IN THE SUPREME COURT OF FLORIDA
(Consolidated Cases)

UNIVERSITY MEDICAL CENTER, INC., etc., et al.,
Petitioners,

vs. CASE NO. 89,986

DEVIN ATHEY, etc., et al.,
Respondents.

THE BOARD OF REGENTS OF THE STATE OF FLORIDA, et al.,
Petitioners,

vs. CASE NO. 89,991

DEVIN ATHEY, etc., et al.,
Respondents.

ON DISCRETIONARY REVIEW OF A CERTIFIED QUESTION
FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

BRIEF OF RESPONDENTS ATHEY ON THE MERITS

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I.
STATEMENT OF THE CASE AND FACTS

This brief is submitted on behalf of the respondents, Devin Athey, a minor, by and through his natural parents and guardians, Karen Athey Simcic (f/k/a Karen D. Athey) and David Athey, and Karen Athey Simcic and David Athey, individually (hereinafter simply Athey). Because the facts underlying the Broaden and Athey incidents are somewhat different, the Broaden respondents will submit a separate brief. The briefs have been coordinated in advance to avoid duplication, however, and the bulk of the respondents' arguments will appear in this brief.

To the extent that it provides a general overview of the case, we have no quarrel with the petitioners' statements of the case and facts. (We note, however, that the district court's decision provides its own adequate statement of the case and facts, as well as a thorough and thoughtful explanation of its conclusions). Unfortunately, the petitioners have erroneously suggested that the three physicians involved were all "residents" at the relevant times, so it is necessary to straighten out the facts in that regard. **We** consider the following undisputed facts to be **the** salient facts underlying the issues before the Court in the Athey case:

(1) Effective January **23, 1989,** the petitioner, Robert J. Thompson, M.D., an employee of the Board of Regents, became a participating member of the "Florida Birth-Related Neurological Injury Compensation Plan" (hereinafter simply **NICA** or the Plan) (R. 505; SA. **24);**

(2) Devin Athey was born at the University Medical Center on June 4, **1989** (R. **459-63);**

(3) Dr. Thompson was the attending obstetrician **(SA. 26,** 30, 34, **37;** medical records in "Large Black Notebook");

(4) The petitioners, Matthew Johnston, **M.D.** and Kevin Cooper, M.D., also

employees of the Board of Regents, were resident physicians at the time, under the supervision of Dr. Thompson, and therefore deemed participating members of the Plan pursuant to §766.314(4)(c) (R. **505; SA. 20,** 30, 34, 37; medical records in "Large Black Notebook");

(5) At no time while she was an obstetrical patient of the petitioners was Mrs. Athey provided with the "Notice to obstetrical patients of participation in the plan" required by §766.316, Fla. Stat. **(1988** Supp.) (R. **251-62, 459-63).**

The record also contains an exhibit identified in the index to the record as a "Large Black Notebook." The exhibit contains copies of Mrs. Athey's hospital records, as well as copies of a contract between the petitioner-hospital and the Department of Health and Rehabilitative Services. These documents reflect that, between October 1, **1987** and March 31, **1989,** the hospital was the contractual provider of all maternity services to the Duval County Public Health Unit. This contract was apparently not renewed after April, **1989,** so we accept the petitioners' contention that the clinic was operated by HRS between April 1, **1989** and the date of Devin's delivery. Nevertheless, there was a rather direct relationship between the two because, as the petitioners have noted, the only hospital in town accepting Medicare patients from the clinic was the petitioner hospital -- and Mrs. Athey was informed on her several visits to the clinic that her baby would be delivered there (Deposition of Karen Simcic, pp. **14-16).**

Although the bulk of Mrs. Athey's pre-natal care was therefore apparently received at the Public Health Unit, Mrs. Athey's ***hospital*** records, which are on the hospital's pre-printed forms, reflect that her initial pre-natal visit to the ***hospital*** was on May **2, 1989** -- more than a month before Devin's delivery. Ultrasound testing was ordered on that date, and the ***hospital*** conducted the testing on May **16.** Mrs. Athey's hospital records for the June 3 admission reflect the "previous admission date" of May 16, and they

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contain a "Resume" (written by Dr. Thompson) which states the following: "The patient had been through prenatal care at the University Hospital of Jacksonville and had had no significant complications." These facts plainly demonstrate that the hospital was on notice for at least a month that Mrs. Athey's baby would be delivered there, yet the notice required by 8766.316 was never provided.

