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appeal

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 87,270
4TH DCA CASE NOS. 93-01661
93-02588

LHERISSON DOMOND, M.D., and
LHERISSON DOMOND, M.D., P.A.,

Petitioners,

v.

KELLY A. MILLS, individually, as a parent, and as Personal Representative of the Estate of Alexis Rosenthal; and JACK ROSENTHAL, individually and as a parent of Alexis Rosenthal,

Respondents.
_____/

PETITIONERS' BRIEF ON THE MERITS

Jennifer S. Carroll
Florida Bar Number: 512796
Metzger, Sonneborn & Rutter, P.A.
1545 Centrepark Drive North
Post Office Box 024486
West Palm Beach, Florida 33402-4486
(407) 684-2000

Attorneys for Petitioners

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PREFACE

This is an appeal from a decision of the Fourth District Court of Appeal which reversed an order of the circuit court dismissing plaintiffs' medical malpractice complaint for lack of subject-matter jurisdiction. The Fourth District Court of Appeal certified the following question to the Florida Supreme Court:

> **DOES § 766.316, FLA. STAT. (1993), REQUIRE THAT HEALTH CARE PROVIDERS GIVE PRE-DELIVERY NOTICE TO THEIR OBSTETRICAL PATIENTS OF THEIR PARTICIPATION IN THE FLORIDA BIRTH RELATED NEUROLOGICAL INJURY COMPENSATION PLAN AS A CONDITION PRECEDENT TO THE PROVIDERS INVOICING NICA AS THE PATIENT'S EXCLUSIVE REMEDY?**[1]

The parties will be referred to by their proper names or as they appeared below. The following designations will be used:

(R.) -- Volume I of the Record on Appeal

(RVol.II.) -- Volume II of the Record on Appeal

[1] This same certified question is presently before this court in Galen of Florida, Inc., and Robert Bazley, M.D. v. Braniff, **Case Nos.** 86,485 and 86,486.

STATEMENT OF THE CASE AND FACTS

Plaintiffs, Kelly A. Mills, as Personal Representative of the Estate of Alexis Rosenthal, Deceased, and Kelly A. Mills and James Rosenthal, as natural parents of Alexis Rosenthal, Deceased, and individually, filed a complaint, and subsequently an amended complaint alleging causes of action arising out of birth-related neurological injuries. (R.1-16, 17-30) The defendants named in the amended complaint were North Broward Hospital District, d/b/a Broward General Medical Center (hereinafter "District"), Dr. Lherisson Domond, M.D. (and his P.A.), and Sunlife OB/GYN Services of Broward County, Inc. (R.17) The only defendants involved in the appeal before the Fourth District Court of Appeal were the District and Dr. Domond and his P.A. Dr. Domond and his P.A. are the only defendants who have brought the present appeal before the Florida Supreme Court.

The amended complaint alleges generally that due to fault on the part of the persons or entities involved with the labor and delivery of Alexis Rosenthal, the child was injured at birth and died as a result of said injuries. (R.17-30) The amended complaint alleged that Mills had engaged Dr. Domond for prenatal and medical care during her pregnancy, and that Dr. Domond examined, treated, and cared for her during that period of time. (R.20) The amended complaint alleged that on August 1, 1990, Mills was admitted to Broward General, and that Alexis Rosenthal was delivered and born at that time. (R.20) The plaintiffs alleged that as a result of the negligence of the defendants, Alexis

Rosenthal died, and the amended complaint sought damages under the Wrongful Death Act. (R.17-30)

Defendants Broward General and Dr. Domond filed motions to dismiss the amended complaint, along with memoranda of law. (R.34-48; 137-149; 161-162) Defendants argued that Florida's Birth-Related Neurological Injury Compensation Plan (hereafter "NICA" or "Plan"), Section 766.301 ***et seq.,*** Florida Statutes, **was** plaintiffs' exclusive remedy for the claims raised in plaintiffs' amended complaint, and that the notice provision of Section 766.316 was not a condition precedent to application of the Act. Plaintiffs argued that the notice provision contained in Section 766.316, Florida Statutes, was an essential prerequisite to the application of the Act, and also challenged NICA's constitutitionality. (RVol.II.1-43)

