017

IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

v.

DEVIN ATHEY, etc., et al.,

Respondents.

CASE NO. 89,986

District Court of Appeal,
First District
Case No. 95-00229

INITIAL BRIEF OF PETITIONER, UNIVERSITY MEDICAL CENTER, INC., ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

INTRODUCTION

Petitioner, University Medical Center, Inc., shall at times be referred to as "UMC."

The Board of Regents, State of Florida; Robert Thompson, M.D., an employee of the State of Florida; Matthew Johnson, M.D., an employee of the Board of Regents, State of Florida; and K. Cooper, M.D., an employee of the Board of Regents, State of Florida, will be referred to collectively as "BOR."

Claimants, Teresa Lynn Wilson, as Personal Representative of the Estate of Channyse Channelle Wilson, deceased, Teresa Lynn Wilson, individually, and Eric Jerome Broaden, shall at times be referred to collectively as "Broaden." Claimants, Devin Athey, a minor, by and through his guardians and natural parents, David Athey and Karen D, Athey a/k/a Karen D. Simcic, individually, shall at times be referred to as "Athey."

The term "Claimants" shall at times be used to refer collectively to all of the Claimants.

Citations to the Record on Appeal shall be designated: (R. volume: p.___). Citations to the Appendix shall be designated: (A _, p.___).

STATEMENT OF THE CASE AND FACTS

On October 16, 1991, the Petitioners, University Medical Center (UMC) and the Board of Regents (BOR), filed two separate complaints for declaratory and injunctive relief in Leon County Circuit Court against the Broaden (Case No. **91-4222)** and Athey (Case No. 91-4223) defendants. (R. I:1-14, III:505-589)[1]. The Complaint alleged that Broaden and Athey had served Notices of Intent to Initiate Litigation for Medical Malpractice, pursuant to the provisions of Section 766.106, Florida Statutes (1989), for birth-related neurological injuries. The Complaints sought declaratory relief determining that the Broaden and Athey birth-related neurological injury claims were exclusively within the province of the Florida Birth-Related Neurological Injury Compensation Plan (hereinafter "NICA"), Section 766.301, et seq., Florida Statutes **(1989).** Injunctive relief was sought prohibiting the filing of any malpractice action in circuit court based on those claims.

In response to the Complaints, both Athey and Broaden filed Answers raising the affirmative defense that the BOR and UMC failed to provide the NICA notice specified in Section 766.316, Florida Statutes (1989), and that such notice is a condition precedent to the exclusive-remedy provision of NICA. (R. I:21-24, I:53-57). Thereafter, Athey and Broaden filed Motions for Summary Judgment

[1]Additional party plaintiffs in the Broaden case are Matthew Johnston, M.D.; K. Cooper, M.D.; and Robert Thompson, M.D.; employees of the Board of Regents.

contending that they are not subject to the NICA exclusive-remedy provision on account of the BOR and UMC's failure to provide pre-delivery NICA notice. (R. II:210-250, II:265-324). The BOR and UMC also filed a Motion for Partial Summary Judgment seeking a determination that any alleged failure to provide NICA notice did not obviate NICAs exclusive-remedy provision. (R. II:332-334).

The salient facts in the Athey and Broaden claims are very similar. Both Karen Athey and Teresa Wilson (The Broaden claimant) received pre-natal care from registered nurses and nurse midwives at the Duval County Public Health Unit Clinic. (R. II:352-353). Both were Medicaid patients. (R. II:353). Both were instructed by the health department clinic to report to UMC at the onset of labor. (R. II:353). Both patients had complications during labor and delivered infants with birth-related neurological injuries as defined by Section 766.302(2), Florida Statutes (1989).

At the time the Trial Court considered the various summary judgment motions, the following undisputed facts were developed in the record through stipulation, request for admissions, and affidavits:

(1) Neither Athey nor Broaden were provided pre-delivery NICA notice. (R. III:459-463).

(2) Athey first presented at UMC at 10:30 p.m. on June 3, **1989.** She delivered her child at 3:14 a.m. on June 4, **1989.** Teresa Wilson (Broaden claimant) presented to UMC for the first time at 1:45 a.m. on May 20, **1989.** She gave birth to her child at 8:45 a.m. on May 21, **1989.** At the time that Athey and Wilson

presented to UMC, both had experienced spontaneous rupture of membranes. (R. II:352-381, II:384-400).

(3) From the time that both women first presented to UMC, it would have been medically unsafe, unacceptable and inappropriate to transfer either expectant mother to any other institution or facility for delivery. (A. 7, A. 8[2]).

(4) Both Ms. Athey and Ms. Wilson were Medicaid patients. (R. Simcic deposition, p.4, R. Wilson deposition, p. 18).

(5) There were no birthing centers, health care facilities or hospitals, other than UMC, providing obstetrical services in Duval County to Medicaid patients at the time that Ms. Athey and Ms. Wilson gave birth to their children. According to the affidavit of H. Wade Barnes, M.D., to the best of his knowledge and belief, no birthing center in Duval County, Florida, has ever treated Medicaid patients. (A. 9). James W. Walker, M.D., testified by affidavit that to the best of his knowledge and belief the only hospital located in Duval County, Florida, available to Ms. Wilson and Ms. Athey in 1989 was UMC. (A. 10).