Mrs. Athey's hospital records also reflect that she was triaged in the hospital's emergency room at 9:30 p.m. on June 3; that she was admitted to the hospital shortly thereafter; and that her baby was not delivered until 3:14 a.m. on June 4 -- nearly six hours later. The records also reflect that, on June 3, Mrs. Athey signed two medical consent forms: a written consent for "Obstetrical Delivery: To Deliver My Baby Vaginally or by Cesarean Section with Anesthesia as Necessary," and a written consent for "Circumcision of the Penis." The consent forms (which do not fill in the blank requiring identification of the attending obstetrician) were countersigned by Dr. Cooper. Although the time these consents were executed is not shown, they must have been executed, at the very minimum, at least three and one-quarter hours before the delivery of Mrs. Athey's brain-damaged baby, given the date on the forms, yet the notice required by §766.316 was never provided.

11.
ISSUES ON DISCRETIONARY REVIEW

Although the district court's decision is before the Court on a single certified question, the petitioners have presented five separate issues for review. We restate the principal issue presented by the certified question (which has been argued by both sets of petitioners as Issue I) as follows:

> A. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT PRE-DELIVERY COMPLIANCE WITH THE NOTICE REQUIREMENT OF §766.316, FLA. STAT. (1988 SUPP.), WAS A CONDITION PRECEDENT

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TO THE IMMUNITY OF THE PETITIONERS OTHERWISE PROVIDED BY PARTICIPATION IN THE NICA PLAN.

The district court's decision disposes of a second issue (which has also been argued by both sets of petitioners -- by the BOR as Issue 11, by the hospital as Issue III B). We restate that issue as follows:

B. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT HEALTH CARE PROVIDERS WHO HAVE A REASONABLE OPPORTUNITY TO GIVE NOTICE AND FAIL TO DO SO CANNOT CLAIM NICA EXCLUSIVITY ON THE ALTERNATIVE GROUND THAT THEIR NON-COMPLIANCE WITH THE NOTICE REQUIREMENT DID NOT PROXIMATELY CAUSE ANY DAMAGE TO THE PATIENT.

The hospital has presented three additional issues for review. We restate its Issue II A as follows:

C. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT BOTH THE PARTICIPATING PHYSICIAN AND THE HOSPITAL MUST GIVE THE REQUIRED NOTICE.

The hospital's next issue was neither considered nor resolved by the district court because it was raised for the first time in the proceeding in the hospital's post-decision motion for rehearing, yet the hospital has resurrected it here. We restate its Issue II B as follows:

D. WHETHER A COMMON LAW MALPRACTICE ACTION WILL LIE AGAINST THE HOSPITAL IF IT IS DETERMINED ON REMAND THAT THE PARTICIPATING PHYSICIAN DID NOT HAVE A REASONABLE OPPORTUNITY TO GIVE THE REQUIRED NOTICE.

The hospital's final issue was not argued below and was therefore not addressed by the district court. We restate its Issue III A as follows:

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E. WHETHER A "MEDICAL EMERGENCY" EXISTED WHICH PREVENTED THE HOSPITAL FROM GIVING THE REQUIRED NOTICE.

III.
SUMMARY OF THE ARGUMENT

The principal issue before the Court, the certified question addressed in Issue A, has already been decided adversely to the petitioners by this Court. In its discretion, the Court need not reach the remaining issues. According to a number of decisions of this Court, the petitioners' position on Issue B is without merit. The hospital's position on Issue C is contrary to the plain and unambiguous language of §766.316, and therefore plainly without merit. And Issues D and E were neither considered nor resolved by the district court, so they are not properly before the Court. The district court's decision should be approved -- or alternatively, because the certified question has already been answered and the Court has "postponed jurisdiction" in these cases, review can simply be denied.

