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THE SUPREME COURT OF FLORIDA

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,

Petitioner,

vs.

Case No. 87,233
Lower Case No. 94-2368

FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS, ET AL.,

Respondents.

_____/

ON CERTIFIED QUESTION FROM THE FIFTH DISTRICT COURT OF APPEAL.

PETITIONER FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, Florida Birth-Related Neurological Injury Compensation Association, refers to itself as "NICA."

NICA refers to Petitioners below/Respondents here, Eric Ryan Birnie, a minor, by and through his parents and natural guardians, Judith Birnie and Fred Birnie, as "the Birnies."

NICA refers to Eric Ryan Birnie, a minor, as "Eric Birnie."

NICA refers to the Division of Administrative Hearings as "DOAH."

NICA refers to Sections 766.301-766.316, Florida Statutes (1995), collectively as the "NICA Act."

NICA designates references to pages of the Appendix filed simultaneously herewith by the prefix "A," as follows: "Appendix A-_."

The Index to the DOAH record lists the transcript of the final hearing, and the transcripts of the depositions of Leon Charash, M.D. and of Joseph White as "ATTACHMENT 1." NICA designates references to the transcript of the final hearing by the page of the transcript. NICA designates references to deposition transcripts by the name of the deponent and the page of the deposition transcript.

STATEMENT OF THE CASE AND FACTS

A. THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN

In 1988, the Florida Legislature determined there was a "financial crisis in the medical liability insurance industry" to the point where "the cost of medical liability insurance is excessive and injurious to the people of Florida and must be reduced" and that "the magnitude of this compelling social problem demands immediate and dramatic legislative action." Preamble, Chapter 88-1, Laws of Florida. An important part of the legislation enacted to alleviate the medical malpractice insurance crisis was the creation of the Florida Birth-Related Neurological Injury Compensation Plan.[1] Sections 766.301-766.316, Florida Statutes, hereinafter referred to as the "NICA Act."[2]

The legislature based its findings in large part on the report and recommendations of the Academic Task Force for Review of the Insurance and Tort Systems. Preamble, Chapter 88-1, Laws of Florida.[3] In Section C of the Academic Task Force's Medical

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[1] In Coy vs. Florida Birth-Related Neurological Injury Compensation Plan, 595 So.2d 943, 946 (Fla. 1992), cert. den. ___ U.S. ___, 113 S.Ct. 194, 121 L.Ed. 2d 137, this Court observed that the NICA Plan "is not a cure all, but will be a major contribution to the cure" of the medical malpractice insurance crisis.

[2] All references are to Florida Statutes (1995) unless otherwise indicated.

[3] See also, University of Miami vs. Echarte, 618 So.2d 189 (Fla. 1993), cert. den. ___ U.S. ___, 114 S.Ct. 304, 126 L.Ed. 2d 252, in which this Court quoted extensively from the Task Force's report in upholding the constitutionality of another component of

Malpractice Recommendations dated November 6, 1987, it described a "no-fault plan for birth-related neurological injuries" patterned closely after a similar plan adopted earlier that year in Virginia. Appendix A-51--A-67. The Task Force did not recommend a no-fault compensation alternative to the tort system for all medical injuries, but only for birth-related neurological injuries. The Task Force stated that this "conclusion is compelled by findings that a comprehensive no-fault system for all medical injuries would be prohibitively expensive, many times more expensive than the existing medical malpractice systems." Task Force Report, Page 31, Appendix A-53. The Task Force recommended that a no-fault plan be created solely for a narrowly defined class of birth injuries "for two reasons: first, because claims costs in this area have been particularly high, and second, because a no-fault system in this limited area is feasible and would involve manageable costs." Ibid.

The NICA Act as ultimately passed by the legislature was similar although not identical to the proposal of the Academic Task Force. The NICA Act commences with the following statement of legislative findings and intent which draws heavily from the Academic Task Force report:

> 766.301 Legislative findings and intent. -
>
> (1) The Legislature makes the following findings:

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the malpractice reform legislation and noted that the legislature had followed the Task Force's recommendations and 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.

(b) Any birth other than a normal birth frequently leads to a claim against the attending physician; consequently, such physicians are among the physicians most severely affected by current medical malpractice problems.

(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.

(2) It is the intent of the Legislature 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. This plan shall apply only to birth related neurological injuries.

Under the common law, a patient injured by medical negligence has a cause of action for monetary damages against the responsible health care providers. In derogation of that common law remedy, the NICA Plan was substituted as the exclusive remedy[4] for an infant who sustained a statutorily-defined "birth-related

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[4] The one exception to the exclusiveness of the NICA remedy is that "a civil action shall not be foreclosed where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property" on the part of a health care provider who participated in the delivery. Section 766.303(2), Florida Statutes.

neurological injury" who was delivered by an obstetric physician who participated in NICA. Sections 766.303 and 766.309, Florida Statutes.

The statutory definition of a "birth-related neurological injury" is set forth in Section 766.302(2), Florida Statutes.[5] For purposes of the present appeal, the salient provision is that an infant is subject to the exclusive remedy of NICA if the injury renders him "permanently and substantially mentally and physically impaired."

The compensation available if an infant is subject to the exclusive remedy of NICA is set forth in Section 766.31, Florida Statutes. The elements of compensation include reasonable medical care and facilities[6], but may not include expenses paid or payable under private health insurance or state or federal government programs. Section 766.31(1)(a), Florida Statutes. In addition, a payment of up to $100,000 to the parents or legal guardians of the infant may be made, as well as reasonable expenses incurred in connection with the filing of a claim for NICA benefits including

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[5] "Birth-related neurological injury" means injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

[6] Coverage is provided for "[a]ctual expenses for medically necessary and reasonable medical and hospital, habilitative and training, residential, and custodial care and service, for medically necessary drugs, special equipment, and facilities, and for related travel." Section 766.31(1)(a), Florida Statutes.

reasonable attorneys fees. Section 766.31(1)(b)(c), Florida Statutes.