(6) All of the resident physicians who have been named as potential Defendants in Claimants' Notice of Intent were obstetric residents employed by the Board of Regents of the State of Florida at the time that they rendered care and treatment to Athey and Broaden. (R. I:2, III:506).

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[2]The affidavits contained within the Appendix as A. 7 - A. 10 are contained within the Supplemental Record by Order of the First District Court of Appeal on August 1, 1995. (A. 11).

(7) **All of** the physicians who have been named as potential Defendants in Claimants' Notice of Intent were participating physicians under Section **766.314**(4)(c), Florida Statutes (1989). (R. I:2, III:506).

In entering a summary declaratory judgment in favor of Claimants, the Trial Court held that pre-delivery notice to the obstetric patient under Section **766,316** is a condition precedent to the application of NICA's exclusive remedy. The Trial Court held that the purpose of the Section **766.316** notice provision is to provide the obstetrical patient with the opportunity to evaluate her "legal rights" and to provide her with the opportunity to obtain the services of a non-participating physician if she so chooses, (R. IV:647) (A. 13, p. 5). The Trial Court held that notice should be given as soon as reasonably possible and is a condition precedent to NICA's exclusive remedy unless providing notice is not reasonably possible. (R. IV:652) (A. 13, p. 5). The Trial Court resolved this latter issue by determining that, as a matter of law, UMC had a reasonable opportunity to provide NICA notice to both Athey and Broaden after they presented to UMC and before the delivery of their infants. (R. IV:651) (A. 13, p. 6).

In its declaratory summary judgment, the Trial Court did not consider or determine whether any of the physicians employed by the BOR had a reasonable opportunity to provide NICA notice. The Trial Court's order did not consider the fact that the resident physicians employed by the BOR are exempt from the notice requirement. The Trial Court also did not address whether there

was any reasonable possibility that Athey or Broaden would have and could have elected to seek medical care from some other physician or hospital had they received pre-delivery notice.

The First District Court of Appeal affirmed the Trial Court's decision as to UMC, reversed the Trial Court's decision as to the BOR physicians and the BOR, and remanded the case to the Trial Court to make findings and conclusions related to the BOR physicians and the BOR. (A. 4, p. 11-12), The Appellate Court held that the purpose of Section 766.316 is to permit an informal choice between alternatives before delivery. The court held that "health care providers who have a reasonable opportunity to give notice and fail to give pre-delivery notice under Section 766.316 will lose their NICA exclusivity regardless of whether the circumstances precluded the patient making an effective choice of provider at the time the notice was provided." (A. 4, p. 10). The court upheld the Trial Court's ruling that UMC had a reasonable opportunity to give the Section 766.316 notice as a matter of law. The Appellate Court noted that the case "does not present us with circumstances in which a reasonable opportunity for notice is not available to the provider due to an emergency or similar situation," and therefore declined to address that issue. (A. 4, p. 10-11, fn. 1). The Appellate Court ruled that both the hospital (UMC) and the participating physicians must give the Section 766.316 notice. (A. 4, p. 7). The court held that residents, assistant residents and interns are exempt from the notice

requirement. (A. 4, p.7). As to the BOR, on remand the Trial Court was directed to address the following issues:

1. Whether the undisputed material facts support a conclusion that the attending physicians had a reasonable opportunity to provide NICA notice;

2. Whether, if no reasonable opportunity to provide NICA notice was available, the exclusive provisions of NICA apply to claims against the BOR physicians and BOR as their employer; and

3. Whether because of the resident physicians' exemption from the NICA notice requirements, the exclusive provisions of NICA apply as to the resident BOR physicians and the BOR, as their employer. (A. 4, p. 12).

The First District Court of Appeal certified the following question to the Florida Supreme Court:

> Whether Section 766.316, Florida Statutes (1993), requires that health care providers give their obstetrical patient 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.

(A. 4, p. 8).

UMC as well as BOR and NICA, all filed timely motions for rehearing, arguing that the court overlooked the effect of requiring notice by both the hospital and participating physicians for each to invoke NICA immunity and ignored the provisions of Section 766.316, Florida Statutes (1995) (A. 2). In addition, the motions for rehearing contend that in fact UMC did contend that an

emergency situation existed precluding a reasonable opportunity to give the NICA notice. (A. 2).

The First District Court of Appeal denied the motion 'for rehearing, rehearing en banc, clarification and certification. (A. 3). Instead, on January 31, 1997 the First District Court of Appeal issued a revised opinion which added a footnote stating that the argument that if Claimants are limited to pursuing NICA remedies as to any appellant, Section 766.303(2), Florida Statutes (1989), bars a common law action against any other appellant for birth-related neurological injuries was not argued below and, therefore, will not be addressed. (A.1, p.12-13, fn. 2). The decision was otherwise identical to the previously filed opinion. UMC timely filed its Notice to Invoke Jurisdiction on February 26, 1997. BOR also filed a Notice to Invoke Discretionary Jurisdiction, which appeal is also presently pending before this Court in Case No. 89,991.

