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 REPLY BRIEF

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BIRTH-RELATED NEUROLOGICAL INJURY
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SUMMARY OF THE ARGUMENT

Eric Birnie is not "permanently and substantially and mentally and physically" impaired. The evidence showed he is above average in intellectual development, which under relevant law precludes any finding that he is substantially mentally handicapped or impaired.

The Respondents do not even attempt to offer a reasoned defense of the Fifth District's ruling that "and" means "or" because it cannot be defended. The Hearing Officer's finding that Eric Birnie meets the statutory definition is based on the erroneous legal conclusion that interference with the child's educational, social and vocational development arising from his physical limitations qualifies as mental impairment. Respondents have no basis for the proposition that NICA covers substantial injuries which have only "components" of mental and physical impairment. The plain and unambiguous statutory definition requires that both the mental and physical impairments be permanent and substantial.

ARGUMENT

In their Answer Brief[1], the Respondents, Judith and Fred Birnie, offer no less than three alternative approaches in order to reach the holding that Eric Birnie is subject to NICA:

> 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
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> 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. AB at 36.

The Respondents favor approach number three, perhaps because it is the least unreasonable of the three. However, all of the alternatives are wrong because they ignore the plain statutory definition that a NICA-covered infant be "permanently and substantially mentally and physically impaired." Eric Birnie does not meet this definition, and therefore is not subject to the NICA Plan. If not overturned, the attempt to judicially expand the class of NICA-covered claimants will throw a large new group of infants into the Plan who do not belong there.

It is rather clear that the Respondents do not place much stock in the approach of the Fifth District that "and" actually means "or." While the Respondents respectfully intone that the Fifth District's "construction certainly is justified under the

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[1] NICA will designate references to Respondents' Answer Brief as "AB" followed by the page number.

circumstances of this case" (AB at 14), they devote virtually no argument in defense of that patently unjustified conclusion. As amply demonstrated in NICA's Initial Brief, the Fifth District's stretch of the word "and" into "or" is simply wrong and no further argument is needed to dispose of it.

After politely bowing to the Fifth District, the Respondents hasten to offer the next alternative: "However, the critical issues which determine the claim of Eric Birnie may be resolved in an even more simple and direct manner." AB at 14. The Respondents note that the Hearing Officer "found from the evidence that Eric Birnie had suffered permanent and substantial mental impairment" and cite the well-known proposition that his determination must be sustained if it is supported by competent and substantial evidence. AB at 15. As discussed below, however, the Hearing Officer misapplied the law to the facts as he found them and in that way erroneously concluded Eric Birnie had sustained a NICA-covered injury.

At least the Hearing Officer formally acknowledged that "and" means "and" and paid lip service to the statutory definition by making sure he said the magic words that Eric Birnie is "permanently and substantially mentally and physically impaired." Final Order, page 24; Appendix A-37. The Respondents, recognizing the lack of evidence supporting the Hearing Officer's conclusory finding, admit that the

> 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 his impairment included both mental and physical components. The latter seems more likely. . . . AB at 25-26.

The Respondents attempt to shore up the deficiencies in the Hearing

Officer's conclusion that the child is substantially mentally impaired by saying that they "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." AB at 29. In the end, the Respondents are left with having to say that they do not exactly understand the basis for the Hearing Officer's ruling, but that it must be correct because it grants the NICA compensation they seek.

Whether as a matter of statutory interpretation, the rules of grammar, or common sense, the Respondents' attempt to squeeze Eric into a class in which he does not belong must fail. Faced with the fact that Eric Birnie possesses above-average intelligence, the Respondents go to great lengths to find a way to say that he is nonetheless "mentally impaired." They argue that Florida's Baker Act and the statute dealing with the criminally insane both define "mentally ill" as including an "impairment of the emotional processes."[2] AB at 20. The Respondents cite these statutes as evidence of the legislature's "understanding" of the term "mental." Ibid.

While it is appropriate to consider the meaning attributed by the legislature to the term "mental" in other laws when interpreting the phrase "mentally impaired" in the NICA Act, the examples chosen by the Respondents are completely inappropriate. The definition in the NICA Act is intended to describe a limited

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[2] Sections 394.55(3) and 916.106(7), Florida Statutes. The reference in footnote 28 of the Respondents' Answer Brief to Section 395.455(3) must be a scrivener's error as the Baker Act is set forth in Chapter 394.

class of catastrophic birth-related neurological injury sustained by infants. The considerations involved in determining whether a criminal defendant is insane have simply no application to the determination whether an infant has suffered an injury to the brain during birth. Similarly, issues related to whether an adult is "mentally ill" with a diagnosis such as schizophrenia and thus is subject to the Baker Act has no place in evaluating infants.