The NICA Plan from which compensation is to be paid was initially funded by an appropriation of $20 million from the Insurance Commissioner's Regulatory Trust Fund. Annual revenues to the Plan are generated by yearly assessments of $5,000 on obstetricians who decide to participate in NICA, $250 on most other Florida-licensed physicians, and $50 per live birth on private hospitals. The NICA Act provides that the Department of Insurance will undertake periodic actuarial evaluations of the assets and liabilities of the NICA Plan. If the funding described above proves insufficient to maintain the NICA Plan on a actuarially sound basis, there has been reserved for potential transfer to NICA an additional amount of up to $20 million from the Insurance Commissioner's Regulatory Trust Fund. If necessary, further funding for NICA is available from assessments on casualty insurers, which can be recovered by the insurance carriers through a surcharge on future policies and/or a rate increase. If the Department of Insurance finds that the NICA Plan still cannot be maintained on an actuarially sound basis, it can increase the assessments collected from Florida obstetricians, other physicians, and private hospitals. See, Section 766.314, Florida Statutes.

Another provision of the NICA Act requires NICA to compute estimates of the present value of the total cost of claims. In the event that the total of all of NICA's current estimates equals 80% of the funds on hand and to become available within the next twelve

months, NICA shall suspend accepting any new claims without express authority from the legislature (except that claims for injuries occurring 18 months or more before the suspension may still be accepted). If any person is precluded from asserting a claim for NICA benefits because of a suspension, the NICA Plan shall not constitute his exclusive remedy and the claimant is free to assert a traditional common law tort claim for medical malpractice. See, Section 766.314(9), Florida Statutes.

B. **THE FACTS CONCERNING ERIC BIRNIE**

Eric Birnie was born at Halifax Hospital in Daytona Beach, Florida on March 12, 1989. Finding of Fact No. 1, Appendix A-18. The parties stipulated that the physician providing obstetrical services at Eric Birnie's birth was a participating physician in the NICA Plan. Finding of Fact No. 2, Appendix A-18. During the course of Mrs. Judith Birnie's labor, there was an abrupt change in the fetal heart monitor without a return to the baseline indicating a strong likelihood of fetal stress. The obstetrician determined it was necessary to try to deliver the baby immediately, and after twice attempting vacuum extraction of the fetus without success, a cesarian section was performed. During the operation, the obstetrician noted there had been an abruption (separation) of the placenta from the uterine wall, a condition which can lead to fetal hypoxia (reduction in oxygen supply). In this case, it appears that the abruption occurred at least 39 minutes before the baby was delivered. Findings of Fact No. 7 and 8, Appendix A-19.

At the time of delivery, the baby was floppy and not

breathing, and his Apgar scores (on a scale of 10) were 2 at one minute and 4 at five minutes. Such scores are consistent with Eric Birnie having suffered a severe hypoxic (deprivation of oxygen) insult at birth. Findings of Fact No. 11 and 13, Appendix A-20. Based on the medical facts, the hearing officer below concluded that Eric Birnie sustained an injury to the brain caused by oxygen deprivation in the course of labor, delivery or resuscitation in the immediate post-delivery period (one of the elements of the definition of a NICA covered injury). Finding of Fact No. 43, Appendix A-28.

As a result of Eric Birnie's injury, he is indisputably permanently and substantially physically impaired. Finding of Fact No. 44, Appendix A-29. At the time of the hearing in this case, Eric Birnie was 4½ years old. He was unable to stand up, walk, or crawl, and his only method of independent mobility was to roll over. The use of his hands and arms was very limited. Eric's speech was greatly impacted by his condition, and he had great difficulty talking and took long pauses to formulate a response to an inquiry. Findings of Fact No. 38 and 39, Appendix A-27. The hearing officer found that while continued therapy may help Eric Birnie to communicate better and to become somewhat more mobile, he will almost certainly never be able to walk, feed, groom, or toilet himself. Ibid.

Eric Birnie attended a special program for developmentally delayed children at Easter Seals beginning when he was approximately 11 months of age. In his thirty-five month

evaluation conducted by Easter Seals, it was noted that he was functioning at an age equivalent of 8 months in gross motor skills. Eric was approximately age equivalent in receptive language skills, but he was functioning at 24 months in expressive language skills. Eric was demonstrating significant delay in oral motor skills. He had limited tongue mobility and was unable to lateralize, raise or lower his tongue and was only able to produce a small number of vowel and consonant sounds. Finding of Fact No. 35, Appendix A-26.

When he was just short of four years old, Eric Birnie was evaluated by a public school psychologist employed by the School District of Volusia County to evaluate his placement in its exceptional student program. Because of his profound physical handicaps, the tests were specially selected and administered. The test results indicated that Eric Birnie was average or even above in his cognitive skills and pre-academic skills. As a result, the School District anticipates that Eric Birnie will ultimately be educated in a mainstream classroom with non-handicapped students of his own age group. The hearing officer found that Eric will, however, need special accommodations within the classroom to address his physical handicaps and limitations. Finding of Fact No. 36, Appendix A-26; Deposition and report of Joseph White.

