them little more than token compensation for their catastrophic loss.

There is also no stated purpose or intent to provide any benefit to those infants who qualify for NICA benefits but who

would not be able to recover at common law. Nevertheless, these infants do benefit under the law, although their actual benefit is very illusory.

The primary problem is that the Task Force and the Legislature did not set out to produce a true "No-Fault Brain Damaged Baby" law. The Task Force readily admitted that such a plan "would be prohibitively expensive".[60] What they really tried to accomplish was to design the Plan to include as many claims as possible that would have been compensable at common law and as few claims as possible that would not have been able to recover at common law. This scheme was fully implemented by the Legislature in the NICA Plan.

Whether this is a reasonable solution to afford obstetric physicians lower malpractice premiums is certainly questionable. However, there can be no question that the classifications created by the Legislature are arbitrary, unreasonable and so vague that the class cannot be fairly determined.

The difficulty in defining the terms creating this class has been discussed earlier in this brief. Since the Legislature did not see fit to define these terms, their ordinary and common usage must be determined. However, even a casual glance at the wide

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[60] Academic Task Force for Review of the Insurance and Tort Systems, 1987, Sub-section (c), pages 31-32.

range of the definitions for these terms in standard reference works clearly demonstrates that they are not "necessarily and precisely drawn".

In Wilkes & Pittman v. Pittman,[61] The Supreme Court noted that the word "substantially" is "a very respectable word, but one that is most difficult to define." In the case of In re Beverly,[62] the Supreme Court indicated that the term "mentally ill" was sufficiently vague that the Baker Act would have been held unconstitutional except for the fact that the Legislature included a definition of that term in the statute.

In addition to being unreasonably vague the classification created by the statute is completely arbitrary. In Lasky v. State Farm Insurance Company,[63] the Supreme Court generally upheld the Florida Automobile No-Fault Law. However, one of the original thresholds to suit in that law was the presence of a fracture of a weight bearing bone. The Supreme Court found this classification to violate the equal protection clause even under the "rational basis" test:

> "One who is involved in an accident and sustains a broken little toe may maintain, under this provision, an action for pain and suffering, since the little toe contains a

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[61] 92 So 2d 822 (Fla 1957).

[62] 342 So 2d 481 (Fla 1977).

[63] 296 So 2d 9 (Fla 1974).

> weight bearing bone. On the other hand, although one's skull is not considered a weight bearing bone, it is normally a more vulnerable and consequential injury. ***
>
> *** Such results cannot reasonably be said to rest on a rational basis, but are clearly arbitrary and unreasonable, and for that reason this provision of F.S. sec. 627.737(2), F.S.A. denies equal protection of the laws...."

The interpretation of this statute urged by NICA would be even more arbitrary and unreasonable. By that interpretation an infant who had "substantial" mental impairment and "substantial" physical impairment would be entitled to compensation, even though such impairment did not amount to total disability. However, a child with a totally disabling and catastrophic physical impairment would not be able to recover if he or she had a fully functioning mind locked in that prison of a body.

CONCLUSION

The NICA Plan may be unconstitutional in the form enacted by the Legislature. It is certainly unconstitutional as interpreted by NICA in this case and the other similar cases cited in the initial brief. One of the major problems with the statute is that the undefined terms used in the classification of qualified claims are unreasonably vague and arbitrary. At least for the purposes of this claim, the constitutionality of the statute may be preserved by resolving the underlying issues in the following fashion:

1. By determining that there was substantial competent evidence to support the finding of the Hearing Officer that Eric Birnie was "permanently and substantially mentally and physically impaired" within the meaning of the statute; or,

2. By approving the determination of the Court of Appeals that the statute should be construed to require that a claimant must be "permanently and substantially mentally impaired and/or permanently and substantially physically impaired; or,

3. By determining that the legal and factual issues of this case are satisfied by construing the statute to require that a claimant be "permanently and substantially impaired" and that the impairment must include components of mental impairment and physical impairment.

The Birnies contend that, despite some very imprecise language, the statute requires only that the claimant be substantially impaired and that the impairment include both mental and physical components. This is in keeping with the literal and the grammatical interpretation of the terms used, and this interpretation best fulfills the purpose and intent of the Legislature.

Respectfully submitted,

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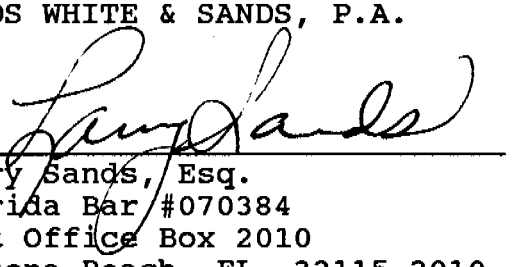
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy hereof has been furnished by U.S. Mail this 22nd day of March, 1996, to Bruce Culpepper, Esq./William E. Whitney, Esq., Pennington, Culpepper, Moore, et al., P.O. Box 10095, Tallahassee, FL 32302-2095; W. Douglas Moody, Jr., Bateman, Graham, 300 E. Park Ave., Tallahassee, FL 32301; Samuel P. Bell, III, Cobb, Cole and Bell, 131 N. Gadsden St., Tallahassee, FL 32301; and to Christopher L. Nuland, Esq., Florida Medical Association, P.O. Box 2411, 32203.

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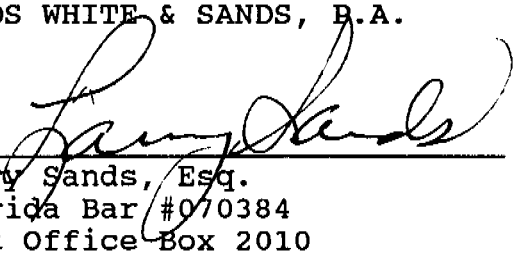
By 
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