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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 87,270

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

Petitioners,

-vs-

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.
_____/



**BRIEF OF RESPONDENTS ON THE MERITS**

WILLIAM deFOREST THOMPSON, P.A.
888 S.E. Third Ave., Ste. 300
Ft. Lauderdale, FL 33316
and
CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
Suite 3A/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(561) 686-8010
Attorneys for Respondents

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## PREFACE

This is an appeal from an Order of the Circuit Court dismissing Plaintiffs' Complaint for lack of subject matter jurisdiction. The parties will be referred to by their proper names or as they appeared below. The following designations will be used:

(A) - Respondents' Appendix

## STATEMENT OF THE CASE AND FACTS

Respondents accept the Statement of the Case and Facts as presented by Petitioners.

## SUMMARY OF ARGUMENT

The certified question should be answered in the affirmative. The Fourth District correctly decided that health care providers must give obstetrical patients pre-delivery notice of their participation in NICA as a condition precedent to invoking NICA as the patient's exclusive remedy. The First and Fifth Districts have also reached this conclusion. The notice requirement was placed in the statute by the Florida Legislature in response to a recommendation of the Academic Task Force to assure that NICA was constitutional. In line with that recommendation, the Legislature's notice provision provides that participating physicians (and hospitals with participating physicians) are required to give notice to obstetrical patients of the "limited no-fault alternative for birth-related neurological injuries." Fla. Stat, §766.316. Satisfaction of that notice requirement is a condition precedent to invoking the protection of NICA. As indicated by the statutory language and the legislative history, the purpose of that notice provision is to allow an obstetrical patient to make an informed choice regarding the rights and remedies she wishes to have with respect to medical malpractice and birth-related neurological injuries. In order to provide an obstetrical patient with that choice, pre-delivery notice is required. Any other construction of NICA's notice provision violates an obstetrical patient's constitutional right to procedural due process.

## OUESTION ON APPEAL

WHETHER §766.3 16, FLORIDA STATUTES ( 1993), REQUIRES THAT HEALTH CARE PROVIDERS GIVE THEIR OBSTETRICAL PATIENTS PRE-DELIVERY NOTICE OF THEIR PARTICIPATION IN THE FLORIDA BIRTH RELATED NEUROLOGICAL INJURY COMPENSATION PLAN AS A CONDITION PRECEDENT TO THE PROVIDERS' INVOKING NICA AS THE PATIENTS' EXCLUSIVE REMEDY?

## ARGUMENT

**The Relevant NICA Provisions:**

NICA is intended to provide an alternative plan of compensation for certain birth related neurological injuries, defined as those "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, " Fla. Stat. §766.302(2). This Court described the statutory scheme as follows in COY v. FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, 595 So.2d 943,944 (Fla. 1992):

> Essentially, the Plan administers a no-fault system to insure against certain types of neurological injuries suffered by infants at birth. However, obstetricians are not required to join the Plan, and insurance thus is available only if the obstetrician has elected to ioin. Those who join pay an annual assessment of at least $5000. §766.314(4)(c) Fla. Stat. (1989).
>
> To further fund the Plan, the statute imposes on all licensed physicians, not merely obstetricians, a mandatory

> annual assessment of $250. §766.314(4)(b) Fla. Stat. (1989). Although not at issue in this case, licensed hospitals also are assessed $50 per infant delivered §766.314(4)(a), Fla. Stat. (1989). These amounts can be increased by action of the Plan whenever it finds that the Plan cannot otherwise be maintained on an "actuarially sound" basis, subject to oversight by the Department of Insurance. §766.314(5), (7), Fla. Stat. (1989). [Emphasis supplied.]

The Court in COY determined that the state could constitutionally impose a mandatory assessment against all licensed physicians to fund the NICA Plan, and even those who elected not to participate in the Plan were compelled to pay it. The Court noted, however, that "only 535 obstetricians elected to join the Plan" in 1989, 595 So.2d at 944-45.

The term "participating physician" is limited to those obstetricians who elect to participate in the NICA Plant, Fla. Stat. §766.302(7). Fla. Stat. §766.314(4)(c) addresses the assessments to be made against "participating physicians," which are significantly greater than the assessments against all physicians licensed in Florida, which is governed by Fla. Stat. §766.314(4)(b). There is no definition, nor use of the phrase "participating hospital" in the Act. The term "hospital" is simply defined as any hospital licensed in Florida, Fla. Stat. §766.302(6).