Prior to the hearing on the District's motion to dismiss, the District filed with the trial court the affidavits of Lynn Dickinson, the Executive Director of the Florida Birth-Related Neurological Injury Compensation Association (hereinafter "NICA"), and Alicia Romance, a registered nurse working in the neonatal intensive care unit at Broward General Medical Center at the time of Alexis Rosenthal's birth. Ms. Dickinson's affidavit stated, in pertinent part, that based on the limited information available to her, the infant [Alexis Rosenthal] suffered a "birth-related neurological injury" giving rise to a valid NICA claim. (R.91-92) Ms. Romance, in her affidavit, testified that she had recorded the infant's birth weight as 3,799 grams. (R.89-90)

Prior to the hearing on Domond's motion to dismiss, Domond also filed the affidavit of Judy Duell, the Accounting/Claims Manager for NICA, which recited that Domond was a participating physician in NICA from June 13, 1990 through December 31, 1990 (RVol.II.194), the period during which Domond was alleged to have treated the plaintiff and delivered her baby. (R.17-30)

No affidavits were filed by the plaintiffs in support of their jurisdictional claim. In the absence of any affidavits to the contrary, and based on the applicable law, the trial court ruled that subject-matter jurisdiction over the plaintiffs' claim was vested exclusively in NICA, and that the trial court lacked jurisdiction to proceed.

SUMMARY OF ARGUMENT

The trial court properly dismissed the plaintiffs' amended complaint against Dr. Domond based upon its conclusion that the court lacked subject-matter jurisdiction. Because the injuries alleged by the plaintiffs fell within the purview of Florida's Birth-Related Neurological Compensation Plan (hereinafter the "Plan"), their exclusive remedy was a claim for compensation pursuant to the Plan's provisions. Once Dr. Domond established that he was a Plan participant, the trial court was divested of jurisdiction to proceed further.

Contrary to the Fourth District Court of Appeal's findings, notice to a patient of a physician's participation in the Plan is not a condition precedent to the application of the Plan's exclusive remedy provisions. There is no language in the statute creating the notice requirement, nor in the Plan's statutory scheme as a whole, establishing notice as a condition precedent. Based upon the plain language of the statute, the trial court correctly concluded that notice to a patient of a physician's participation in the Plan is not a prerequisite to the application of the Plan and the invocation of its exclusive remedy provisions.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THE PLAINTIFFS' AMENDED COMPLAINT AGAINST DR. DOMOND FOR LACK OF SUBJECT-MATTER JURISDICTION.

A. *Applicability* of the *Plan.*

In 1988, Florida's legislature created the Florida Birth-Related Neurological Injury Compensation Plan to provide compensation, on a no-fault basis, for birth-related neurological injuries which result in unusually high costs for custodial care and rehabilitation. § 766.301(2), Fla. Stat. (1991). The Plan provides a remedy, exclusive of all other rights and remedies, common law or otherwise, for the infant, his personal representative and his parents for birth-related neurological injuries arising out of **or** related to a medical malpractice claim. § 766.303(2), Fla. Stat. (1991).

The NICA statute provides the exclusive administrative remedy for any birth-related neurological injury related to medical malpractice where the physician who delivers the infant has elected to participate in NICA. See § 766.303 et ***seq.,*** Fla. Stat. (1991). Section 766.303(2) provides in pertinent part:

> 766.303 **Florida Birth-Related Neurological Injury Compensation Plan; exclusivity** of **remedy.--**
>
> *** * ***
>
> (2) The rights and remedies granted by this plan on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents, and next of kin, at common law or otherwise,

> against any person or entity directly involved with the labor, delivery, or immediate post-delivery resuscitation during which such injury occurs, arising out of or related to a medical malpractice claim with respect to such injury... (emphasis supplied).

A birth-related neurological injury is defined under the Plan as an

> 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.

§ 766.302(2), Fla. Stat. (1991).

In their amended complaint, the plaintiffs alleged the infant, Alexis Rosenthal, suffered fetal heart distress and/or hypoxia and/or anoxia (i.e., oxygen deprivation) immediately prior to her birth, and that the injuries suffered by Alexis were the result of negligence on the part of Domond and others. (R.17-30)

The infant's injury thus met the Plan's description of "birth-related neurological injury," placing it within the class of injuries to be compensated under the Plan. Once Domond established that he was a participating physician[2] at the time of the injury,

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[2] Section 766.302(7) defines a participating physician as a "physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full time or part time and who had paid or was exempted from payment at the time of the injury the assessment required for participation in the birth-related neurological injury compensation plan for the year in which the injury occurred...."

the plaintiffs' claim fell within the ambit of the Plan, which provided their exclusive remedy.