Indeed, the very Baker Act definition cited by the Respondents explicitly excludes the forms of impairment which are more applicable to the case of a birth-injured infant: "the term [mentally ill] does not include retardation or developmental disability as defined in chapter 393, ..." Section 394.455(3), Florida Statutes. Developmental disability is defined in Chapter 393 as a "disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader Willi syndrome and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely." Section 319.063(11), Florida Statutes. It is significant that the developmental disability statute considers retardation and cerebral palsy as separate entities. Cerebral palsy is defined as "a group of disabling symptoms of extended duration which results from damage to the developing brain that may occur before, during, or after birth and that results in the loss or impairment of control over voluntary muscles." Section 393.063(3), Florida Statutes. Retardation is defined as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." Section 393.063(43), Florida Statutes. In other words, a

"developmental disability" is a permanent and substantial mental or physical impairment.

Eric Birnie has been diagnosed with cerebral palsy, which the developmental disability statute and the Hearing Officer below recognize as a permanent and substantial physical impairment. Final Order, page 16; Appendix A-29. In contrast, Eric Birnie clearly does not meet the definition of retardation because of his documented above-average intellectual functioning. While it is true that the NICA Act does not employ the term "retardation" in describing the substantial mental impairment needed to be subject to the Act, NICA submits that it is a more appropriate concept than that of "mental illness" suffered by psychotic patients who must be institutionalized under the Baker Act, or the criminally insane.

Another appropriate source to consult in determining whether a child is mentally impaired to the point of being covered by the NICA Act is the classifications used in the Public Education Act to describe exceptional students. The term exceptional students includes numerous discrete categories, including "students with disabilities who are mentally handicapped, . . . physically impaired, [or] emotionally handicapped, ..." Section 228.041(18), Florida Statutes. Under the authority of that statute, the State Board of Education has promulgated rules elucidating the criteria for a given student to qualify under each of the categories. At the request of NICA, the Hearing Officer took official recognition of the rules governing special programs for students who are mentally handicapped and for students who are emotionally handicapped: Rules 6A-6.03011 and 6A-6.03016, Florida Administrative Code. Final Order, page 4; Appendix A-17. The

first rule defines a student as mentally handicapped where there is "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." Within the general classification of mentally handicapped students, three sub-categories are created depending upon whether the student is "mildly," "moderately or severely," or "profoundly impaired in intellectual and adaptive behavior ...." Rule 6A-6.03011(1), Florida Administrative Code (emphasis added). The second rule defines emotional handicap as "a condition resulting in persistent and consistent maladaptive behavior, which exists to a marked degree, which interferes with the student's learning process ...."

Rule 6A-6.03015, Florida Administrative Code, governs special programs for students who are physically impaired. That rule states that "the term physically impaired as used in this rule includes students who are orthopedically impaired," and that

> Orthopedically impaired means a severe skeletal, muscular, or neuromuscular impairment which adversely affects a child's educational performance. The term includes impairments resulting from congenital anomaly, disease and other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures). Rule 6A-6.03015(2), Florida Administrative Code.

The foregoing Board of Education rules provide a meaningful structure for evaluating the concepts of mental impairment[3] and physical impairment as used in the NICA Act. These rules were promulgated by education professionals for use in evaluating various forms of impairment present in children, as opposed to the

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[3] The rules indicate that a "handicap" is equivalent to an "impairment." The Respondents agree that a NICA injury, which speaks in terms of impairments, "certainly describes a person who is handicapped within any definition of that term." AB at 30.

"mental illness" definitions the Respondents seek to use which apply to adults. More importantly, these very Board of Education criteria were actually applied to Eric Birnie following an individualized evaluation by a school psychologist, Joseph White. Deposition of Joseph White, page 14.

Without question, Joseph White acknowledged, Eric Birnie "is a physically impaired child due to cerebral palsy" and "is appropriately placed in the Exceptional Student Education program at this time." Exhibit 1 to Deposition of Joseph White, page 3; Deposition of Joseph White, page 14. Just as clearly, Mr. White found that Eric Birnie is not mentally handicapped and in fact is advanced both in his cognitive development and in his acquisition of pre-academic skills. Ibid. Significantly, Mr. White anticipates that it is very likely that Eric will be educated in a mainstream classroom along with non-handicapped students (Deposition of Joseph White at 19) in contrast with mentally impaired students for whom this is not possible. NICA submits that the Board of Education criteria defining children who are eligible for special programs for the mentally handicapped and for the physically impaired are very similar to, if not synonymous with, the requirements that a child be "substantially mentally and physically impaired" to be covered by NICA. Eric Birnie does not meet both requirements and thus is not subject to the Act.