The school psychologist, Joseph White, wrote a report which contained the following summary of his assessment:

> Eric Birnie was referred for a routine evaluation to determine his current levels of ability and achievement. Eric is a physically impaired child due to cerebral palsy. This examiner found Eric to be a friendly, outgoing

> youngster. Although he is slow in forming his words due to his motor impairment, Eric's speech is intelligible and one is immediately impressed with Eric's ability to express himself verbally. Test results show that he advanced both in his cognitive development and in his acquisition of pre- academic skills. Deposition and Report of Joseph White.

At the request of Eric Birnie's counsel, he was evaluated shortly after his fourth birthday by Leon Charash, M.D., in Hicksville, New York. Dr. Charash concluded that Eric was functioning at a normal intellectual level or was, simply stated, of normal intelligence. Charash deposition, Page 60, and Exhibit 1 to deposition. Moreover, Dr. Charash is of the opinion that the portions of Eric's brain responsible for intellectual function have not been damaged. Charash deposition, Pages 69-70.[7] Similarly, the board-certified pediatric neurologist who evaluated Eric Birnie at the request of NICA, Michael Duchowny, M.D., concluded that Eric Birnie did not suffer from a substantial mental impairment. Transcript of final hearing, Pages 80-82. The Birnies' counsel conceded at the final hearing that Eric Birnie "appears to have an intellectual component that is within normal limits; conceivably, even above average." Transcript of final hearing, Page 17.

C. **THE PROCEEDINGS BELOW**

On or about July 19, 1991, when Eric Birnie was two years and four months old, his parents filed a Petition for Compensation for

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[7] Dr. Charash deems the term "mental" to be the functional equivalent of the word "intellectual." He testified in his video taped deposition that "I accept mental capacity and mental, and intellectual quotients [IQ] as being reasonably equatable, yes." Charash Deposition, at Page 62.

Birth-Related Neurological Injury. Final Order, Page 2, Appendix A-15. On September 30, 1993, a final hearing was held in Daytona Beach, Florida before J. Stephen Menton, a hearing officer with the Division of Administrative Hearings (DOAH). Final Order, Page 3, Appendix A-16. Prior to the hearing, the parties agreed that the amount of compensation, if any, should be bifurcated from the issue of whether Eric Birnie had sustained compensable NICA-covered injury, and no evidence was presented on the issue of benefits. Final Order, Page 3, Appendix A-16. On September 22, 1994, the hearing officer entered his final order. Record 83-111, Appendix A-14 - A42.

In his final order, Hearing Officer Menton ruled that Eric Birnie had sustained a NICA-covered birth-related neurological injury. Paragraphs 54 and 61 of the final order contain the ultimate rationale of the hearing officer in reaching this conclusion:

> 54. The evidence in this case established that Eric suffered an injury to the brain caused by oxygen deprivation during the course of labor, delivery or resuscitation in the immediate post-delivery period. The more difficult issue is whether Eric's injury falls within the scope of the statute. Eric is indisputably permanently and substantially physically impaired as a result of the damage to his brain. Respondent argues that Petitioners are not entitled to compensation under the NICA Plan because Eric tested within normal ranges on specially selected and administered intelligence tests. Based upon those test results and the observations of various witnesses who testified that Eric appears to have an intellectual ability in the normal range, Respondent contends that Eric is not substantially and permanently "mentally

impaired" with the scope of the statute.[2] Essentially, Respondent argues that mental impairment should be equated with cognitive functioning as measured by intelligence tests and any child who tests within normal ranges on an intelligence test is not entitled to receive compensation under the NICA Plan irrespective of the special accommodations necessary to administer the tests and/or the social and vocational limitations on the child as a result of his injury. This interpretation is rejected as unduly narrow.

[2] Petitioners have suggested that the NICA Plan should be interpreted to cover any child who is permanently and substantially physically impaired or permanently and substantially mentally impaired. In this regard, Petitioners point out that the statute purports to cover spinal cord damage resulting from mechanical injury even though the damage in such a case would be primarily physical. To the extent that Petitioners contend that the NICA Plan covers injuries that result in only physical or only mental impairment, their interpretation is rejected. The Statute is written in the conjunctive and can only be interpreted to require permanent and substantial impairment that has both physical and mental elements. Thus, a deformity or loss of a limb would not ordinarily be covered under the NICA Plan.

* * *

61. In sum, it is concluded that, as a direct result of his brain injury and consequent physical limitations, Eric will not be able to translate his cognitive capabilities into adequate learning in a normal manner. Moreover, as a direct consequence of his injuries, Eric's social and vocational development have been drastically impaired. Consequently, it is concluded that Eric is permanently and substantially mentally and physically impaired and that Eric has suffered a "birth-related neurological injury," within the meaning of Section 766.302(2), Florida Statutes. Accordingly, the subject claim is compensable under the NICA Plan. Sections

> 766.302(2), 766.309(2), and 766.31(1), Florida Statutes. This interpretation furthers the legislative intent to provide compensation to a limited class of catastrophically injured infants on a no-fault basis to help alleviate the malpractice insurance crisis facing physicians practicing obstetrics.

NICA appealed the final order to the Fifth District Court of Appeal. Record 112. After oral argument, the Fifth District rendered its opinion in Florida Birth-Related Neurological, etc. vs. Florida Division of Administrative Hearings, 20 Fla. L. Weekly D2355 (Fla. 2nd DCA 1995), Appendix A-1 - A-10, rehearing denied, 20 Fla. L. Weekly D2725, Appendix A-11 - A-13. The Fifth District affirmed the final order entered by the hearing officer, but on somewhat different grounds. The Fifth District held that because of the "stated policy" of the NICA Act to "reduce the cost of malpractice insurance" for obstetricians, the definition of a covered birth injury should be broadly construed to give "full effect to the legislative policy." 20 Fla. L. Weekly at D2356, Appendix A-7. The Fifth District decided to "construe the definition of 'birth-related neurological injury' to include those injuries which cause permanent and substantial impairment, mental and/or physical." 20 Fla. L. Weekly at D2357, Appendix A-9. (emphasis supplied).