The hospitals' assessment is governed by Fla. Stat. §766.314(4)(a), and is assessed based on the number of infants delivered in the hospital during the preceding calendar year.

NICA provides an alternative claim resolution procedure for birth-related neurological injuries occurring during treatment by participating physicians. When a

claim is presented to the judge of compensation claims, the judge is required to make a finding whether the obstetrical services were delivered by a participating physician, or a certified nurse/midwife who was supervised by a participating physician. There is no similar provision regarding a participating hospital because hospitals are not "participants" in the plan, Fla. Stat. §766.309(1)(b). Fla. Stat. §766.309(2) provides:

> If the judge of compensation claims determines that the injury alleged is not a birth-related neurological injury or that obstetrical services were not delivered by a participating physician at the birth, he shall enter an order and shall cause a copy of such order to be sent immediately to the parties by registered or certified mail.

Only upon determining that the infant has sustained a birth-related neurological injury, and that "obstetrical services were delivered by a participating physician at birth," is the judge of compensation claims authorized to award compensation, Fla. Stat. $766.3 1(1). Additionally, Fla. Stat. §766.309(3) provides:

> By becoming a participating physician, a physician shall be bound for all purposes by the finding of the judge of compensation claims or any appeal therefrom with respect to whether such injury is a birth-related neurological injury.

There is no similar provision for non-participating physicians.

If the participating physician has NICA immunity for a birth-related neurological injury, so does the hospital where the birth occurred. Section 766.303(2) provides that in those circumstances the rights and remedies of the plan exclude other rights and remedies of the injured infant and his parents "against any person or entity directly involved with the labor, delivery or immediate post-delivery resuscitation during which

such injury occurs". Since the judge of compensation claims has no authority to grant any compensation when the treating obstetrician is a non-participating physician, NICA obviously provides no rights nor remedies to infants and parents in that situation.

**The Notice Provision:**

NICA includes a provision requiring notice to obstetrical patients of the physician's election to participate in the Plan. Fla. Stat. §766.316 provides:

> **§766.316 Notice to obstetrical patients of participation in the plan**
>
> Each hospital with a participating phvsician on its staff and each participating phvsician, other than residents, assistant residents, and interns deemed to be participating physicians under $766.3 14(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided in forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. [Emphasis supplied.]

That statute specifically directs that each participating physician and each hospital with a participating physician on its staff shall provide notice "to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injuries. "

This notice requirement was included in the statutory scheme by the Florida legislature upon the recommendation of the Academic Task Force for Review of the Insurance and Tort System, Medical Malpractice Recommendations (November 6, 1987) (A14). That requirement was not contained within the Virginia statute upon which NICA

was modeled, but was specifically added by the Florida Legislature. The Academic Task Force stated in its report (A14):

> The Virginia statute does not require participating physicians and hospitals to give notice to obstetrical patients that they are participating in the limited no-fault alternative for birth-related neurological injuries. The Task Force recommends that health care providers who participate under this plan should be required to provide reasonable notice to patients of their participation. This notice requirement is justified on fairness grounds and arguably may be required in order to assure that limited no fault alternative is constitutional. [Emphasis supplied. ]

The Academic Task Force was correctly concerned that NICA would be unconstitutional without a notice provision.

In construing the NICA statute, the Fourth District was undoubtedly aware that it has a duty to construe legislation so as to save it from constitutional infirmities, CHATLOC v. OVERSTREET, 124 So.2d 1 (Fla. 1960), and to adopt a construction that will render a statutory scheme constitutional, rather than unconstitutional. See, e.g., SANDLIN v. CRIMINAL JUSTICE STANDARDS & TRAINING COMMISSION, 53 1 So.2d 1344 (Fla. 1988); LLOYD v. NORTH BROWARD HOSPITAL DISTRICT, 570 So.2d 984 (Fla. 3d DCA 1990); EMHART CORP. v. BRANTLEY, 257 So.2d 273 (Fla. 3d DCA 1972). The Fourth District specifically agreed with the decisions in TURNER v. HUBRICH, 656 So.2d 970 (Fla. 5th DCA 1995), and BRANIFF v. GALEN OF FLORIDA, INC., 20 FLW D2 140 (Fla. 1st DCA September 11, 1995), see also, CARL

BRENT DAVIS v. LAKE WALES HOSPITAL, Case No. GC-G-92-2249 (Circuit Court, Polk County, October 14, 1994).