There is only one circumstance where the NICA statute allows a civil action to be brought prior to and in lieu of the exclusive administrative remedy under NICA. Section 766.303(2) provides that the rights and remedies under the Plan shall exclude all other rights and remedies with the following exceptions:

> ...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, provided that such suit is filed prior to and in lieu of payment of an award under ss. 766.301-766.316....

Thus, only where there are allegations of bad faith, malicious purpose, or wilful and wanton disregard of human rights, safety, or property does the exclusive administrative remedy of the NICA statute cease to apply. Only under this limited circumstance is it appropriate to file a civil action prior to and in lieu of payment under the NICA Plan.

The exclusivity of the administrative remedy under the NICA statute was upheld in University of Miami v. Klein, 603 So.2d 651 (Fla. 3d DCA 1992). In Klein, the Third District held that "administrative rights and remedies granted by the Plan for birth-related neurological injuries are exclusive unless there is clear and convincing evidence of bad faith, malicious purpose, or wilful and wanton conduct." Id. at 653. (e.s.) Further, the Third District Court of Appeal stated that permitting parties to litigate in court where there is a legal obligation to proceed only

administratively constitutes a departure from essential requirements of law. Id. at 652.

Mills' amended complaint does not meet the one exception to the NICA statute's exclusive administrative remedy provision. Specifically, Mills' amended complaint does not allege bad faith, malicious purpose, wilful or wanton disregard of human rights, safety, or property. (R.17-30) Instead, the amended complaint alleged ordinary medical negligence wherein oxygen deprivation occurred within the course and scope of labor and delivery. As such, the trial court was correct in ordering plaintiffs to pursue their claim under the NICA statute.

B. *The Notice Requirement of Section 766.316 is Not a Condition Precedent to the Application of the Plan's Provisions.*

Plaintiffs' position below *was* that because Domond failed to provide notice of his participation in the Plan to Kelly *Mills,* although required to do so under Section 766.316, Florida Statutes (1991), he is not entitled to the protections afforded him by the Plan.[3] Compliance with the notice requirement, plaintiffs argue, is a condition precedent to *a* defendant's assertion of immunity provided under the Plan.

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[3] There was no allegation in the complaint, nor did plaintiffs submit any supporting affidavits, that Domond failed to provide Mills with notice of his participation in the Plan. But even assuming for the sake of argument that notice was not given, such fact is irrelevant for the reasons expressed herein.

plaintiffs' interpretation effectively frustrates the purpose of the NICA statute in providing an exclusive administrative remedy for the particular injuries. Section 766.316 states in pertinent part:

> Each hospital with a participating physician on its staff and each participating physician ...under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injuries. such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan.

There is no language requiring that such notice be given as a condition precedent to the application of the Plan's provisions. Indeed, there is no language anywhere in the statutory scheme establishing notice as a condition precedent.

A reading of the NICA statute in its entirety evidences a clear intent on the part of the legislature to establish a no-fault system of compensation similar to that which has long been established for workers' compensation. See Birth-Related Neurological Injury Comp. v. Carreras, 633 So.2d 1103, 1107 (Fla. 3d DCA 1994) (appellate court noted that "the no fault NICA system is one comparable to the workers' compensation system."). Drawing from the statutory scheme in effect for workers' compensation, the Legislature provided in NICA for a statutory schedule of compensation and benefits, the judicial determination of claims by an assigned hearing officer, and the exclusivity of remedy. Specifically, Section 766.303(2) states:

> (2) The rights and remedies granted by this plan on account of a birth-related neurological injury shall exclude all other rights and remedies...against any person or entity directly involved with the labor, delivery, or immediate post-delivery resuscitation during which such injury occurs...except that a civil action shall not be foreclosed where there is clear and convincing evidence of bad faith or malicious purpose...provided that such suit is filed prior to and in lieu of payment of an award under ss. 766.301-766.316.

There is no provision in this section that refers to notice as a condition precedent to the application of this statutory exclusive remedy.

Courts of this state have dealt with similar provisions in the very similar statutory scheme governing workers' compensation. For example, in Allen v. Estate of Carman, 281 So.2d 317 (Fla. 1973), the Supreme Court of Florida was presented with the almost identical issue that currently is being presented to this court. That case arose out of the notice provision of the Workers' Compensation Act. The employer in that case employed less than three employees. Under the Act as it existed at that time, such an employer was not obligated to obtain workers' compensation coverage and to otherwise be subject to the Act. Such an employer was afforded an opportunity, however, to elect to participate in the Act by purchasing coverage and posting notice to his employees. If the employer elected to participate, then he incurred the detriment of the cost of workers compensation coverage, but he obtained the benefit of the exclusivity of remedy afforded under the statute.