In light of the compelling evidence of Eric Birnie's intact intellect, the Respondents argue that he has some emotional impairment which qualifies him as being "mentally impaired." See, AB at 20-22. Assuming for the sake of argument that severe emotional problems may qualify as mental impairment, the argument

nonetheless fails because of a lack of evidence that Eric Birnie is substantially emotionally impaired. NICA does not contend that the physical impairment sustained by Eric Birnie will produce absolutely no emotional ramifications. However, despite frustration and anger at times resulting from his physical condition, the overwhelming evidence in this case is that Eric Birnie is happy and well adjusted:

> 1. After observing Eric Birnie testify at the hearing, the Hearing Officer found that he "appears to be a happy, charming little boy." [Final Order, page 23; Appendix A-36.
>
> 2. The school psychologist, Joseph White, found Eric to be "very well adjusted" and that he is <u>not</u> classified as an "emotionally handicapped" child under Board of Education Rules. [Deposition of Joseph White, page 23.]
>
> 3. Respondents' medical expert, Dr. Leon Charash, testified that Eric has a "pleasant personality," was a "positive boy with a nice outlook" and that he appeared very gregarious and attentive. [Deposition of Dr. Charash, pages 15, 86.]
>
> 4. Dr. Charash further observed that while Eric's physical impairment may affect his self-esteem and produce depression, "he may end up with more emotional courage than the rest of us." [Deposition of Dr. Charash, page 45.]
>
> 5. NICA's examining neurologist, Dr. Michael Duchowny, stated that while a substantial physical impairment will have some impact on a child's emotional well-being, in his experience with children where the physical deficit is acquired early in life, "their reset expectations allow them to progress emotionally in a satisfactory fashion." [Transcript of Final Hearing, page 123.]

There is no evidence that Eric Birnie's emotional state has interfered with the learning process (a criterion under the Board of Education definition of "emotional handicap"). Therefore, even if it is a relevant factor, there is simply insufficient evidence to conclude that Eric Birnie has sustained a substantial emotional impairment. Indeed, the Hearing Officer explicitly considered this

issue and found:

> [The Birnies] contend that Eric's handicaps are likely to cause him emotional damage sufficient to constitute mental impairment within the scope of the statute. The mere possibility of emotional problems in the future is too speculative to independently serve as a basis for a finding of mental impairment. [Final Order, page 23; Appendix A-36.]

Having rejected the "emotional impairment" argument advanced by the Respondents, the Hearing Officer then proceeded to misapply the law to the facts by making the formal finding that Eric Birnie is permanently and substantially mentally impaired. The Hearing Officer concluded that Eric Birnie is permanently and substantially mentally and physical impaired because

> [A]s 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, page 24; Appendix A-37]

This constitutes an impermissible administrative re-writing of the statutory definition. The NICA Act simply does not state that a particularly severe physical injury, which may have learning, social and vocational implications, may be substituted for the requirement of a co-existing substantial mental impairment resulting from the brain injury.

Returning to the Board of Education rules, the criteria for "physically impaired" students specifically acknowledge that a severe muscular or neuromuscular impairment will "adversely affect a child's educational performance." Rule 6A-6.03015(2), Florida Administrative Code. Thus, any learning difficulties Eric Birnie may have are <u>part</u> <u>of</u> his physical impairment. Therefore, even assuming the Hearing Officer correctly found that Eric Birnie's

physical impairment will adversely affect his educational, etc. development, he erred when he concluded as a matter of law that this constitutes a substantial mental impairment. The Hearing Officer cited no authority supporting this conclusion in the context of brain injuries sustained by infants at birth. He did not mention, let alone distinguish, the Board of Education rules.

Where, as here, NICA agrees that the claimant is substantially physically impaired, it begs the question to state that that same physical impairment also qualifies as the required substantial mental impairment. This approach constitutes an indirect manner of saying that a substantial physical or mental impairment qualifies for NICA coverage. Unlike the Fifth District, neither the Hearing Officer nor the Respondents will admit that is what is necessary to make Eric Birnie subject to NICA. Admitted or not, the statutory requirement of substantial physical and mental impairment is unavoidable, and Eric Birnie does not qualify.