IV.
ARGUMENT

A. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT PRE-DELIVERY COMPLIANCE WITH THE NOTICE REQUIREMENT OF §766.316, FLA. STAT, (1988 SUPP.), WAS A CONDITION PRECEDENT TO THE IMMUNITY OF THE PETITIONERS OTHERWISE PROVIDED BY PARTICIPATION IN THE NICA PLAN.

The certified question which the Court has "postponed jurisdiction" to answer in these consolidated cases is identical to the question which the same district court certified to it in ***Braniff v.*** Galen ***of Florida, Inc.,*** 669 So.2d 1051 (Fla. 1st DCA 1995), ***approved,*** 22 Fla. L. Weekly S227 (Fla. May 1, 1997). In ***Galen of Florida, Inc. v. Braniff***, 22 Fla. L. Weekly S227 (Fla. May 1, 1997), this Court approved the district court's decision

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and answered the question adversely to the petitioners' position here. ***Accord Domond v. Mills*, 22** Fla. L. Weekly **S239** (Fla. May **1, 1997).** Most respectfully, this Court's recent answer to the certified question requires that the district court's disposition of the identical issue presented in this case be approved as well, or that review simply be denied.

Because the likelihood that the Court will change its mind in the near future seems very remote, we will not trouble it with detailed responses to the numerous arguments advanced **by** the petitioners -- all **of** which are fairly disposed **of** in the Court's opinion in ***Braniff***. If a detailed response is desired, the Court will find all the arguments we would have made here in the "Brief of Amici Curiae, Athey and Sierra, in Support of Position of Respondents" which undersigned counsel filed on behalf **of** the respondents Athey in the *Braniff* case -- and we hereby adopt those arguments by reference here. We respectfully submit that *Braniff* is controlling; that the certified question presented here has already been answered; and that, because **of** the answer provided in *Braniff*, the petitioners' first issue is without merit.

B. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT HEALTH CARE PROVIDERS WHO HAVE A REASONABLE OPPORTUNITY TO GIVE NOTICE AND **FAIL TO DO SO CANNOT CLAIM NICA EXCLUSIVITY ON THE ALTERNATIVE GROUND THAT THEIR NON-COMPLIANCE WITH THE NOTICE REQUIREMENT DID NOT PROXIMATELY CAUSE ANY DAMAGE TO THE PATIENT.**

The district court's decision disposes of **a** second issue raised by the petitioners below. It holds that health care providers who have a reasonable opportunity to give notice and who fail to do so cannot claim NICA exclusivity on the alternative ground that their non-compliance with the notice requirement did not proximately cause any damage to the patient. The petitioners claim that this holding was erroneous -- that the district

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court should have construed the notice requirement to contain a "no harm -- no foul" exception. This aspect of the district court's decision was not certified for review, so this Court may, in its discretion, decline to consider the petitioners' challenge to it. In the event that the Court chooses to entertain the issue, we offer the following argument on the point.

As a predicate to the argument, we note that, on the undisputed facts in this case, no legitimate argument can be made that the hospital did not have a reasonable opportunity to advise Mrs. Athey that the physician who would deliver her baby would be a participant in the NICA Plan.[1/] As we noted in our restatement of the case and facts, the hospital had ***at least a month's notice*** that Mrs. Athey would deliver her baby at the hospital, utilizing an attending obstetrician and resident physicians to be provided to her by the hospital, Indeed, the petitioners cannot even arguably contend otherwise, since they have insisted here that Mrs. Athey could have delivered nowhere else. There is ***no*** reason why Mrs. Athey could not have been given the required notice at some point during that lengthy period of time, and the petitioners' contention to the contrary below was plainly without merit.