The Fourth District was aware that if it construed the notice provision as not requiring pre-delivery notice it would be ruling that the participating physician would be authorized by the State to deprive obstetrical patients of their existing common law rights without notice before the deprivation occurred, merely by electing to become participating members in NICA. There is no authority that would permit the State to allow a private person [obstetrical patient's physician) to, without advance notice, deprive another private person (obstetrical patient) of her common law rights merely by allowing the physician to make an election to participate in NICA.

It is a fundamental concept of procedural due process that notice must be provided before a party can be deprived of vested property rights, see COUNTY OF PASCO v. RIEHL, 635 So.2d 17 (Fla. 1994); GOODRICH v. THOMPSON, 118 So. 60 (Fla. 1928). [1] By analogy, this Court has held, consistent with federal cases that due process requires that identifiable members of a class must be given actual notice of a class action suit because their rights would be affected by any resulting judgment. Similarly here, obstetrical patients must be given pre-delivery notice of a physician's election to join the plan, because that action will affect the patient's legal rights.

[1]The test of KLUGER v. WHITE, 281 So.2d 1 (Fla. 1973) is not applicable because it pertains to access to courts, not procedural due process.

In this case, the Fourth District's construction of the NICA Act affords procedural due process because it provides the requisite notice prior to the deprivation of an obstetrical patient's rights. To construe the notice provision as not requiring pre-delivery notice would unconstitutionally deprive an obstetrical patient of her existing common law rights without due process. Without advance notice, the obstetrical patient would be prevented from choosing to retain those rights by electing to be cared for by a physician who has decided not to become a NICA participant.

In addition to the constitutional infirmities of Defendants' suggestion that the NICA statute should be construed as not requiring pre-delivery notice, the only reasonable and legitimate reading of the statute based upon its language and its statutory scheme is that pre-delivery notice is required, First, the statute explicitly states that NICA participants "shall provide notice to the obstetrical patients thereof" (Emphasis supplied). A pregnant woman is an "obstetrical patient" throughout her pregnancy and during the birthing process, but she ceases to be an "obstetrical patient" thereafter. The plain language of the statute therefore requires that "notice" be provided before any child-birth that might be subject to the drastic limitations upon recovery imposed by the "limited no-fault alternative" of NICA. This reading of the statute is also fairly implicit in the Task Force's stated reason for recommending this provision to the legislature, which was "fairness" to the patient who might be stuck with NICA if she chose to remain a patient of a participating physician.

Second, the NICA Act provides obstetrical patients with an alternative remedy. The NICA statute does not require obstetricians to become participating members in the NICA Plan. COY v. FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, supra. Some obstetricians are members of the Plan, while others are not. Accordingly, under Florida law today, an obstetrical patient has a common law right to sue her obstetrician for malpractice as a result of birth-related neurological injuries to her baby, [which right is only limited by the Medical Malpractice Reform Act, §766.101-766.212 Fla. Stat.] if her obstetrician is not a "paid up" participating member in the NICA Plan established by Fla. Stat. §766.303. If the obstetrical patient's obstetrician is a member of the NICA Plan, then the patient has a choice of either going to an obstetrician who is not a member of the Plan (and thus retaining her common law medical malpractice rights), or waiving her common law medical malpractice rights by choosing to be cared for by a participating member of the alternative no-fault NICA Plan.

Because an obstetrician's participation in NICA is entirely voluntary, the statutory scheme clearly contemplates that only some physicians will enjoy immunity from suit under its provisions, and that others will not. This notion is reinforced by the notice statute's explicit description of NICA as a "limited no-fault alternative" (Emphasis supplied), Fla. Stat. §766.316. And because the statute is clearly designed to require notice to the patient of the physician's participation in this alternative, as well as provide the patient with "a clear and concise explanation of [her] rights and limitations under the

plan," the obvious purpose of the notice requirement is to ensure that the "obstetrical patient" gives an informed consent to continued care by such a physician.

Put another way, the clear purpose of the "notice" requirement is to ensure that the patient can make an informed decision as to whether to forego her legal rights and continue under the care of a participating physician whose liability is limited, or to choose instead to seek the care of a non-participating physician who has elected to have his liability for birth-related injuries depend upon proof of negligence by not opting into NICA. Why would the statute even mention notice, if notice can be given after the fact? The only point in time at which an obstetrical patient can make such a decision is before delivery of her baby, of course, and to read the statute as authorizing notice after the fact is to render its notice requirement altogether meaningless. Post-delivery notice is no notice at all. Unless the patient is given pre-delivery notice, she is deprived of the right of choosing her and her baby's rights and remedies, where a choice is provided under the law. Without pre-delivery notice, the patient is accorded the alternative no-fault remedy as a result of the unilateral action of her obstetrician. The decision is hers, not his.