The Fifth District further stated that because it realized the possible impact of this decision on the [NICA] Fund and on pipeline cases, "we stay our mandate and certify the following question to the Florida Supreme Court as one of great public importance:

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?

20 Fla. L. Weekly at D2357, Appendix A-10.

ISSUE ON APPEAL

(The certified question)

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?

SUMMARY OF THE ARGUMENT

By statutory definition, only infants who are "permanently and substantially mentally and physically impaired" are subject to the exclusive remedy of the NICA Act for birth-related neurological injuries. The Fifth District erred in ruling that infants who are "mentally and/or physically" impaired are subject to NICA.

The legislature based the NICA Act on the academic task force report, which said that NICA should only apply to a limited class of catastrophic injuries so that the Plan would involve manageable costs and be economically feasible. At the same time, limiting NICA's application to only the most severely birth-injured infants who are mentally and physically impaired will produce the maximum impact on achieving the legislature's goal of reducing malpractice insurance costs for obstetricians. The Fifth District ignored the plain meaning of the statutory definition and judicially amended the Act to reach the result it desired.

The Legislature has amended the NICA Act on several occasions, but never to expand the definition of a NICA-covered injury. The amendments have shortened the time to file a claim and required NICA to suspend accepting new ones if the total of estimates of known claims exceeds 80% of anticipated revenues. These amendments reinforced the legislature's intent to limit NICA's application so it will continue to be economically feasible and actuarially sound. Broadening NICA's coverage to include infants who are mentally or physically impaired may threaten the soundness of the Plan, and will preclude those infants from asserting a common law tort claim.

NICA is in derogation of birth-injured infants' common law tort rights, and should be strictly construed. Other than this case, final administrative orders hearing officers have consistently construed the definition strictly. The authorities cited by the Fifth District for the proposition that "and" sometimes means "or" are distinguishable.

ARGUMENT

The definition of a NICA-covered birth-related neurological injury requires the infant to be "permanently and substantially mentally and physically impaired." (emphasis supplied) The question certified by the Fifth District asks whether the NICA Act requires an infant to "suffer both substantial mental and substantial physical impairment, or can the definition be construed to require only substantial impairment, mental and/or physical?" 20 Fla. L. Weekly at 2357, Appendix A-10 (emphasis supplied).

The certified question should be answered in the negative and this case remanded to DOAH for the entry of a final administrative order that Eric Birnie is not subject to the NICA Plan. When the legislature required an infant to be "substantially mentally and physically impaired," the word means and, not or.

Legislative intent is determined primarily from the language of the statute, and the plain meaning of the statutory language is the first consideration. St. Petersburg Bank & Trust Co. vs. Hamm, 414 So.2d 1071, 1073 (Fla. 1982). It is a fundamental principle of statutory construction that legislative intent and policy concerns must control our construction of statutes and that the determination as to the intent of the legislature is based upon the plain and ordinary meaning of the language in the statute itself. Barnett Bank of South Florida vs. Department of Revenue, 571 So.2d 527, 528 (Fla. 3rd DCA 1990), citing extensive Supreme Court authority.

In reaching its erroneous conclusion, the Fifth District

brushed aside the plain and ordinary meaning of the statutory definition and instead focused on the NICA Act's "policy" to remove "high cost" birth injuries from the tort system. In so doing, the Fifth District overlooked the legislative history and intent that only a limited class of catastrophic injuries could be covered by the NICA Plan. By interpreting the statute in a way which expands the class of infants subject to the Plan, the Fifth District is actually acting contrary to the legislature's intent. The Fifth District said that the "stated policy" of the NICA Act is to "cover 'catastrophic injuries that result in unusually high costs for custodial care and rehabilitation' caused by birth-related neurological injuries .... to reduce the cost of malpractice insurance for those doctors who perform obstetrics ...." 20 Fla. L. Weekly at D2356, Appendix A-7. The Fifth District went on to observe that Eric Birnie sustained a catastrophic physical injury which it assumed will result in unusually high costs for custodial care and rehabilitation, and said there was no indication in the record the cost would be any greater if his cognitive functioning was also substantially impaired.[8] The Fifth District then concluded:

> If that is the case, how then is the stated legislative policy promoted by requiring that

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[8] However, the Fifth District cited no record evidence supporting its supposition that the cost of care in fact would not be higher if the child had also been substantially mentally impaired. Without diminishing the impact of Eric Birnie's substantial physical impairment, his intact mental function imbues him with certain potential not found in other NICA-covered children who also are substantially mentally impaired.

> one suffer both substantial mental and substantial physical impairment? 20 Fla. L. Weekly at D2356, Appendix A-7. (emphasis in original)

The answer is: because that is what the legislature clearly and unambiguously said. The Academic Task Force report stressed the need to make a no-fault system feasible by restricting it to one with manageable costs, and the legislature explicitly provided that only a "limited class of catastrophic injuries" would be subject to the NICA Plan. That limited class consists of infants who are "substantially mentally and physically impaired," not mentally or physically so.