In addition, nearly six hours elapsed between Mrs. Athey's admission to the hospital and the delivery of her baby. This was ample time for the hospital (and Dr. Cooper) to have obtained at least two of the necessary "informed consents." There is ***no*** reason why the hospital could not also have obtained the third "informed consent" required by §766.316 at the same time. The petitioners plainly recognize this obvious point, and attempt to finesse it by arguing that Mrs. Athey's condition rendered it

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[1/] The District Court did not determine the issue of whether the remaining petitioners had a reasonable opportunity to provide the required notice, and left that issue open for determination on remand. We will therefore limit our discussion here to the hospital's obvious opportunity to give the required notice.

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medically undesirable to transfer her to another hospital.[2/] Whether Mrs. Athey could have been transferred to another hospital misconceives the issue, however. It was not necessary for **Mrs.** Athey to go to another ***hospital*** to avoid the draconian limitations of the **NICA** Plan. All that was necessary was that she obtain an attending obstetrician who was not a participant in the Plan -- because, as is clear from the statutory scheme, **NICA** immunity derives solely from the status of the attending obstetrician, and no one else. Surely, even if the Court chooses to ignore the fact that at least **a** month existed in which such an arrangement could have been made, at minimum Mrs. Athey should have been given that option in the nearly six hours which remained to her after she checked into the hospital,

Fairly read, of course, the petitioners' argument does not really deny that one month, or even six hours, provided a "reasonable opportunity' in which to provide the required notice. The ***opportunity*** to give the required notice plainly existed on the facts in this case as a matter of law. What the petitioners are really arguing is that, notwithstanding that the ***opportunity*** plainly existed, their failure to provide the required notice did "not deprive . . . [Mrs. Athey] of any right **or** privilege" to which (because of her Medicaid status) she had any realistic claim, so their non-compliance with **$766.316** should be excused (BOR's brief, p. **26).** This type of "no harm-no foul" argument is frequently made by persons **who** have run afoul of notice requirements contained in the statutory law, **of** course, but it is routinely rejected by the courts of this

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[2/] The petitioners also argue that no other hospital would have taken her in any event because of her "Medicaid **status,"** and that she therefore had no "right to choose" worthy of protection by **$766.316.** We choose not to dignify this argument by discussing it in the text. In effect, what the petitioners have argued is that charity patients should be treated differently than well-to-do patients where the notice required by **§766.316** is concerned. We are confident that this Court is not prepared to write an opinion construing **$766.316** to include such an outrageous distinction, ***so*** we will devote no more than this footnote to the petitioners' argument.

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state.

In ***Levine v. Dude County School Board, 442*** So.2d 2 10 (Fla. 1983), for example, the plaintiff gave the notice required by §768.28(6), Fla. Stat. (1977), to the governmental entity which he later sued, but his action was dismissed because he had failed to provide the additional notice to the Department of Insurance required by the statute, This Court held that the action was properly dismissed, notwithstanding that the Department of Insurance had no financial interest in the case and no role in its defense, and notwithstanding that no prejudice resulted to anyone from the omission, In rejecting the plaintiff's argument that a notice requirement should not be enforced where the failure to comply with it causes no harm, this Court explained:

> Such speculation, however, does not authorize us to ignore the plain language of the statute. Section 768.28(6) clearly requires written notice to the department within three years of the accrual of the claim before suit may be filed against any state agency or subdivision except a municipality. Because this subsection is part of the statutory waiver of sovereign immunity, it must be strictly construed. [Citations omitted], In the face of such a clear legislative requirement, it would be inappropriate for this Court to give relief to the petitioner based on his or our own beliefs about the intended function of the Department of Insurance in the defense of suits against school districts. Our views about the wisdom or propriety of the notice requirement are irrelevant because the requirement is so clearly set forth in the statute. [Citations omitted]. Consideration of the efficacy of or need for the notice requirement is a matter wholly within the legislative domain.