SUMMARY OF THE ARGUMENT

The Appellate Court erred as a matter of law when it found that the notice provision of Florida Statute 766.316 is a condition precedent to the exclusive-remedy provision of Florida Statute 766.303. The Trial Court improperly grafted the notice provision onto the exclusive-remedy provision in the absence of any statutory language to support this interpretation. The purpose of NICA was to establish a no-fault alternative scheme for high cost birth-related neurological injuries to stabilize medical malpractice insurance premiums. Because of the similarities between NICA and the Worker's Compensation Act, the Trial Court should have relied on the analogous case law holding that the notice provision of the Worker's Compensation Act is not a condition precedent to its exclusive-remedy provisions. The purpose of the NICA notice requirement is to provide information to the patient concerning NICA rather than to give notice of a cause of action that has not yet arisen or to act as a pre-condition to the applicability of NICA.

Even if the notice requirement of Section 766.316 is a condition precedent to invoking the exclusivity of NICA, Section 766.303(2) dictated that once NICA is invoked by any defendant, -the only remedy against all other health care providers is NICA. The Appellate Court affirmed the Trial Court's decision that TJMC was subject to a common-law suit while remanding to the Trial Court the issue of whether BOR can invoke the NICA provisions. As a matter

of law, if the remedy against BOR for the actions of the participating physicians is NICA, the only remedy against UMC, the hospital at which the doctors delivered the infants, will also be NICA. To hold otherwise destroys the exclusivity of the NICA remedy, will lead to duplicative lawsuits and remedies, and will undercut the stabilization of malpractice insurance premiums.

Even if this court accepts the position of the Trial Court that pre-delivery NICA notice is a condition precedent to the exclusive NICA remedy when notice can be reasonably afforded, the Trial Court erred in granting summary judgment because there remain disputed issues of material fact: whether emergent situations prevented UMC from having reasonable opportunities to provide notice.

ARGUMENT

I. THE APPELLATE COURT ERRED AS A MATTER OF LAW WHEN IT HELD THAT THE NOTICE PROVISION OF FLORIDA STATUTE 766.316 WILL BE CONSTRUED AS REQUIRING NOTICE AS A CONDITION PRECEDENT TO THE APPLICABILITY OF THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ACT ("NICA").

The Claimants argued and the Appellate Court found that pre-delivery notice is a condition precedent to invoking the statutory provision providing for exclusiveness of NICA. Section 766.316, Florida Statutes (Supp. 1988) provides as follows:

> **Notice to obstetrical patients of participation in the** plan--Each hospital and each participating physician under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients thereof as to participation in 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.

NICA was amended by Chapter 89-186, Laws of Florida, for the purpose of clarifying the legislature's intent. The revised version of Section 766.316 states as follows:

> 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. 766.314(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 on forms furnished by the association and shall include **a** clear and concise explanation of **a** patient's rights and limitations under the Plan.

Section 766.316, Fla. Stat. (1989).

In the instant case, the First District Court of Appeal, following its previous decision in Braniff v. Galen of Florida,

Inc., 669 So. 2d 1051 (1st DCA 1995), rev. granted, 670 So. 2d 938 (Fla. 1996) held that Section 766.316 will be judicially construed to require the notice as a condition precedent to invoking the exclusivity of the NICA remedies. The Appellate Court's decision ignores both the plain language of Section 766.316 and the purpose behind the Florida Birth-Related Neurological Injury Compensation Act.

A. The statutory language of Section 766.316 does not dictate that the notice is a condition precedent to NICA applicability.

Neither the original language nor the clarifying language of Section 766.316 suggests in any way that the notice provision was intended to create a condition precedent to the exclusivity of the NICA remedy. There is simply no language to that effect anywhere within the Act. In light of the fact that the legislature has used "condition precedent" language in numerous other situations, the legislature obviously could have used this language in NICA had this been its intention. (See infra note 3, p. 21). The plain language of Section 766.316 does not establish the notice as a condition precedent to the invocation of NICA remedies.

Examination of the statutes referenced in note 1 establishes that the legislature knows how to make notice a condition precedent when it so chooses. It is equally clear that the legislature did not make pre-delivery notice a condition precedent in the NICA statute by choosing not to include any language making delivery of the NICA notice a condition precedent to the exclusive remedy provision of NICA. The use by the legislature of certain language

in one instance and wholly different language in another indicates that different results were intended. Department of Professional Regulation v. Durrani, 455 So. 2d 515 (Fla. 1st DCA 1984); Ocasio v. Bureau of Crimes Compensation, 408 So. 2d 751 (Fla. 3d DCA 1982). Had the legislature chosen to do so, it certainly could have made pre-delivery notice a condition precedent to the exclusive-remedy provision of NICA. The point is, however, that it chose not to do so.