In a last-ditch effort to salvage the compensability of their claim, the Respondents argue that the statutory definition only requires the claimant to be permanently and substantially impaired and that the "the impairment must include components of mental impairment and physical impairment." See AB at 16, 29 and 36. The Respondents assert that the rules of English grammar favor their interpretation. They contend that the words "permanently and substantially" are adverbs which modify the verb "impaired," but do not modify "mentally and physically" because those words are also adverbs. As a result, the Respondents assert, the adverbs "mentally and physically" were used to indicate that the impairment should include mental and physical components or aspects. AB at 19.

This argument is misplaced because the adverbs "permanently" and "substantially" are adverbs of degree. It is well settled in American usage that such adverbs of degree generally modify other adverbs and adjectives. The New Webster's Grammar Guide (Lexicon Publications, Inc. 1987) states:

> Adverbs of degree tell how large, how small, how long, to what extent, etc. They answer the questions, "How much?", "To what extent?", "In what degree?" Adverbs of degree usually modify adjectives or other adverbs. Ibid. at 95.

Under this rule, the words "permanently" and "substantially" were intended by the legislature to modify the adverbs "mentally" and "physically," which in turn were intended to modify the verb "impaired." Therefore, the correct grammatical interpretation of the statutory definition yields the phrase that the NICA claimant must be permanently and substantially mentally impaired and permanently and substantially physically impaired.

In another vain effort to avoid the plain meaning of the NICA definition, the Respondents observe that the NICA Act covers injury to the spinal cord as well as brain damage at birth. They claim that relatively few injuries to the spinal cord would result in substantial mental impairment, such that "there must have been a corresponding legislative intent that a lesser degree of 'mental' impairment would satisfy the requirements of the statute." AB at 16-17. However, the evidence showed that there indeed are high cervical spinal injuries which can produce mental impairment, and that the high cervical spine is the most likely portion to be injured because of the stress upon the infant's head and neck in the context of a traumatic delivery. Transcript of Final Hearing, pages 116-119. Furthermore, in one of the few NICA cases to reach

this Court, the infant had sustained permanent neurological damage from a spinal cord injury, and the issue was whether it occurred during or after delivery. Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852 (Fla. 2nd DCA 1995), approved sub nom. Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 21 Fla. L. Weekly S91 (Fla. Feb. 29, 1996). Thus the Respondents' contention that virtually no spinal cord injuries will involve NICA claims is inaccurate. In any event, Eric Birnie did not suffer a spinal cord injury and from that perspective the point is irrelevant to this case.

NICA has consistently asserted that the NICA Act is in derogation of the common law and thus should be strictly construed. NICA's Initial Brief at 24. In response, the Respondents contend that the NICA Act is a remedial statute which should be broadly construed. AB at 18. Despite the Respondents' accusation that "the courts seem to ignore that principle [of strict construction of statutes in derogation of the common law] when the Legislature uses the magic words 'a financial crisis in the medical liability insurance industry,'" (AB at 18), this Court recently agreed that

> Because the [NICA] Plan, like the Worker's 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. Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 21 Fla. L. Weekly S91 (Fla. Feb. 29, 1996), citing Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852, 859 (Fla. 2nd DCA 1995).

Judged by this standard, the Respondents' efforts to employ a liberal construction to expand the class of infants subject to NICA (who would thus lose their common law tort remedy) must fail.

Finally, Respondents conclude their summary of the argument with the statement:

> Insofar as this case is concerned, the Respondents are claiming compensation under the statute, and they do not challenge the constitutionality of the [NICA] statute. AB at 6.

Notwithstanding this disclaimer, the Respondents could not resist going on at some length to criticize the NICA Act and suggest it may be constitutionally infirm (unless their interpretation is adopted). Since the issue of constitutionality was never raised below, it is not at issue before this Court, and because the Respondents do not have standing to raise it, there is no need for NICA to address the constitutionality of the Act in these proceedings. Suffice it to say that the "suspect class" argument is misplaced and only diverts attention from the narrow question at issue here. Prior to the creation of NICA, all infants injured by medical negligence possessed a common law claim for compensation. The NICA Act does not effect, let alone unlawfully "discriminate" against, infants not within the limited class of NICA-covered injuries, because they retain their existing common law rights to sue for damages. Regardless of whether the analysis is factual, legal, or constitutional, the end result is the same: Eric Birnie is not covered by NICA.

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 16th day of April, 1996.

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