442 So.2d at 212-13. For similar authority, ***see Menendez v. North Broward Hospital District,*** 537 So.2d 89 (Fla. 1988); ***Arrowsmith v. Broward*** County, 633 So.2d 21 (Fla. ***4th*** DCA 1993). ***Cf. Turner*** v. ***Gallagher,*** 640 So.2d 120 (Fla. 5th DCA 1994).

Like the notice requirement of §768.28(6), the "efficacy of or need for the notice requirement" of §766.3 16 is also "a matter wholly within the legislative domain, " and the

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statute is simply not subject to second-guessing or the creation of exceptions to it by the courts. This Court therefore cannot create an exception to it where non-compliance is not the proximate cause of any deprivation of legal rights, as the petitioners contend, Besides, Mrs. Athey had a "legal right" to the ***notice*** required by the statute, and the petitioners' failure to comply with the statute plainly deprived her of ***that*** "legal right, " whether she had a realistic claim to the option to be protected by that right or not. Most respectfully, whether the non-compliance was a "proximate cause" of some ***additional*** harm to Mrs. Athey is simply an irrelevant question here, according to ***Levine,*** and this aspect of the petitioners' argument is therefore plainly without merit.

If that point is not clear enough from ***Levine,*** the Court will find sufficient authority to nail it down in its more recent decision in ***Stresscon v. Madiedo, 58*** 1 So.2d 158 (Fla. 1991). In that case, Stresscon, a sub-subcontractor, provided Madiedo, an owner, with a timely and accurate notice, as required by §7 13 .16(2), Fla. Stat. (1987) -- but it failed to have the notice notarized, as the statute also required. In Stresscon's subsequent suit to foreclose its mechanic's lien, the owner obtained a summary judgment in his favor on the ground of non-compliance with the notice requirement. This Court approved this result, explaining as follows:

> This Court's decision in ***Home Electric [of Dade County, Inc.*** v. *Gonas*, 547 So.2d 109 (Fla. 1989),] is controlling in this case. In ***Home Electric,*** an electrical contractor filed a claim of lien against the homeowner for work completed. As specified by section 7 13.16(2), Florida Statutes (1985), the homeowner demanded a statement of account from the contractor. How-ever, the demand letter did not mention that a reply must be made within thirty days to preserve the lien, and the contractor failed to furnish the statement within the required time. Noting that mechanics' liens are purely statutory creatures, this Court held "'that the mechanics' lien law is to be strictly construed in every particular and strict compliance is an indispensable prerequisite for a person seeking affirmative relief under the statute. ' " [Citation

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> omitted]. Accordingly, the contractor's failure to strictly comply with section 7 13.16(2) resulted in the denial of an otherwise valid lien. In the instant case, Stresscon also failed to strictly comply with section 713.16(2), and its lien must be denied.
>
> The fact that no prejudice has been nor can be shown is not the determining factor in this case; nor is it significant that Stresscon substantially complied with the mechanics' lien law. The courts have permitted substantial compliance or adverse effect to be considered in determining the validity of a lien when there are specific statutory exceptions which permit their consideration. [Citations omitted]. In contrast, section 713.16(2) requires that the lienor's written statement of account be under oath. Furthermore, this section contains no language permitting either substantial compliance or lack of prejudice to be considered in determining the validity of lien.
>
> As this Court has stated before, mechanics' liens are "purely creatures of the statute." [Citation omitted]. Because the acquisition of a mechanics' lien is purely statutory, there must be strict compliance with the mechanics' lien law in order to acquire such a lien. . . . Section 713.16(2) requires the lienor to provide a written statement under oath. Stresscon's failure to notarize the statement of account must result in a denial of the mechanic's lien.