When language of a statute is clear and unambiguous, a court should not resort to rules of statutory interpretation and construction, and the statute must be given its plain and obvious meaning. Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). While a court may construe or interpret a provision, a court is not allowed to graft onto the statute something that is not there. Public Health Trust of Dade County v. Lopez, 531 So. 2d 946, 949 (Fla. 1988). Courts are not permitted to attribute to the legislature an intent beyond that expressed, Board of County Commissioners of Monroe County v. Department of Community Affairs, 560 So. 2d 240, 242 (Fla. 3d DCA 1990); nor may a court speculate about what should have been intended. Public Health Trust, 531 so. 2d at 949; Tropical Coach Line, Inc. v. Carter, 121 So. 2d 779, 782 (Fla. 1960). Based on these principles, the Appellate Court erred as a matter of law in grafting onto the exclusive remedy provision the requirement that notice be given as a condition precedent.

B. **The purpose of NICA is to establish a no-fault system of compensation for a limited class of birth-related neurological injuries and, accordingly, the notice requirement should be construed in a manner consistent with the analogous worker's compensation law.**

On February 8, 1988, the Florida Legislature passed Chapter 88-1, **Laws** of Florida, dealing with comprehensive reforms of the tort system. The preamble to the legislation indicates, inter alia, that Florida was in **a** financial crisis in the medical liability insurance industry, and that the cost of medical liability insurance was excessive and injurious to the people of Florida and must be reduced. The preamble also noted that the legislature desired to provide a rational basis for measuring and determining damages and fairly compensating the interests of injured parties while balancing these damages and injuries against the interest of society as a whole, and determined that "...the magnitude of this compelling social problem demands immediate and dramatic legislative action...." Part of the program of legislative changes in Chapter 88-1, Laws of Florida, was the creation of the Florida Birth-Related Neurological Injury Compensation Association (NICA), Sections 60 through 75, now Sections 766.301 through Section 766.316, Florida Statutes (1995).

The Florida Birth-Related Neurological Injury Compensation Plan provides a no-fault compensation plan for a limited **class** of birth-related neurological injuries which result in extremely high costs for child care. Section 766.301(2), Florida Statutes (1995).

See Florida Birth-Related Neurological Injury Compensation Assoc. v. McKaughan, 662 So. 2d 974 (Fla. 1996). Because of these high costs, NICA was created to provide a schedule of compensation and benefits to patients suffering from birth-related neurological injuries irrespective of fault.

The stated legislative intent behind NICA is to help preserve the availability of obstetrics services to Floridians through "the stabilization or reduction of malpractice insurance premiums." See COY v. Florida Birth-Related Neurological Injury Compensation Act, 595 So. 2d 943, 947 (Fla. 1992), cert. denied sub. nom., McGibony v. Florida Birth-Related Neurological Compensation Plan, 506 U.S. 867 (1992). Accordingly, any interpretation of NICA should not be inconsistent with such a purpose.

The essential provisions of NICA are succinctly summarized in Florida Birth-Related Neurological Injury Compensation Association v. Carreras, 633 So. 2d 1103, 1105 (Fla. 3d DCA 1994):

> The NICA Program is a no-fault plan which provides benefits where there has been a birth-related neurological injury. In general, the plan applies where there has been an injury to the brain or spinal cord of an infant caused by oxygen deprivation or a mechanical injury during labor or delivery, which renders the infant permanently and substantially mentally and physically impaired [citation omitted].
>
> If the infant's injury satisfies the statutory definition, then the infant qualifies for financial benefits [citation omitted].
>
> The claimant need not establish any fault on the part of a health care provider [citation omitted].

As noted in Carreras, NICA is a no-fault plan comparable to worker's compensation. Id. at 1107. The Carreras court stated:

> It is reasonably clear that the legislature viewed NICA as a relatively simple no-fault process for the care of infants with very severe, very expensive permanent disabilities. [citation omitted]
>
> The process of qualifying an infant for an award does not require a showing of fault and should ordinarily be accomplished without adversary litigation. The compensatory awards will, however, routinely be **large,** especially in comparison with the time expended in the claim process.

Id. at 1109.

Reading NICA in its entirety, it becomes clear that the legislature desired to establish a no-fault system of compensation very similar to the worker's compensation statute. The statutory provision pertaining to NICA **as** an exclusive remedy is as follows:

> § 766.303 Florida Birth-Related Neurological Injury Compensation Plan; Exclusiveness 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 postdelivery resuscitation during which such injury occurs, arising out of or related to a medical malpractice claim with respect to such injury; except that a civil action shall not be foreclosed where there is clear and convincing evidence of bad faith or malicious purpose or wilful 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...

Section 766.303, Florida Statutes (1989) and (1995) . This statutory provision contains only one exception in which **NICA** would not be the exclusive remedy: cases in which there is bad faith, malicious purpose or wilful and wanton disregard of human rights, safety or property, none of which is at issue herein.