Rather than accept this straightforward language on its face, the Fifth District resorted to the notion that the "literal language" of the NICA injury definition is in "conflict with the stated legislative policy of the act." 20 Fla. L. Weekly at D2356, Appendix A-6. When NICA argued in its motion for rehearing that there was no "conflict" because the legislature intended the NICA Act to apply only to a limited class, the Fifth District refused to be moved from its own statement of legislative policy. It its opinion denying NICA's motion for rehearing, the Fifth District finally acknowledged "the 'unambiguous' legislative definition of 'birth-related neurological injury' which provided that the infant must be mentally and physically impaired.'" 20 Fla. L. Weekly at D2726, Appendix A-13 (emphasis in original). However, the Fifth District persisted in stating that there is no indication that

> the requirement of dual injuries would affect

> the "unusually high costs for custodial care and rehabilitation" that results even from a single injury of this nature. Therefore, such classification would not further the goal of reducing the high costs of such injuries and would not reduce the cost of medical malpractice insurance. If the sole reason for the dual injury requirement is to reduce the number of infants suffering catastrophic birth-related neurological injuries who might benefit from the Plan, it is every bit as discriminatory (and as unrelated to the overall state policy) as requiring that eligible infants must also be born left-handed or born during the last fifteen days of the month. We do not believe that such was the legislature's intent. Id.

The Fifth District cited no record evidence, legislative history, or any other authority to support this conclusion. Accordingly, rather than discerning legislative intent, the Fifth District is baldly substituting its own concept of what classifications of injury are preferred for achieving the goal of reducing malpractice premiums. It is not the Court's duty or prerogative to modify or shade clearly expressed legislative intent in order to uphold a policy favored by the Court. Holly vs. Auld, 450 So.2d 217, 219 (Fla. 1984). Where the language used in a statute has a definite and precise meaning, the courts are without power to restrict or extend that meaning. Graham vs. State, 472 So.2d 464, 465 (Fla. 1985).

If the legislature had desired to simply tie NICA coverage to the anticipated cost of care a given infant would require, it could and would have so stated. Even assuming that the cost of care is one of the criteria the legislature intended to use, it is reasonable to infer that the costs of care of birth-injured infants

with dual injuries will generally be higher than those with single injuries. Thus, even under the Fifth District's own analysis, the requirement of both mental and physical impairments is a reasonable and rational manner of identifying the most severely injured who are subject to the NICA Plan.

The Fifth District suggests that the law might just as well have required NICA-covered infants to be born left-handed or during the last fifteen days of the month. Absent a showing that left-handed neurologically injured infants have higher costs of care (if that is to be test) than right-handed ones, basing NICA coverage on such a distinction makes no sense. In contrast, basing NICA coverage on the distinction between infants with single injuries and those with dual injuries does make sense in defining the limited class of covered catastrophic injuries. It is related to the policy of making the NICA Plan economically workable by restricting the class of covered infants.

The fact that there may be cases (such as Eric Birnie) where a single injury results in "unusually high costs" for care does not mean that the legislature may not and did not intend that NICA cover only dual injuries which produce both mental and physical impairment. Removing such dual injuries from the tort system will undoubtedly result in a reduction in the cost of medical malpractice insurance, thereby fulfilling the legislative policy behind the creation of NICA. Simply because there exist additional classifications of injury which might have high care costs which could have been included in the NICA Plan does not mean that the

legislature intended to include them. To the contrary, of course, the NICA Act explicitly excludes such single injuries from being subject to NICA.

A departure from the letter of a statute is permissible only when there are cogent reasons for believing that the letter of the law does not accurately disclose the legislative intent. Shell Harbor Group, Inc. vs. Dept. of Business Regulation, 487 So.2d 1141, 1142 (Fla. 1st DCA 1986). In this case, there are no such reasons. In creating the NICA Act, the legislature sought to remove the most severely birth-injured infants from the tort system, but also realized that to be economically feasible the NICA Plan had to be limited in application. The letter of the NICA Act shows that the legislature addressed both goals by requiring a covered infant to be substantially mentally and physically impaired.

Amendments to the NICA Act provide evidence that the Florida Legislature intended to limit, and not expand, its reach, so as to keep it an economically feasible program which is actuarially sound. As originally enacted, the NICA Act contained a seven year statute of limitations. Section 766.313, Florida Statutes (1989). However, in 1993, that section was amended to reduce the time to file a NICA claim from seven to five years after the birth of the infant. Section 1, Chapter 93-251, Laws of Florida. The legislature's shortening the period to file a claim by two years will limit, and certainly not expand, the number of NICA claimants.

In 1989, one year after passing the NICA Act, the legislature

added subsections 8 and 9 to Section 766.314, Florida Statutes. Section 6, Chapter 89-186, Laws of Florida. The new subsection 8 requires NICA to report to the legislature its determination as to the annual costs of maintaining the NICA Plan on an actuarially sound basis. The new subsection 9 requires NICA to estimate the present value of claims and to suspend accepting new claims, absent express authority from the legislature, in the event the total of all current estimates equals 80% of anticipated revenues. If any person is precluded from asserting a claim for NICA benefits due to such a suspension, the NICA Plan will not constitute the infant's exclusive remedy and he may pursue a common law tort claim.[9] This amendment evinces strong legislative intent to maintain the NICA Plan on an actuarially sound basis, and constitutes a recognition by the legislature that the costs of the NICA Plan need to be monitored to be sure only a manageable obligation is being taken on. It is contrary to this expression of legislative caution to suggest, as does the Fifth District, that the legislature actually intended to broaden the class of NICA claimants.