581 So.2d at 159-60.

Most respectfully, like the Mechanics' Lien Law, the NICA Plan is purely a creature of statute. Section 766.316 requires pre-delivery notice of participation in the Plan as a condition precedent to obtaining immunity under the Plan. The statute contains no exceptions for substantial compliance or for lack of prejudice -- and it most certainly places no burden on obstetrical patients to prove that a participating physician's and a hospital's undisputed failure to comply with the statute was a proximate cause of a deprivation of ***an additional*** legal right, as the petitioners contend. The positive command of the statute simply cannot be written off the books by writing into it the after-the-fact

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"excuse" clamored for by the appellants here, because the exception would all but swallow the rule. Most respectfully, the district court did not err in following **Levine and** in declining to read a "no harm -- no foul" exception into the statutory notice requirement -- and this issue, like the first, is without merit.

C. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT BOTH THE PARTICIPATING PHYSICIAN AND THE HOSPITAL MUST GIVE THE REQUIRED NOTICE.

The hospital next contends that the district court erred in concluding that both the participating physician and the hospital must give the required notice. According to the hospital, it ought to be sufficient if one notice is given -- and if one notice is given by anyone, then all should enjoy NICA immunity. Most respectfully, this issue is simply not presented by the facts in this case, because it is undisputed that no notice was given to Mrs. Athey by ***anyone*** involved in her treatment. And because this issue is not presented by the facts in this case, it should not be addressed by the Court.

In any event, it is simply impossible that the district court erred in concluding that both the participating physician and the hospital must give the required notice, It could not possibly have erred in reaching that conclusion because §766.3 16 explicitly requires that both the participating physician and the hospital give the notice:

> Each hospital with a participating physician on its staff ***and*** each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 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. . . . .

(Emphasis supplied).

In effect, the hospital has asked this Court to substitute the word "or" for the word "and" in this sentence -- to change it from the conjunctive to the disjunctive. It goes

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without saying, we think, that the Court simply does not have the authority to "relegislate" in that fashion, and that the word "and" in the statute must **be given its plain** and ordinary conjunctive meaning. See, e. g., ***Zuckerman*** v. Alter, 6 15 So **.2d** 66 1 (Fla. 1993). Clearly, both the participating physician and the hospital are required to give notice, because $766.316 says precisely that, and the district court plainly did not err in saying so.

That is the short and simple answer to the core of the hospital's argument. The hospital's argument goes further, however; it suggests that the word "and" must be read to mean "or," else g766.3 16 will be in conflict with the "exclusive remedy" provision of $766.303. Actually, this is an argument that compliance with the literal requirements of **§766.3** 16 should not be deemed a condition precedent to NICA immunity -- a point which the Court has already resolved against the petitioners in ***Braniff***. And to the extent that the argument means to suggest something slightly different -- that partial compliance with the notice requirement by one should afford NICA immunity to the other, else the notice requirement of $766.3 16 will conflict with the "exclusive remedy" provision of **§766.303** -- we disagree.

Both of these statutes -- indeed, all of the 15 statutes in the Act -- can be given effect without utilizing one to void another, as the hospital has attempted to do. Surely the hospital would not take the position that the "exclusive remedy" provided by 5766.303 is so plain and unambiguous that the remedy is exclusive, even where the attending obstetrician has not joined the Plan by paying the **$5,000.00** entry fee required by **§766.314(4)(c)**. Payment of this assessment is clearly a condition precedent to gaining the protection from **common** law liability provided by the Plan. Why should the notice requirement of **§766.3** 16 be treated any differently?

The dissenting justices in ***Braniff*** concluded that, if the legislature had intended

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compliance with §766.3 16 to be a "condition precedent" to NICA immunity, it would have expressly said so, and that the majority impermissibly inserted these two words (and others) into the statute. Although this position was rejected by the majority and therefore needs no additional debate, we should note that the words "condition precedent" do not appear in §§766.303 or 766.3 14(4)(c) either, yet it is undeniable that payment of the assessment is clearly a condition precedent to gaining the protection from common law liability provided by joining the Plan, Surely, the entire statutory scheme must be read as a harmonious whole, and each of its provisions given their common sense effect, so enforcing the consequences of non-compliance with §766.3 16 against a health care provider which has failed to comply with it, while providing immunity to one who has fulfilled its statutory obligation, does no violence to the "exclusive remedy" otherwise provided by participation in the Plan.