Third, NICA's notice provision must be construed to require pre-delivery notice because the only justification for the statute's express notice provision is to provide obstetrical patients with an opportunity to make a choice regarding their potential remedies in the event of malpractice or birth-related neurological injuries. The NICA statute mandatorily requires notice to be given by each hospital and each participating physician: "shall provide notice to the obstetrical patients thereof as to the limited no-

fault alternative for birth-related neurological injuries, Fla. Stat. § 766.316. It should be emphasized that the statute utilizes the word "shall" and not "may." And, it is important that it states that the obstetrical patients are to be provided notice of the "limited no-fault alternative" which clearly indicates that the obstetrical patients are to be given the opportunity to make a decision between that alternative and their comrnon law rights. This is consistent with the last sentence in the statute, which states that the notice "shall include a clear and concise explanation of a patient's rights and limitations under the plan. "

Non-participating NICA physicians are obviously not required to give the notice required by the NICA statute, because their patients' rights and remedies are not limited, but rather are those that exist at common law, as modified by the Medical Malpractice Act. The Task Force Report stated that the NICA notice provision was justified on "fairness grounds, " and referred to the "limited no fault alternative. " Clearly, the statute reflects the concern that the obstetrical patients have the opportunity to choose their rights and remedies, rather than having those issues decided solely by their treating physician.

Fourth, the ability to make the decision to retain or waive those common law rights is totally dependent upon the obstetrical patient receiving notice, pre-delivery, from the obstetrician that: he is a member of the NICA Plan, which means that the obstetrical patient's rights and remedies will be limited to no-fault compensation in an administrative proceeding as an alternative to pursuing her existing common law rights in a court of law for any birth-related neurological injuries. Without being provided that notice, pre-

delivery, the obstetrical patient is unknowingly denied procedural due process because her existing common law rights are taken from her without notice or consent.

The point is that the NICA plan is not mandatory for obstetricians. The obstetrical patient has a choice of going to another obstetrician, i.e., a non-NICA member. But she has no choice without being notified that the obstetrician whose care she is seeking is a NICA plan member. Without that notice, she is deprived of the right to retain her existing common law medical malpractice remedy over the alternative NICA no-fault remedy. In effect, she is denied procedural due process. Her right to retain and pursue her common law rights in the court system is taken from her without her ever knowing about it or ever agreeing to it. And, importantly, 9766.3 16 places the burden of giving that crucial notice upon NICA Plan members, It does not place the burden of finding out that information upon obstetrical patients.

Reading the Medical Malpractice Reform Act [which allows an obstetrical patient to pursue her common law remedy in a court of law, so long as she is not treated and cared for by a NICA obstetrician] in conjunction with the NICA statute [which relegates an obstetrical patient to an administrative no-fault remedy if she is treated and cared for by a NICA obstetrician] in effect provides the patient with an election of remedies. However, under the trial court's construction of NICA's notice provision the information necessary for the patient to make an informed election does not have to be disclosed, and can even be intentionally withheld. An election can be unknowingly made for the patient as a result of being treated by a NICA obstetrician when she has never been placed on

notice that that treatment constitutes an election of remedies and, more importantly, she has never been told that her obstetrician is a NICA obstetrician. The patient's rights are unknowingly taken from her without her ever knowing about it until after she has given birth to a birth-related neurologically damaged baby at which time she is handed a NICA pamphlet.

Given the fact that the apparent purpose of NICA's notice provision is to inform obstetrical patients that their legal rights will be limited by being cared for by a NICA participating physician, so as to allow them to choose, if they so desire, a non-participating physician and thereby retain their common law rights, Defendants' asserted construction of the statute results in the following scenario: When an obstetrical patient goes to an obstetrician for care and treatment in her pregnancy and for delivery of her baby, even if there is never any mention to her that she is waiving her existing common law rights by being cared for by that obstetrician because he is a participating member of NICA, if he delivers her baby with neurological injuries as a result of his negligence, she can be told post-delivery for the first time that she has been deprived of the right to retain and pursue her common law rights in the court system by having been treated by that obstetrician. Under Defendants' asserted construction of the statute, an obstetrical patient is denied procedural due process, i.e., she is denied, without notice or consent, the opportunity to retain and pursue her available common law remedy in a court of law instead of being relegated to the alternative no-fault NICA administrative remedy.