The NICA Act has been amended on 13 occasions.[10] Some of the amendments were substantive and some were minor technical revisions. If the legislature had decided that the class of NICA covered infants needed to be expanded, it easily could and would

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[9] See, discussion of Sections 766.314(8) and (9) at pages 5-6, supra.

[10] The amendments are in Chapters 88-277, §§36-41; 88-294, §44; 89-186; 91-46, §§16-21; 92-33, §103; 92-149, §122; 92-196; 92-288, §94; 93-251; 93-268, §66; 94-84; 94-106; and 94-218, §§247-248, Laws of Florida.

have done so by amending the definition on one of those occasions. The Fifth District should not be permitted to judicially amend the NICA definition where the legislature itself has not used one of these numerous opportunities to do so.

Before NICA was ever created, birth-injured infants such as Eric Birnie had the formidable remedy of a common law malpractice suit. The elements of damages available in a malpractice suit are broader than the benefits payable under the NICA Plan.[11]

The exclusive remedy of the NICA Plan is in derogation of infants' common law tort rights, and should be strictly construed. In Humana of Florida, Inc. vs. McKaughan, 652 So.2d 852 (Fla. 2nd DCA 1995), it was recognized that

> [B]ecause the [NICA] Plan, like the Workers' Compensation Act, is a statutory substitute for common law rights and liabilities, it should be strictly construed to include only those subjects clearly embraced within its terms. See, American Freight Sys., Inc., 453 So.2d 468. Thus, just as under the Workers Compensation Act, a legal representative of an

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[11] See text at page 4-5; supra, for a description of NICA benefits. In addition to these elements, a common law plaintiff may recover "non-economic" damages such as pain and suffering and loss of enjoyment of life, as well as other damages. This, no doubt, explains why the representatives of infants who otherwise meet the NICA definition strive to avoid the exclusive remedy of NICA by arguing they did not receive the notice required in Section 766.316, Florida Statutes. Turner vs. Hubrich, 656 So.2d 970 (Fla. 5th DCA 1995); Braniff vs. Galen of Florida, Inc., 20 Fla. L. Weekly D2140 (Fla. 1st DCA 1995); Mills vs. North Broward Hospital District, 20 Fla L. Weekly D2714 (Fla. 4th DCA 1995); Bradford vs. Florida Birth-Related Neurological Injury Compensation Association, 21 Fla. L. Weekly D51 (Fla. 4th DCA 1995); Behan vs. Florida Birth-Related Neurological Injury Compensation Association, 21 Fla. Law Weekly D52 (Fla. 4th DCA 1995); Siravo vs. Florida Birth-Related Neurological Injury Compensation Association, 21 Fla. L. Weekly D435 (Fla. 4th DCA 1996).

> infant should be free to pursue common law remedies for damages resulting in an injury not encompassed within the express provisions of the Plan. See, Grice, 113 So.2d 742. (emphasis supplied).

See also, Adventist Health System vs. Hegwood, 569 So.2d 1295 (Fla. 5th DCA 1990) (statutes designed to supersede or modify rights provided by common law must be strictly construed and will not displace common law remedies unless such an intent is expressly declared); Carlile vs. Game and Fresh Water Fish Commission, 354 So.2d 362, 364 (Fla. 1978) (statutes in derogation of the common law are to be construed strictly, and inference and implication cannot be substituted for clear expression). The Fifth District has gone far beyond even a liberal interpretation of the plain statutory language to transmute "and" into "or." It is a violation of the rule of strict construction and contravenes the policy and purpose of the NICA Act.

Both before and after the hearing officer's decision in Eric Birnie's case, DOAH orders adjudicating claims for NICA benefits consistently provided that the NICA Act requires the infant to be both mentally and physically impaired. In Dupont vs. Florida Birth-Related Neurological Injury Compensation Association, 16 FALR 3504 (8/26/94), the hearing officer found that the child suffered a profound impairment of her motor ability, as evidenced by a marked generalized hypotonia and hyporeflexia, that rendered her permanently and substantially physically impaired. However, it was also concluded that the proof failed to support the conclusion that the child suffered any mental impairment, much less a

substantial and permanent mental impairment. The claim was therefore denied as a NICA compensable injury.

In Luna vs. Florida Birth-Related Neurological Injury Compensation Association, 17 FALR 1261 (6/1/94), the hearing officer found that the claimant was permanently and substantially mentally impaired, but that her physical impairment could best be described as mild to moderate. For that reason, as well as the fact that there was a question as to the cause of the impairments, the claim for NICA compensation was denied. In an administrative order entered after the final order concerning Eric Birnie, another hearing officer ruled that mental and physical impairments of a permanent and substantial nature need to be present. Zepeda vs. Florida Birth-Related Neurological Injury Compensation Association, 17 FALR 2422 (5/10/95). In an unpublished endnote, the hearing officer rejecting the findings and rationale of Hearing Officer Menton in Eric Birnie's case. Appendix A-71.

In ruling that Eric Birnie met the definition for NICA coverage, Hearing Officer Menton did not follow the interpretation utilized by his fellow hearing officers. However, even Hearing Officer Menton did not go so far as did the Fifth District to rule that "and" should be interpreted to mean "or." In footnote 2 to paragraph 54 of the Final Order, Hearing Officer Menton explicitly said that to the extent the Birnies "contend that the NICA Plan covers injuries that result in only physical or only mental impairment, their interpretation is rejected. The Statute is written in the conjunctive ...." Appendix A-39. (emphasis

supplied).