If the physician has paid his assessment and timely notice has been provided by both the physician and the hospital, as required, then NICA is the patient's "exclusive remedy. " If the physician has not joined the Plan, or has joined the Plan but has failed to provide the required notice of his participation in the Plan, then NICA is not the patient's "exclusive remedy" against the physician. If the physician has not joined the Plan, or the hospital has failed to provide the required notice of his participation in the Plan, then NICA is not the patient's "exclusive remedy" against the hospital. Most respectfully, §766.303 has nothing to do with the issue presented here. The issue is the meaning of 8766.316, and the consequences which follow from a failure to comply with its positive mandate -- and the fact that NICA becomes a patient's "exclusive remedy" if all conditions precedent to the physician's and the hospital's immunity have been complied with is simply beside the point. Quite apart from the fact that this issue is simply not presented by the facts in this case, it is also without merit.

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D. THE ISSUE OF WHETHER A COMMON LAW MALPRACTICE ACTION WILL LIE AGAINST THE HOSPITAL IF IT IS DETERMINED ON REMAND THAT THE PARTICIPATING PHYSICIAN DID NOT HAVE A REASONABLE OPPORTUNITY TO GIVE THE REQUIRED NOTICE IS NOT PROPERLY BEFORE THE COURT.

The hospital next contends that a comrnon law malpractice action should not lie against it if it is determined on remand that the participating physician did not have a reasonable opportunity to give the required notice. While the argument made immediately above ought to be dispositive of the merits of this position as well, we are constrained to note that this issue is not properly before the Court, for at least two reasons. First, the district court expressly declined to address it below:

> In their motions for rehearing, appellants argue that, if appellees are limited to pursuing NICA remedies as to any appellant, section 766.303(2), Florida Statutes (1989), bars appellees from pursuing a common law action against any other appellant for a birth-related neurological injury. This issue, however, was not argued below or in the main argument here. Accordingly, we decline to address this issue on rehearing. . . .

(Slip opinion, p. 12, n. 2). Most respectfully, because the decision under review neither addresses nor disposes of the issue, the issue cannot be raised and resolved here.

Second, the issue is, on the present record, entirely hypothetical, and may never arise in the litigation. If, on the remand ordered by the district court, the trial court should determine that Dr. Thompson had a reasonable opportunity to give the required notice -- a conclusion which we believe highly likely -- then the issue will be entirely moot.2' This Court sits to decide issues actually presented by the facts and properly

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3/ We consider such a conclusion probable because of the undisputed fact, reflected on the face of Mrs. Athey's hospital records, that the attending/participating physician, Dr. Thompson, delegated his legal obligation to obtain Mrs. Athey's "informed consents" to

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raised below. It does not sit to render advisory opinions on hypothetical issues neither presented by the facts nor properly raised below -- and we therefore respectfully submit that the Court should decline to entertain this issue. There will be time enough for the courts to resolve it after remand, *if* it ever becomes a justiciable issue on the as-yet undecided facts of this case.

E. THE ISSUE OF WHETHER A "MEDICAL EMERGENCY" EXISTED WHICH PREVENTED THE HOSPITAL FROM GIVING THE REQUIRED NOTICE IS NOT PROPERLY BEFORE THE COURT.

