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' REPLY 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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## REBUTTAL ARGUMENT

**SECTION 766.316, FLORIDA STATUTES, DOES NOT REQUIRE PRE-DELIVERY NOTICE AS A CONDITION PRECEDENT TO APPLICATION OF THE EXCLUSIVE REMEDY PROVISION OF NICA.**

Nowhere in Section 766.316 is there any language stating either (1) that the notice must be given before delivery, or (2) that pre-delivery notice is a condition precedent for a defendant health care provider to invoke the exclusive remedy provisions of NICA. Moreover, nowhere in any of NICA's provisions is there any indication that pre-delivery notice is a condition precedent. The terms "pre-delivery," "pre-birth," and "condition precedent" are not contained in any NICA section.

The logical purpose of the notice provision in Section 766.316 is to inform the patient of her remedy under the legislatively created compensation system, i.e., to advise the patient that she has a remedy to recover for the injury to her child without regard to a showing of fault, when no such remedy was previously available under the common law. For the court to read more into the statute and to conclude that the statute requires pre-delivery notice as a condition precedent to application of the exclusive remedy provisions of the statute would amount to judicial legislation in an area in which the legislature has already acted.

The purpose of the notice provision is not to provide the patient a basis on which to choose a NICA or non-NICA physician for the delivery of her baby. First, the word "choice" or its equivalent is never mentioned in Section 766.316. The legislative intent of NICA is "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." § 766.301(2), Fla. Stat. (1993) (emphasis added). There is no indication of legislative intent or statutory language in the Act to provide for a mechanism of pre-delivery "choice" between a no-fault remedy and a quiescent civil action.

Second, the phrase "limited no-fault alternative" refers to an alternative exercised by the legislature when it created the NICA plan for no-fault compensation, similar to the workers' compensation no-fault alternative. To say that the phrase embodies a legislative requirement of pre-delivery notice as a condition precedent for applying NICA as a remedy is to ignore the plain language of the statute.

Third, injecting respondent's argument of choice of a NICA or non-NICA physician before delivery only convolutes the issue because it is not possible to make a truly informed choice before delivery. The primary factor that would affect this "choice" is whether medical negligence is implicated in the delivery of the child -- something that cannot be known until after delivery. Without negligence, the patient certainly would select a NICA physician for delivery because NICA allows no-fault recovery; with negligence, the patient may or may not select a non-NICA physician, depending on other factors that could affect the outcome of medical negligence litigation. But the fact remains that the existence of negligence cannot be known before delivery, hence making an "informed choice" of a NICA or non-NICA physician impossible. To

conclude, that the phrase "limited no-fault alternative" in Section 766.316 means that a patient must receive pre-delivery notice of her physician's participation in NICA so she can choose between delivery by a NICA or non-NICA physician implies that an informed choice on this question can be made, when, in fact, the information necessary for such a choice cannot be known before delivery.

NICA's notice provision is not limited to pre-delivery notice. The statute mentions notice so that obstetrical patients will be given a "clear and concise explanation of a patient's rights and limitations under the plan." § 766.316, Fla. Stat. (1993). Supplied with this notice, the patient then knows of the basic provisions of NICA and how to avail herself of her statutory benefits.

The notice provision in Section 766.316, Florida Statutes (1992), relied upon by Mills, does not suggest in any way that the notice provision was intended to create a condition precedent to the availability of the exclusivity of remedy as provided under the NICA statute. Despite all of the unrelated statutory provisions and cases relied upon by Mills, no language to that effect can be found anywhere within the NICA statute.

Mills attempts to create a judicial rule requiring notice to be a condition precedent by citing cases involving Section 768.28, Florida Statutes. However, this provision specifically states that notice is a condition precedent under Section 768.28(6)(b), Florida

Statutes.[1] Mills' reliance upon Section 766.106, Florida Statutes (1991), and the cases concerning this provision is similarly misplaced.

In support of her position, Mills attempts to draw an analogy between the notice requirement of the Plan and the notice requirements contained in other, unrelated Florida statutes and cases. The law relied upon by Mills is inapposite to the present issue. In the cases relied upon by Mills, the appellate court was called upon to interpret statutory provisions which explicitly required some form of notice as a condition precedent to filing suit. In Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983), the court construed Section 768.28(6), Florida Statutes (1977), which provided, in pertinent part:

> An action shall not be instituted on a claim against the state or one of its agencies or subdivisions, unless the claimant presents the claim in writing to the appropriate agency, and also, except as to any claim against a municipality, presents such claim in writing to the Department of Insurance. . . .