Rather, Hearing Officer Menton manufactured his own misinterpretation of the NICA injury definition. While paying lip service to the statutory requirement of mental and physical impairment, the hearing officer attempted to finesse the point by asserting that Eric Birnie's physical impairments will interfere with his ability to utilize his normal cognitive capability. The hearing officer said:

> In sum, it is concluded that, as a direct result of his brain injury and consequent physical limitations, Eric will not be able to translate his cognitive capabilities into adequate learning in a normal manner. Moreover, as a direct consequence of his injuries, Eric's social and vocational development have been drastically impaired. Final Order, paragraph 61, Appendix A-37.

For all of the reasons discussed above, this also constitutes an erroneous misapplication of the plain language of the statutory definition which amounts to a judicial amendment to the Act. Had the legislature intended to allow coverage of anything less than an infant who is permanently and substantially mentally and physically impaired, it would have said so.

The certified question now before this Court does not address the interpretation used by the hearing officer. Accordingly, the hearing officer's misinterpretation will not be discussed further other than to reiterate it is equally wrong.

It appears the hearing officer and the Fifth District were so moved by the catastrophic nature of the single physical injury

sustained by Eric Birnie that they put aside the plain language of the NICA Act and decided to find a way to grant him NICA compensation. Most respectfully, this is a classic example of the maxim that "hard cases make bad law." By doing so, the lower courts have engaged in impermissible legislative activity. Such an approach violates the longstanding rule that the "courts of this state are 'without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.' [citation omitted]." Holly vs. Auld, 450 So.2d 217, 219 (Fla. 1984) (emphasis supplied).

The potential consequences of expanding the class of infants covered by NICA beyond that explicitly defined in the statute demonstrate why it would be "bad law." Including infants with single injuries in the exclusive remedy of NICA could create a potentially large new class of claimants who formerly sought compensation through a medical malpractice claim. The inclusion of a large new class of claimants in NICA not contemplated by the legislature may well threaten the actuarial soundness of the Plan. If the definition of the type of injury covered by NICA is stretched by judicial fiat beyond that contemplated by the legislature, the current funding mechanisms may prove inadequate to sustain NICA.[12] If assessments to fund NICA are increased, initially the cost will be passed on to Florida consumers in the

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[12] See text at page 5, supra, for a description of the NICA funding mechanisms.

form of higher hospital bills, doctor fees, and casualty insurance premiums. If assessments become too high for obstetricians, many may opt out of NICA, and any babies delivered by non-participants will not be eligible for NICA coverage. Ultimately, NICA may have to cease accepting claims, even of infants delivered by physicians who continue to participate, if claims estimates reach 80% of anticipated revenues.[13]

Another consequence of the Fifth District's ruling is that a new class of infants will be subject to the exclusive remedy of NICA and will not be permitted to pursue a common law tort claim. The representative of most such infants would no doubt argue that they do not belong in NICA absent a clear expression of legislative intent to include them. Moreover, non-NICA covered infants who do not choose to file a malpractice claim or whose injury was not caused by negligence have available private and governmental programs to help meet their special needs.[14] Therefore, ruling that Eric Birnie is not subject to the NICA Plan will not leave him without any remedy or avenue of assistance.

The Fifth District cited several cases including a Maryland appellate court decision for the proposition that "circumstances may require courts to construe the word "and" to mean "or" ... where it is necessary to effectuate the obvious intention of the

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[13] Section 766.314(9), Florida Statutes; See text at pages 5-6, supra.

[14] For example, the hearing officer noted that Eric Birnie received therapy through the Easter Seals program, and has been included in the Volusia County exceptional student program. Appendix A-24, A-26.

legislature." 20 Fla. L. Weekly at D2357, Appendix A-9, citing Comptroller of Treasury vs. Fairchild Industries, Inc., 303 Md. 280, 493 A.2d 341, 344 (1985). However, on closer inspection, none of those authorities mandates converting "and" to "or" in the NICA definition, and the cases must be limited to their own facts.

In the Fairchild Industries case, the Maryland appeals court actually held to the contrary and ruled that "and" does not mean "or." A Maryland statute provided that interest on a tax refund is due except where the overpayment was due to a "mistake or error on the part of the taxpayer and not attributable to the State or any department or agency thereof." The Maryland Comptroller attempted to avoid paying interest by interpreting the statute to mean that interest is payable except where either due to a taxpayer error or attributable to a government mistake. The Maryland court rejected that interpretation, and held the plain and ordinary meaning of the law is that to justify denial of interest, there must be a taxpayer mistake which is not attributable to the State. The court said:

> It is ordinarily presumed that the word "and" should be interpreted according to its plain and ordinary meaning and that it is not interchangeable with the word "or." Sands, 1A Sutherland Statutory Construction, §21.14 (4th ed. 1972 and Cum. Supp. 1984); 73 Am. Jur. 2d Statutes, §241 (1974), 493 A. 2d at 344.

The other cases cited by the Fifth District for the proposition that "and" can mean "or" made sense in their own particular factual circumstances, but must be limited to those facts. See, Winemiller vs. Feddish, 568 So.2d 483 (Fla. 4th DCA

1990) (ordinance prohibiting placement and maintenance of coral rocks adjacent to public right of way interpreted to prohibit placement or maintenance of coral rocks in light of legislative purpose of preventing injuries to the traveling public); Duncan vs. Wiseman Banking Company, 357 S.W. 694 (Ky. App. 1962) (statute requiring placement of flares whenever a "truck and its lighting equipment are disabled" interpreted to mean that flares must be used where truck disabled even if lighting equipment operational); Peacock vs. Lubbock Compress Co., 252 F.2d 894 (5th Cir. 1958) (court acknowledged that process of compressing cotton "is an operation entirely removed from ginning and that the two are never carried on together" such that statute which applied to a firm engaged in "ginning and compressing of cotton" applies to a firm engaged only in compressing cotton).