In Allen, the employer elected to voluntarily purchase workers' compensation coverage so as to participate in the

statutory scheme for workers' compensation, but he failed to provide the notice as required under the statute. On certification from the United States Court of Appeals, the Florida Supreme Court was asked, inter alia, whether under those circumstances an employer who had purchased workers' compensation coverage and elected to participate in the statutory scheme, but who failed to provide notice as required by the statute, could enjoy the defense of exclusivity as provided in the statute. In other words, did the providing of notice as required by the Act constitute a condition precedent to the applicability of the exclusivity of remedy provision. The Supreme Court concluded that the purpose of the statute was to permit an employer to elect to bring himself within the protection of the Act. As stated by the court:

> We think there can be no question that the purpose and effect of Fla. Stat. § 440.04, F.S.A., is to empower an exempt employer to voluntarily assume the obligations and privileges of the Workmen's Compensation Act and thereby insulate himself from common law liability pursuant to Fla. Stat. § 440.11, F.S.A.

Allen, 281 So.2d at 322. The Supreme Court declined to find that the providing of notice was a condition precedent to the applicability of the exclusivity of remedy provision.

The statutory scheme at issue in Allen is similar to the statutory scheme in the present case. See Birth-Related Neurological Injury Comp. v. Carreras, 633 So.2d 1103 (Fla. 3d DCA 1994). In both the workers' compensation provisions as applied in Allen and in the NICA statute there is the opportunity for voluntary participation. Moreover, those who voluntarily choose to

participate incur a detriment in terms of the cost of participation, but receive a benefit in the form of exclusivity of remedy. Under both statutes, the election is accomplished by incurring financial detriments -- in workers' compensation by the payment of insurance premiums and in NICA by contribution to the Plan. Next, in addition to exclusivity of remedy, the Legislature included in a separate and distinct portion of the Act a requirement for notice to the affected individuals. Finally, nowhere within the notice provision was there any statement of legislative intent that the giving of notice constituted a condition precedent to obtaining the benefits of the exclusivity of remedy provisions.

The Supreme Court in Allen provides instruction which is particularly helpful to this court in considering the issues currently before it. In Allen, this court looked to the underlying policy provisions of the Workers' Compensation Act. The court concluded that treating the notice requirement as a condition precedent was inconsistent with the stated intent and purposes of the Legislature in creating the workers' compensation scheme and concluded that the notice requirement was not a condition precedent to the applicability of the Act and to its exclusivity of remedy provision. See also Hughes v. B. F. Goodrich Co., 152 Fla. 170, 11 So.2d 313 (Fla. 1943) (en banc).

It is a fundamental rule of statutory construction that legislative intent is the polestar by which a court must be guided when interpreting a statute. That intent is determined primarily

from the language of the statute itself, since the legislature is assumed to have expressed its intent through the words found in a statute. St. Petersburs Bank & Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982); Zuckerman v. Alter, 615 So.2d 661, 663 (Fla. 1993). If the language of the statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the lesislature intended. Id. at 663, citing Tropical Coach Line, Inc. v. Carter, 121 So.2d 779 (Fla. 1960). Words are to be given their clear and unambiguous meaning, and it is presumed that the Legislature is cognizant of the meaning of the words it chooses. Arthur v. Unicare Health Facilities, Inc., 602 So.2d 596 (Fla. 2d DCA 1992).

The legislative findings and intent of the Plan are found at § 766.301, Fla. Stat. (1991):

> **766.301 Legislative findings and intent.--**
>
> (1) The Legislature makes the following findings:
>
> * * *
>
> (c) . ..[I]t is incumbent upon the Legislature to provide **a** plan designed to result in the stabilization and reduction of malpractice insurance premiums for providers of [obstetric] services in Florida.
>
> * * *
>
> (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....

The legislature's intent is thus effectuated by the establishment of a no-fault compensation plan for the families of neurologically injured infants, and the presumably correlative diminution of malpractice insurance premiums for obstetricians. Notification to a patient of a physician's participation in the Plan, while desirable, is not a necessary element of the goals enunciated by the legislature.