Id. at 212. Holding that notice to the Department of Insurance is a condition precedent to bringing an action, the court wrote that

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[1] **768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions.--**

* * *

(b) For purposes of this section, the requirements of notice to the agency and denial of the claim pursuant to paragraph (a) are conditions precedent to maintaining an action but shall not be deemed to be elements of the cause of action and shall not affect the date on which the cause of action accrues.

it was not authorized to ignore the plain language of the statute which clearly required written notice to the Department before suit could be filed. Id. No similar provision exists under the Plan, and the holding in Levine thus bears no relevance to the case at bar.

Similarly, Section 768.57[2], Florida Statutes (1985), at issue in Hospital Corporation of America v. Lindberg, 571 So.2d 446 (Fla. 1990), states that:

> Prior to filing a claim for medical malpractice, a claimant shall serve upon each prospective defendant . . . a notice of intent to initiate litigation for medical malpractice. . . . No suit may be filed for a period of ninety (90) days after notice is served upon the prospective defendant.

Id. at 447. According to the court, the requirement that claimants give notice to potential defendants as a condition precedent to suit is analogous to the presuit notice which must be served when an agency is sued, as required by Section 768.28(6), Florida Statutes (1989). Id. at 448.

Mills' reliance on Osteen v. Morris, 481 So.2d 1287 (Fla. 5th DCA 1986), construing Sections 559.905, et. seq. of the Florida Motor Vehicle Repair Act, is also misplaced. Section 559.905 is not simply a notice requirement appended to a statutory scheme; rather, it is the raison d'être for the Act. It sets forth requirements for written motor vehicle repair estimates and disclosure statements, the violation of which gives rise to an independent cause of action pursuant to Section 559.923(1) (any

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[2]Subsequently renumbered as § 766.106, Fla. Stat. (1991).

customer injured by a violation of Sections 559.901-559.923 may bring an action in the appropriate court for relief). The Osteen court did not directly consider whether compliance with the notice requirements found at Section 559.905 was a condition precedent to bringing suit, but held that because the repair shop violated the statute, the customer was not indebted to the shop beyond the statutory limit of $50.00. Id. at 1289. Unlike the notice provision of the NICA Plan, the written estimate and disclosure requirements of the Motor Vehicle Repair Act created specific substantive rights and remedies for customers who were injured by violations of the Act.

Mills' analogy to the Notice of Commencement required under the Mechanics' Lien Law is similarly inapt. While a property owner's failure to file a notice of commencement may indeed subject the property to double financial liability for improvements made to his property, it does not invalidate every other provision of the Mechanics' Lien Law. Indeed, in Bill Ader, Inc. v. Maule Industries, Inc., 230 So.2d 182 (Fla. 4th DCA 1969), cited by respondents, the issue was not the property owner's failure to file a notice of commencement, but improper payments by the property owner to the general contractor. Id. at 183. As noted by the court, compliance with the notice of commencement simply limits the aggregate of liens against an owner's property, for improvements made to the property, to the amount of the contract price less monies properly paid. Id. at 183. The Mechanics' Lien Law further differs from the notice requirement of the NICA Plan in that the

lien law specifically recites the liability which a homeowner may incur by failing to comply with the notice requirements contained therein. See e.g. § 713.135, Fla. Stat. (1991) (failure to comply with Mechanics' Lien Law can result in property owner paying twice for building improvements).

None of the statutory provisions cited by Appellants or the cases construing them are analogous to the notice requirement of Section 766.316 under the Plan, and do not support Appellants' position that notice is a condition precedent to the exclusive remedy provisions of the Plan.

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, St. Petersburg Bank & Trust Company v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982), since the legislature is assumed to have expressed its intent through the words found in a statute. 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 legislature 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 Section 766.301, Fla. Stat. (1991):

> [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. . . . It is the intent of the Legislature to provide compensation, on a no-fault basis, for a limited clan of catastrophic injuries that result in unreasonably high costs for custodial care and rehabilitation.

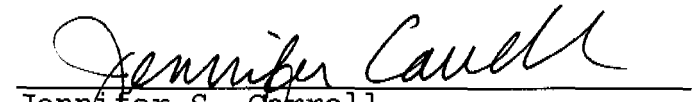
The legislature's intent is thus effectuated by the establishment of a no-fault compensation plan for the families of neurologically injured infants, and the presumably correlative diminution of malpractice insurance premiums for obstetricians. Notification to a patient of a physician's participation in the Plan 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.

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.

## 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 25th day of June, 1996.

Jennifer S. Carroll