The Appellate Court failed to recognize that this NICA no-fault scheme is closely analogous to the workers' compensation statutory scheme, Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852 (Fla. 2d DCA 1995), approved and remanded, 668 So. 2d 974 (Fla. 1996). Although the Appellate Court in Humana did not address the Trial Court's finding that the notice provision of NICA was not a condition precedent to NICA's exclusive remedy provision, the court made reference to the numerous similar purposes and characteristics between NICA and the Worker's Compensation Act in analyzing the jurisdictional question. Id. at 857-858. The court pointed out that both the Worker's Compensation Act and NICA share the fundamental purpose of relieving society of the burden, of caring for an injured person and shift the burden of bearing the cost to the industry involved. Id. at 857. Both statutory schemes operate for the fundamental purpose of providing a no-fault remedial process which is administered in an expedited manner and provides for specifically defined and limited benefits. Id. Additionally, the court pointed out that both systems were designed to be administered so that benefits can be paid without a formal administrative hearing process and that both statutory schemes were intended to be a substitute for common law rights and liabilities. Id. at 858. The final observation made by the court was that the legislature acknowledged these close similarities between the Worker's Compensation Act and NICA by originally vesting the judge of compensation claims with authority to hear and determine NICA claims. See also Carreras, 633 So. 2d at 1107 ("We also note

that the no-fault NICA system is one comparable to the worker's compensation system.")

The similarities of these two statutory schemes and the obvious intent of the legislature to design the two systems to operate similarly is important in light of Allen v. Estate of Carman, 281 So. 2d 317 (Fla. 1973). In Allen, the Supreme Court of Florida was presented with the nearly identical issue; namely, whether an employer who had purchased worker's compensation coverage and elected to participate in the statutory scheme, but who failed to provide statutory notice, nevertheless enjoyed 'the defense of exclusivity of remedy as provided in the statute. Id. at 320.

In Allen, an employer with less than four employees, who was statutorily exempt from the Worker's Compensation Act, exercised his option to waive the exemption and purchase worker's compensation coverage. Id. at 318-319. Under the applicable provisions of the Worker's Compensation Act, the employer was entitled to waive his exemption by purchasing coverage but, if he did so, was required by statute to post a conspicuous work-place notice of his waiver of the exemption. Id. at 321-322. The employer, however, failed to post the required notice. Id. at 319. The issue before the court was whether the employer's failure to post the notice precluded him from asserting the exclusivity of worker's compensation as a defense to a wrongful death claim brought on behalf of a deceased employee. Id. at 320. 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 so that the critical act was the "purchase and acceptance of the policy, not the posting of notice." Id. at 322. In reaching this conclusion, the Supreme Court relied on its earlier holding in Hughes v. B.F. Goodrich Co., 11 So. 2d 313 (Fla. 1943), in which it held that compliance by the employer with the notice-posting requirements of the worker's compensation statute was not a prerequisite to the applicability of the provisions of the Act. Allen, 281 So. 2d at 322-323.

The importance of the holding in Allen to the case before this Court becomes clear when comparing the similarities of the court's analysis in Allen to the circumstances of the case before this Court. In both the worker's compensation provisions as applied in Allen and in NICA, the opportunity for voluntary participation exists and 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. In both the Worker's Compensation Act and in NICA, the election to participate is accomplished by incurring a financial detriment by paying insurance premiums under the Worker's Compensation Act and by contribution to the plan and, in some cases, the performance of state missions such as indigent care and medical education under NICA. In both the Worker's Compensation Act and NICA, in addition to exclusivity of remedy, the legislature included a separate and distinct portion of the Act concerning notice to affected individuals. In neither the Worker's Compensation Act nor NICA is there any statement within the statutory notice provision of any legislative intent that

notice constitutes a condition precedent to obtaining the benefits of the exclusivity of remedy provisions.

Due to the striking similarities between the two statutory systems, this Court should similarly find that the notice provision of NICA is not a condition precedent to NICA's exclusive remedy. As the court pointed out in Humana, supra, NICA should be strictly construed to include only those subjects clearly embraced within its terms since it is, like the Worker's Compensation Act, a statutory substitute for common law rights and liabilities. Humana, 652 So. 2d at 859 [citing American Freight System, Inc. v. Florida Farm Bureau Casualty Insurance Company, 453 So. 2d 468 (Fla. 2d DCA 1984)]. The court in Humana also pointed out that, because NICA and the worker's compensation system were both creatures of statute, all rights and liabilities established by NICA as with the worker's compensation system flow exclusively from the statutes creating the plan. Humana, 652 So. 2d at 859-860 [citing Travelers Insurance Company v. Sitko, 496 So. 2d 920 (Fla. 1st DCA 1986)]. It is a well accepted principle of law that courts may not find legislative intent beyond what is expressed or speculate about what the legislature should have intended. Public Health Trust, 531 So. 2d at 949 (citations omitted). Given these rules of statutory construction and the similarities between the two statutory systems, the Appellate Court erred in finding that the notice provision was a condition precedent to the exclusive remedy provision of NICA in the absence of any statutory language in support of this proposition.