The other cases cited by the Fifth District stood for the converse proposition that "or" can sometimes mean "and" to fulfill legislative purpose, but again are limited to their own facts. In Dotty vs. State, 197 So.2d 315 (Fla. 4th DCA 1967), a statute provided that the "prosecuting attorney or assistant prosecuting attorney shall attend the grand jurors." A convicted defendant attempted to quash the indictment handed up by the grand jury on the grounds that the prosecuting attorney and the assistant prosecuting attorney were both present before the grand jurors at the same time. The Fourth District sensibly concluded that the "or" in that particular statute did not preclude both the prosecutor and the assistant from attending the grand jury. See

also, Rudd vs. State ex rel. Christian, 310 So.2d 295 (Fla. 1975) (citing Dotty vs. State with approval to the effect that state attorney and one or more assistants may attend the grand jury); Pinellas County vs. Woolley, 189 So.2d 217 (Fla. 2d DCA 1966) (law requiring weeds to be kept clear from property except property lying more than 150 feet from an intersection or more than 600 feet from an inhabited dwelling interpreted to mean only lands both 150 feet from intersection and 600 feet from dwelling exempt in view of legislative intent to prevent fire or health hazard as well as traffic hazard).

Accordingly, none of the authorities cited by the Fifth District mandates that "and" must be interpreted to mean "or" in the NICA Act. If anything, the authorities stand for the basic proposition that "[t]wo of the fundamental rules of statutory construction are that courts should construe a statute so that the plain intent of the legislature is given effect and that courts should not construe a statute in such a manner as to reach an absurd conclusion if any other construction is possible." Pinnellas County vs. Wooley, supra, 189 So.2d at 219.

In violation of this principle, construction of "and" to mean "or" in the present case will defeat the clearly-expressed intent of the legislature and may lead to absurd conclusions. If, as the Fifth District suggests, the NICA act should be read to mean that injuries involving mental "or" physical impairment are covered, then another court would be free to similarly construe the proceeding phrase of the Act to mean that permanent "or"

substantial injuries are likewise covered. Thus, if an infant sustained a mental or physical injury which was substantial, but not necessarily permanent, he would be covered. Alternatively, if the infant sustained a mental or physical injury which was permanent, but not substantial, he would also be covered according to the Fifth District's transmutation of "and" into "or." All of these interpretations would expand the class of NICA-covered infants, which seems to be the Fifth District's intent.

Taken to its logical extreme, the Fifth District's position is that the statute should be read to require NICA to cover a birth injury "which renders the infant permanently or substantially mentally or physically impaired." Of course, the legislature said no such thing. Such an interpretation would result in a virtually unlimited class of birth-related neurological injuries to be covered by NICA on a no-fault basis. Until NICA ran out of money, a huge new class of infants with birth-related injuries not heretofore deemed covered by NICA would be prevented from suing in tort for common law damages and would be restricted to NICA as their exclusive remedy. Eventually, NICA would run out of money because it was never structured to cover such a large class, and the legislative intent behind the creation of NICA of increasing the availability of obstetrical services by lowering malpractice premiums would be totally defeated.

In a word, the Fifth District has opened a Pandora's box by impermissibly legislating an amendment to the NICA Act to provide that "and" means "or." Where a statute is clear and unambiguous,

no statutory interpretation is required and the courts should apply the plain language of the statute. Florida vs. Egan, 287 So.2d 1 (Fla. 1973); Florida ex rel. Florida Jai Alai, Inc. vs. State Racing Commission, 112 So.2d 825 (Fla. 1959). Had the legislature intended that an infant need only be either mentally or physically impaired to be covered by NICA, the conjunction "or" would have been used, as that word is generally construed to be used in the disjunctive. Sparkman vs. McClure, 498 So.2d 892 (Fla. 1986); Telophase Society of Florida, Inc. vs. Florida Board of Funeral Directors and Embalmers, 334 So.2d 563 (Fla. 1976). NICA respectfully submits that this Court should keep the lid on Pandora's box by acknowledging that "and" means "and." Failure to do so risks destruction of the entire NICA Plan, but not before throwing numerous infants into it who do not belong there.

This Court has recognized that the NICA Plan "is not a cure all, but will be a major contribution to the cure" of the medical malpractice insurance crisis. Coy vs. Florida Birth-Related Neurological Injury Compensation Plan, 595 So.2d 943, 946 (Fla. 1992), cert. den. ___U.S. ___, 113 S.Ct. 194, 121 L.Ed 2d 137. The threat to the continued success of the NICA Plan arising from an unwarranted expansion of the class of NICA-covered infants can be avoided. The threat can be avoided by strictly construing the statutory definition which plainly requires mental and physical impairment. If a determination is to be made that the class of NICA-covered infants needs expansion to reduce malpractice premiums and preserve the availability of obstetric services, such

determination can only be made by the legislature, and not by the courts.

CONCLUSION

The certified question should be answered in the negative, and this case remanded for entry of a final administrative order that Eric Birnie is not subject to the NICA Plan.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: Samuel P. Bell, III, Cobb, Cole and Bell, 131 North Gadsden Street, Tallahassee, Florida 32301, Christopher L. Nuland, Esquire, Florida Medical Association, P.O. Box 2411, Jacksonville, Florida 32203, Larry Sands, Esquire, 760 White Street, Daytona Beach, Florida 32115-2010, this 26th day of February, 1996.

William L. Whitney

ATTORNEY