Had the legislature intended to elevate the notice requirement to a condition precedent, it certainly would have done so. In fact, at the time of the incident, the Florida legislature had dealt with the concepts of "notice" and "condition precedent" in several statutes. See e.g., § 766.106 (in medical malpractice claim, no suit may be filed unless potential defendant is provided with notice of intent to initiate litigation); § 768.28 (action may not be instituted on claim against state unless claimant presents the claim in writing to appropriate agency and to the Department of Insurance); § 214.51(1), Fla. Stat. (1989) (renumbered Ch. 91-112, Sections 71 through 76, Laws of Florida) (notice is a condition precedent to any legal action against a sheriff or other authorized person for wrongful levy or seizure or sale of property); § 378.211(4), Fla. Stat. (1989) (notice by the Department of Nature Resources is a condition precedent for the institution of an action for injunctive relief involving land reclamation); § 494.044(1), Fla. Stat. (1989) (repealed, Laws of Florida, Chapter 91-245, Section 51) (persons who give notice and otherwise comply with conditions precedent may recover from the mortgage brokerage

guarantee fund); § 624.155(2)(a), Fla. Stat. (Supp. 1990) (sixty days written notice is a condition precedent to bringing a civil action for violation of prohibited action under the insurance code); § 634.3284(3), Fla. Stat. (1989) (notice to the Department of Insurance and the insurer is a condition precedent to bringing an action for civil remedies for violation of the provisions of the Home Warranty Association Act); § 634.433, Fla. Stat. (1989) (notice to the Department of Insurance and the insurer is a condition precedent to bringing a civil action for violations of the provisions of the Service Warranty Act); § 642.0475(3) (notice to the Department of Insurance and the person against whom a civil action is brought is a condition precedent to bringing an action for civil remedies for violations of the provisions of the Legal Expense Insurance Act); § 713.23(e), Fla. Stat. (Supp. 1990) (a lienor is required to serve written notice of non-payment to the contractor as a condition precedent to recovery under a payment bond); § 768.28(6)(b), Fla. Stat. (1989) (notice to the governmental agency and denial of the claim are conditions precedent to maintaining an action against that agency); § 770.01, Fla. Stat. (1989) (plaintiff must give notice in writing five days before instituting an action for libel and slander, specifying the article or broadcast and the statements therein which he alleges to be false and defamatory); and § 836.07, Fla. Stat. (1989) (a prosecutor must give five days written notice to a defendant before a criminal action may be brought for publication, in a newspaper

periodical, of libel, specifying the article and statements therein which he alleges to be false and defamatory).

Because the Florida legislature did not designate the notice referred to in Section 766.316 as a "condition precedent," it does not affect the applicability of the exclusive remedy provisions under Section 766.303(2).

Having elected not to do so, the legislature did not intend that notice by a participating physician be a condition precedent to invoking the Plan's exclusive remedy provisions. This position is supported by the report of the Academic Task Force for Review of the Insurance and Tort System, Medical Malpractice Recommendations (November 6, 1987). Notwithstanding the Task Force's recommendation to the legislature, no language establishing notice as a condition precedent was incorporated in the legislative enactment. Because the legislature must be presumed to understand and intend the language it chooses, Arthur v. Unicare Health Facilities, Inc., supra, the legislature could not have intended that notice be a condition precedent.

Once Domond established that the infant, Alexis Rosenthal, suffered from a birth-related neurological injury, and that he was a participating physician at the time of that injury, the plaintiffs' claim fell within the exclusive remedy provisions of the NICA Plan, and the court properly dismissed plaintiffs' amended complaint for lack of jurisdiction.

CONCLUSION

Wherefore, for the foregoing reasons, petitioners respectfully submit that the Fourth District Court of Appeal's opinion be quashed, and the trial court's order be affirmed.

Respectfully submitted,

Jennifer S. Carroll
Florida Bar Number: 512796

Metzger, Sonneborn & Rutter, P.A.
1545 Centrepark Drive North
Post Office Box 024486
West Palm Beach, Florida 33402-4486
(407) 684-2000

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Philip M. Burlington, Esquire, Caruso, Burlington, Bohn & Compiani, P.A., Suite 3A/Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401; Linda R. Spaulding, Esquire, Post Office Box 14723, Fort Lauderdale, Florida 33302; and David F. Cooney, Esquire, Post Office Box 14546, Fort Lauderdale, Florida 33302, by mail, this 1st day of April, 1996.

Jennifer S. Carroll