In addition, in stark contrast to the similarities between NICA and the Worker's Compensation Act, virtually all of the other statutes which contain notice requirements are applicable to circumstances in which a cause of action has already arisen and the requirements of the statutes are simply to provide a party advance notice of an intended or threatened claim.[3] While the notice

[3]Section 97.023(3), Fla. Stat. (1995) (a person who has been aggrieved by a violation of either the National Voter Registration Act of 1993 or the Florida Election Code must give written notice to the Secretary of State and participate in informal dispute resolution process if filing a complaint for declaratory or injunctive relief in circuit court and the violation occurred more than 30 days before an election date); § 220.827(2), Fla. Stat. (1995) (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. (Supp. 1996) (notice of violation by the Department of Nature Resources is a condition precedent for the institution of an action for injunctive relief involving land reclamation); § 624.155(2)(a), Fla. Stat. (1995) (sixty days written notice to the Department of Insurance and the insurer is a condition precedent to bringing a civil action for violation of prohibited action under the insurance code); § 634.3284(3), Fla. Stat. (1995) (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(3), Fla. Stat. (1995) (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), Fla. Stat. (1995) (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(d), Fla. Stat. (1995) (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. (Supp. 1996) (notice to the governmental agency and denial of the claim are conditions precedent to maintaining an action against that agency); 770.01, Fla. Stat. (1995) (plaintiff must give notice in writing five days before instituting an action for libel or slander, specifying the article or broadcast and the statements therein which he alleges to be false and defamatory); and § 836.07, Fla. Stat. (1995) (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

requirements in those statutes have been construed in many cases to be a condition precedent, the analysis of the notice requirement under NICA is different because notice under NICA is to be provided prior to the accrual or even expectation of any cause of action. Section 766.316, Fla. Stat. (Supp. 1988). Additionally, as previously referenced, any legislative intent that notice operate as a condition precedent is clearly stated in the subject statutes. Given these fundamental differences which distinguish NICA and the Worker's Compensation Act from other statutes that have notice requirements, this Court should rely on case law construing the Worker's Compensation Act in interpreting NICA rather than other dissimilar statutory schemes. This Court has found that "decisions predicated upon statutory provisions that are essentially different from those contained in the [Worker's Compensation] Act here considered are not to be regarded as precedents for a decision in this case." Hughes v. B.F. Goodrich Co., 11 So. 2d 313, 316 (Fla. 1943).

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statements therein which he alleges to be false and defamatory).

C. Requiring notice as a condition precedent to the applicability of the Florida Birth-Related Neurological Injury Compensation Act is not supported by the public purpose of NICA.

The error that underlies the appellate decision in the instant case and the other appellate cases holding that notice is a condition precedent to NICA exclusivity[4] was the Appellate Courts' misunderstanding of the purpose of the notice provision of NICA. Simply stated, the Appellate Courts interpreted the purpose of Section 766.316 as an attempt by the legislature to preserve for the patient the right to select obstetrical care from a non-participating physician (A.1. p. 8) instead of providing a no-fault scheme to alleviate a malpractice insurance crisis for a limited group of high cost birth-related neurological injuries. The Appellate Court below stated that the intent of requiring notice was so that the patients may make an "informed choice" between "alternatives" before delivery. (A.1, p. 8) However, there is no support in the text of Section 766.316, or in any other provision of NICA, to support this construction of statutory "purpose." If the purpose of Section 766,316 was to preserve the patient's right to choose between participating and non-participating physicians,

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*Braniff v. Galen of Florida, Inc., 669 So. 2d 1051 (Fla. 1st DCA 1995), rev. granted, 670 So. 2d 938 (Fla. 1996); Siravo v. Florida Birth-Related Neurological Injury Compensation Assoc., 667 so. 2d 971 (Fla. 4th DCA 1996); Bradford v. Florida Birth-Related Neurological Injury Compensation Assoc., 667 So. 2d 401 (Fla. 4th DCA 1995); Behan v. Florida Birth-Related Neurological Injury Compensation Assoc., 664 So. 2d 1173 (Fla. 4th DCA 1995); Mills v. North Broward Hosp. Dist., 664 So. 2d 65 (Fla. 4th DCA 1995), review granted sub. nom., Domond v. Mills, 678 So. 2d 338 (Fla. 1996); Sierra v. Public Health Trust of Dade County, 661 So. 2d 1296 (Fla. 3d DCA 1995); Turner v. Hubrich, 656 So. 2d 970 (Fla. 5th DCA 1995).

the legislature could have employed language which so states, On the contrary, the language contained in Section 766.316 leads to the conclusion that the legislature intended nothing more, or less, than to provide information to the patient concerning NICA's limited no-fault alternative remedies for birth-related neurological injuries.

Interpreting the "purpose" of Section 766.316 as preserving a patient's right to choose between participating and non-participating physicians opens a virtual Pandora's Box of litigation, as is amply demonstrated by the instant case. If the purpose of NICA notice is to preserve a patient's right to make an "informed choice," litigation results to determine whether there was a reasonable opportunity to provide notice and, if so, whether the patient had a viable alternative to seek obstetrical care from a non-participating physician. In fact, if the purpose of the notice is to provide a choice between alternatives, in the instant case UMC should not be required to give the notice given the fact that both Athey and Broaden had no reasonable alternatives to receiving obstetrical services from a participating physician. ,(A. 9, A. 10). Additional areas of potential litigation relate to the timeliness of notice, the adequacy of the content of the notice, any alleged misinterpretations that may have accompanied the notice, and whether the patient was adequately able to comprehend, understand, and act upon the notice.