In contrast, the effect of the Fourth District's ruling that pre-delivery notice is a condition precedent to an obstetrician having NICA immunity is as follows: When an obstetrical patient goes to an obstetrician for care and treatment during her pregnancy and for delivery of her baby, she retains the right to pursue her common law rights against him for birth-related injuries in a court of law unless she is given pre-delivery notice that he is a NICA Plan member, and she nonetheless chooses the care and treatment of that obstetrician. Any other result constitutes a denial of the obstetrical patients' due process.

Construing the NICA statute to require notice as a precondition to application of the statutory immunity provided therein is consistent with the construction of other statutory notice requirements in other contexts, see LEVINE v. DADE COUNTY SCHOOL BOARD, 442 So.2d 210 (Fla. 1983) (plaintiff's notice to governmental entity is condition precedent in sovereign immunity case); HOSPITAL CORPORATION OF AMERICA v. LINDBERG, 511 So.2d 446 (Fla. 1990) (plaintiff's notice of intent to initiate litigation is condition precedent to medical malpractice suit); OSTEEN v. MORRIS, 481 So.2d 1287 (Fla. 5th DCA 1986) (delivering written repair estimate is condition precedent to mechanic's right to be paid for completed repairs). Such notice requirements have been applied to potential defendants as well as potential plaintiffs, see, BILL ADER, INC. v. MAULE INDUSTRIES, INC., 230 So.2d 182 (Fla. 4th DCA 1969) (property owner must file "notice of commencement" in order to protect himself against claims of subcontractors who have not been paid by general contractor, who has received full payment from the owner" ; see also, CLIMATROL CORPORATION v.

KENT, 370 So.2d 394 (Fla. 3d DCA 1979), cert. dismissed, 383 So.2d 1197 (Fla. 1980).

In conclusion, the language of the NICA statute, the legislative history, basic fairness, and constitutional requirements compel the conclusion that Mrs. Braniff was statutorily entitled to be informed of the alternatives available to her in the event of injury to her baby. She cannot be deprived of her common law rights without having had the opportunity to participate in that election of remedies. Accordingly, the Fourth District correctly construed the NICA statute as requiring pre-delivery notice as a condition precedent to Defendants being entitled to the immunity provided by the statute. Any other construction would violate obstetrical patients' constitutional right to due process.

**Defendants' Arguments**:

Defendants argue that if the Legislature intended NICA's notice provision to be a condition precedent, it would have expressly used that terminology or other similar language in the statute. However, the notice provision of one of the very statutes Defendants cite for this proposition, Fla. Stat. $768.28. was held to be a condition precedent even though the statute did not expressly so provide. When the sovereign immunity statute was enacted in 1975, it did not expressly require notice as an exception to the statute, nor did it provide that notice was a condition precedent. Section 768.28 Fla. Stat. (1975). Notwithstanding, the Florida Supreme Court judicially declared the

statute's notice requirement to be a "condition precedent" to suit, COMMERCIAL CARRIER CORP. v. INDIAN RIVER COUNTY, 371 So.2d 1010 (Fla. 1979).[2]

Defendants claim that the Legislature enacted NICA to establish a no-fault system of compensation similar to the worker's compensation statute. They seek to analogize NICA to the Workers' Compensation Act and argue that the notice provisions in that Act are not construed as being conditions precedent to application of immunity, and therefore NICA's notice provision should not be so construed. However, NICA is an alternative remedy, not a mandatory statutory scheme as is the Workers' Compensation Act. Furthermore, the Workers' Compensation Act presumes notice, which is justified by its mandatory application. Since NICA is elective, on the part of the physician, the notice requirement takes on a vital importance as a matter of fairness and due process. The Defendants' argument overlooks certain statutory provisions in the Workers' Compensation Act which render it unique and distinguishable from NICA.