The hospital finally contends that the district court erred in not reversing the trial court's declaratory judgment against it, because the record presented a genuine issue of material fact as to whether a "medical emergency" existed whichprevented it from giving the required notice. Like the previous issue, this issue is not properly before the Court because it was neither raised nor addressed below -- points which are explicit on the face of the district court's decision: (1) "Appellants do not argue that a medical emergency prevented the giving of the notice in the instant case" (slip opinion, p. 9); (2) "This case does not present us with circumstances in which a reasonable opportunity for notice is not available to the provider due to an emergency . . . Thus, we do not address here whether a medical emergency existed for any of these patients or consider any of these

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a resident, Dr. Cooper; because Dr. Cooper countersigned the two "informed consents" which he bothered to obtain from Mrs. Athey; and because the district court concluded that, as a matter of law, those two documents demonstrated that the hospital had a reasonable opportunity to obtain the additional "informed consent" represented by the notice requirement of §766.3 16. Surely, Dr. Thompson cannot absolve himself of his statutory obligation simply by delegating it to a subordinate who failed to comply with it -- and if Dr. Cooper's failure to comply with §766.3 16 was sufficient to waive the hospital's NICA immunity as a matter of law, it should logically follow that his non-compliance was sufficient to waive Dr. Thompson's NICA immunity (and the derivative immunity of the residents under his supervision) as well.

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hypothetical situations" (slip opinion, p. 10, n. 1). As a result, for the reasons previously stated, the Court should decline to entertain this issue as well.

The hospital attempts to finesse these explicit statements by arguing that it ***did*** argue what the district court said it did not. The hospital raised this identical point in its motion for rehearing, and the district court rejected it, so the district court plainly meant what it said. Most respectfully, the hospital is in error; the district court's recitation of the petitioners' position on appeal was accurate in every respect.

In their second issue on appeal (initial brief, pp. 32-36; reply brief, pp. 14-15), the petitioners acknowledged that the trial court had held that pre-delivery notice was required "unless such notice is not reasonably possible, " and nowhere did they argue that notice was not possible in these cases. Neither did the petitioners argue that medical emergencies existed which ***prevented*** the giving of notice. While they did characterize the patients' conditions as medical emergencies of a sort, they did so for the sole purpose of contending that the patients could not have been transferred to other hospitals; and they argued that, because the patients were stuck where they were and really had no choice in the matter, there was no "reasonable opportunity" to give an ***efficacious*** notice, and that their failure to do so should therefore be excused -- a ***different*** argument which was explicitly addressed and resolved by the district court. Most respectfully, the petitioners' position on appeal was accurately summarized by the district court.

In any event, the hospital's contention that a factual question is presented as to whether a "medical emergency" existed which ***prevented*** giving the required notice is clearly insupportable. The hospital simply overlooks the undisputed facts, which demonstrate as a matter of law that the hospital was not ***prevented*** by any "medical emergency" from obtaining the "informed consent" represented by the notice requirement of §766.316:

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> The undisputed facts here support the trial court's conclusion that as a matter of law UMC had a reasonable opportunity to provide a NICA notice to the appellees. Weeks prior to these obstetrical patients presenting for delivery, UMC performed prenatal ultrasound procedures for these patients and had knowledge that these patients would deliver their babies at UMC. In addition, at the time these patients presented for delivery, UMC had the opportunity to obtain other written consents, but failed to provide the NICA notice. We, therefore, affirm the ruling of the trial court as to UMC.

(Slip opinion, p. 11).

Most respectfully, the hospital may well have an argument on the facts that the manner in which Mrs. Athey presented to its emergency room gave it no "reasonable opportunity" to give her an *efficacious* notice (a point upon which it did not prevail below, and which is separately addressed in Issue B), but it plainly has no argument that a "medical emergency" existed which *prevented* it from obtaining the "informed consent" represented by the notice requirement of §766.3 16. This issue is not properly before the Court, and it is plainly without merit.

v.
CONCLUSION

It is respectfully submitted that the certified question should be answered as it was answered in ***Galen of Florida, Inc. v. Braniff***, 22 Fla. L. Weekly S227 (Fla. May 1, 1997), and that the district court's decision should be approved. Alternatively, because the Court has "postponed jurisdiction, " and because the certified question has already been answered in ***Braniff***, review could simply be denied.

VI.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 20th day of May, 1997, to: Stephen E. Day, Esq., Taylor, Day, Currie & Burnett, 50 North

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Respectfully submitted,

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