The Appellate Court's "bright line" rule that any pre-delivery notice is enough (A. 1, p. 10) does not resolve these issues. In

fact, the Appellate Court recognized that issues will exist as to the existence of emergencies and whether the notice was too late to allow for the exercise of an informed choice. (A.1, p.11). Accordingly, the Appellate Courts' "reasonable opportunity to give notice standard" is ripe for litigation concerning the existence of emergencies and the "reasonableness" of opportunities. For example, UMC in this appeal alleges that under the Appellate Courts' standard these factual issues exist and preclude the Trial Court's entry of a summary judgment against UMC as a matter of law. The Appellate Court's interpretation of Section 766.316 opens up all of these areas for potential litigation and seriously damages NICA's ultimate legislative goal of reducing the cost to society of litigating birth-related neurological injury claims.

If the legislature's purpose in enacting Section 766.316 was to preserve the patient's right to make an informed choice between participating and non-participating physicians for obstetrical care, the statute is woefully inadequate for the task. For example, the statute does not specifically state when notice is to be provided to the patient.[5] The legislature also did not specify what the notice would say and left the content of the notice to be determined by the Florida Birth-Related Neurological Injury Compensation Association. The statute places no requirement on non-participating physicians to disclose to the patient evidence of the existence of liability insurance or financial solvency which,

[5]Of course, the appellate court below has judicially imposed a pre-delivery requirement. (A. 1, p. 10).

presumably, is necessary for the patient to make a rational choice in selecting a non-participating physician over a participating physician. No provision is made for advising those patients who may have high risk pregnancies that it may be, in fact, advisable to obtain obstetric care from a NICA participating physician since NICA benefits are awarded irrespective of fault.

Finally, the statute makes no provision with regard to obstetrical patients who cannot speak English, who are mentally or emotionally impaired, who are incapacitated or incompetent, who are minors, who present themselves in emergency condition, who are too poor to afford alternative services, or who for other practical reasons have no choice to make. Simply stated, the language of Section 766.316 contains no indication that the legislature intended the statute to deal with the complex issues of whether a patient has made an informed decision to receive obstetrical care from a NICA participating physician. If the legislature had intended this purpose it would have competently provided the details necessary to achieve it.[6]

Contrary to the conclusions of the Appellate Court, it is far more reasonable and logical to conclude that the legislative purpose in enacting Section 766.316 was simply to advise the patient of her rights and remedies under NICA in the unfortunate event that her infant suffers a birth-related neurological injury.

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[6]The Legislature has demonstrated that when it chooses to do so, it can deal with the complex issues of informed consent. The Florida Medical Consent Law, Section 766.103, Fla. Stat. (1995), contains a detailed provision concerning the legal requirements of informed consent in the context of medical malpractice liability.

Since the NICA Association is to supply the notice form, the hospitals and participating physicians **act** as mere conduits' of information from the Association to the patient. The fact that Section 766.316 provides for no penalties or consequences for failure to provide notice further supports the conclusion **that** the statute **was** intended simply to provide information to the patient and belies any intent that notice constitute some type of "informed consent" to treatment by a participating physician,

In summary, the Appellate Court's determination that notice under Section 766.316 is a condition precedent to NICA's exclusive remedy provision has the effect of transforming a simple legislative scheme into a complete legal quagmire. As originally enacted by the legislature, NICA is clear in its purpose, operation and effect. As long as two simple conditions are met; namely, care provided by a participating physician and a birth-related neurological injury, the exclusive remedy of NICA applies in lieu of all other common-law remedies. Such speculation of purpose is also inconsistent with the fact that the legislature clearly (from other statutes) knew how to make notice a condition precedent, yet declined to do so; is inconsistent with the legislative decision to omit other provisions that would be obviously essential to achieve the speculated purpose; and from the fact that such purpose would be literally impossible to achieve in some circumstances. Further, the attribution of such purpose would require this Court and others to embark upon **a** course of judicial legislation to fill in the many

essential details that the legislature would have provided if it had intended this speculated purpose.

II. THE COURT BELOW ERRED AS A MATTER OF LAW IN HOLDING THAT EACH PARTICIPATING PHYSICIAN AND HOSPITAL MUST PROVIDE SECTION 766.316 NOTICE, AS SUCH HOLDING IGNORES THE EXCLUSIVITY PROVISION OF SECTION 766.303(2), OTHER NICA PROVISIONS, AND THE PUBLIC POLICY UNDERLYING NICA.

A. Requiring notice by each provider and hospital destroys the exclusive compensation scheme and underlying public purpose of NICA.

Not only did the Appellate Court below-judicially graft a pre-delivery condition precedent notice requirement to the Florida Birth-Related Neurological Injury Compensation Act, but the court destroyed the exclusive compensation scheme of NICA set forth in Section 766.303(2) through its interpretation of Section 766.316.

The First District Court of Appeal held that "in addition, except for residents, assistant residents and interns who are exempted from the notice requirement, a.participating physician is required to give notice to the obstetrical patients to whom the physicians provide services. Under Section 766.316, therefore, notice on behalf of the hospital will not by itself satisfy the notice requirement imposed on the participating physician(s) involved in the delivery." (A. 1, p. 7).