Defendants cite HUGHES v. B.F. GOODRICH CO., 11 So.2d 313 (Fla. 1943), for the proposition that statutory notice under the Workers' Compensation Act is not a condition precedent to its exclusive remedy provisions. That argument ignores the fact that under the predecessor statutory scheme in effect when HUGHES was decided, the Workers' Compensation Act provided as follows (quoted in HUGHES, 11 So.2d at 314):

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[2]/Thereafter, in 1983, the legislature amended the statute to expressly make notice a "condition precedent. "

> Section 3. From and after the taking effect of this Act, every employer and every employee, unless otherwise specifically provided, shall be presumed to have accepted the provisions of this Act, respectively to pay and accept compensation for injury or death, arising out of and in the course of employment, and shall be bound thereby, unless he shall have given prior to the injury, notice to the contrary as provided in Section 5.

No such presumption exists in NICA, and as indicated by the legislative history, it is intended to be a no-fault alternative, not a mandatory system.

Defendants cite ALLEN v. ESTATE OF CARMAN, 281 So.2d 317 (Fla. 1973), for the proposition that notice of the election by the employer to be covered by the Workers' Compensation Act is not a condition precedent to application of the Act to its employees. This ignores the context of this Court's decision, and the limited basis on which it ruled. This Court specifically noted that the employee's non-acceptance of the Workers' Compensation remedy was not an issue (281 So.2d at 321, n.2):

> Until September 1, 1970, the Florida Workmen's Compensation Act was an elective remedy. Pursuant to Fla. Stat. $440.03, F.S.A., which was repealed by Chapter 70-148, Laws of Florida, both employers and employees were empowered to waive coverage under the Act. For that reason, Fla. Stat. 9440.04 and 440.05 F.S.A., then in force included provisions relative to nonacceptance of the Act (440.04[1]) and notice of nonacceptance (440.05 [2]). However, nonacceptance bv the employee is not an issue on this appeal. We note, moreover, that Fla. Stat. 6440.03, F. S .A., presumed acceptance of the provisions of the Act by both employer and employee; therefore, the employee was required to affirmatively indicate his desire for exemption, which he failed to do in this instance. Accordingly, we limit our discussion to the employer's waiver of exemption

> resulting from the purchase of a workmen's compensation insurance policy.

There are no comparable provisions in NICA for a presumption of notice, nor would such a presumption be reasonable since the Act's application is contingent on the physician's election to participate.

The fact that notice is not required under the Workers' Compensation Act does not constitute a due process violation, nor does it impose any unfairness, because Fla. Stat. $440.03 states, "every employer and employee as defined in $440.02 shall be bound by the provisions of this Chapter." Fla. Stat. §440.02(13)(a) defines "employee" as "any person engaged in any employment under any employment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors." Thus, obviously, the Workers' Compensation Act is designed to apply to all employees, regardless of their situation, and the Act itself is intended to constitute notice of its application.

NICA differs because it does not contain comparable provisions making it applicable to all obstetricians. Unlike the Workers' Compensation Act, obstetricians have to opt in, not out, of NICA. Worker's compensation applies to all employers and employees (with few exceptions), and only a very limited category of entities have the right to opt out. However, as noted by the Florida Supreme Court in COY v. FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, supra, only 535 obstetricians in the state had elected to join the plan in Florida in 1989.

Accordingly, there is no need for notice under the Workers' Compensation Act which is mandatory. But since NICA provides an optional plan which the physicians can elect to participate in, and an alternative remedy, which obstetrical patients can choose in lieu of their common law rights, such notice is necessary.

Defendants cite BIRTH-RELATED NEUROLOGICAL INJURY COMP. v. CARRERAS, 633 So.2d 1103, 1107 (Fla. 3d DCA 1994), as a case stating that NICA is comparable to the Workers' Compensation Act. However, there was no issue of notice in that case; the sole issue was an award of attorney's fees. Thus, that case is not relevant to the issues before this Court.

## CONCLUSION

For the reasons stated above, the Fourth District Court of Appeal's decision should be approved, and the certified question should be answered in the affirmative.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to DAVID F. COONEY, ESQ., P.O. Box 14546, Ft. Lauderdale, FL 33302; LINDA R. SPAULDING, ESQ., P.O. Box 14723, Ft. Lauderdale, FL 33302; and JENNIFER S. CARROLL, ESQ., 1545 Centrepark Dr. N., West Palm Beach, FL 33401-7414, by mail, this 16th day of May, 1996.

WILLIAM deFOREST THOMPSON, P.A.
888 S.E. Third Ave., Ste. 300
Ft. Lauderdale, FL 33316
and
CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
Suite 3A/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(561) 686-8010
Attorneys for Respondents

By: _____
PHILIP M. BURLINGTON
Florida Bar No. 285862

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