Accordingly, under the First District Court of Appeals' interpretation of Section 766.316, notice must be given by each participating physician as well as by the hospital. If notice is not given by a particular physician, common law remedies will be

available against that physician. If another participating physician involved in the same delivery provided the notice, recovery against that physician will also be available under NICA. By so ruling, the First District Court of Appeal has destroyed the exclusivity provisions of NICA.

This duplicative recovery contradicts the express language of Section 766.303121, Fla. Stat. (1989) and (1995). Section 766.303(2) provides that:

> The rights and remedies granted by this plan on account of 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 postdelivery resuscitation during which such injury occurs, arising out of or related to a medical malpractice claim with respect to such injury; except that a civil action shall not be foreclosed where there is clear and convincing evidence of bad faith or malicious purpose or willful or 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. Such suit shall be filed before the award of the division becomes conclusive and binding as provided for in s. 766.311. (Emphasis added.)

As stated by the First District Court of Appeal in ~~Braniff,~~ **699 So.** 2d at 1052-3, the NICA plan is a "limited no-fault alternative for birth-related neurological injuries." The purpose behind NICA was to provide an alternative remedy, not an additional remedy to common law suits for birth-related neurological injuries. The stated legislative intent behind NICA is to help preserve the availability of obstetric services to Floridians through "the stabilization or reduction of malpractice insurance premiums." See

Coy, 595 So. 2d at 947. Section 766.303 recognizes that "cost of birth-related neurological injury claims are particularly high." Under the Appellate Court's analysis where, as in the instant case, there are multiple physicians who participated in the labor, delivery or resuscitation, a claimant may be able to maintain a civil action against one participating physician who failed to provide notice but also maintain a claim for NICA benefits by virtue of the notice given by the other participating physician. To require both the entity (UMC) and physicians involved to each give notice (or be exempt or excused from the provisions of Section 766.316) allows claimants to have duplicative remedies: a NICA claim and a medical malpractice common law claim. Such a result will not stabilize malpractice premiums, effectively abolishes exclusivity of NICA, and is clearly contrary to the provisions of Section 766.303(2). NICA is a covered infant's exclusive remedy against all health care providers involved in its birth pursuant to Section 766.303(2).

The Appellate Court's decision that notice by both the entity and participating physicians is a condition precedent to the application of the exclusive-remedy provision of NICA also creates a direct conflict with other provisions of the NICA legislation that should be construed in pari materia. Major v. State, 180 So. 2d 335 (Fla. 1965) (statutes relating to the same subject matter must be read in pari materia especially where the statutes in question were enacted by the same legislature as part of a single act). Construing the notice provision as a condition precedent

creates a conflict with Section 766.303(2), which states that only evidence of bad faith or malicious purpose is an exception to the limitation on civil remedies. Construing the notice provision in such a way also creates conflict with the provisions of Section 766.309, Florida Statutes (1989), which provides that the sole basis for a NICA award is the existence of a birth-related neurological injury with a participating physician involved in the labor, delivery or resuscitation. Moreover, construing Section 766.316 as a condition precedent conflicts with the NICA claim-filing provision set forth in Section 766.305, Florida Statutes (1989), which does not require a NICA claimant to allege the receipt of notice under Section 766.316.

Another fundamental conflict created by the Appellate Court's construction of the NICA notice provision as a condition precedent is that it allows a claimant the opportunity to elect, based on lack of notice, between NICA benefits and a civil remedy. Under the Appellate Court's interpretation of Section 766.316, a claimant who did not receive notice could pursue a civil action against the participating physician who did not provide notice or elect. to waive the failure to provide notice and pursue a claim for NICA benefits. Clearly, the NICA legislative scheme was designed to preclude such an "election" of remedies. For example, where there is evidence of bad faith or malicious purpose, which is the one and only recognized exception to the exclusive-remedy provision of NICA, the claimant is required to file a civil lawsuit prior to and

in lieu of a claim for NICA benefits. Section 766.303(2) (emphasis added).

B. As a matter of law, if NICA applies for any claim against BOR, no common law suit against UMC for the same birth-related neurological injury is possible.

The Appellate Court also held that resident physicians are exempt from the notice requirement of Section 766.316 pursuant to the statutory language. (A. 1, p. 12). UMC agrees with this statement, but believes that the Appellate Court failed to recognize the effect of this exemption. As to BOR, the Appellate Court remanded to the Trial Court for determination as to whether, because the resident physicians were exempt from the NICA notice, the Claimants were limited to pursuing NICA remedies against BOR as the employer of the resident physician. (A. 1, p. 12). Pursuant to Section 766.306, Florida Statutes (1989), if NICA remedies apply as to BOR, the NICA provisions also apply as to UMC, the hospital in which these participating physicians and resident physicians were operating. Section 766.306 clearly dictates such a result.

Likewise, the Appellate Court on remand to the Trial Court requested that the Trial Court consider whether the attending physicians, employees of BOR, had "any prenatal or other prior professional relationship with these patients such that the notice could reasonably have been given," and whether if no such reasonable opportunity existed, NICA precludes common law claims against these physicians and the BOR as their employer. If on remand the Trial Court determines that the attending physicians did

not have a reasonable opportunity to provide the NICA notice and that, therefore, NICA precludes the Claimants' common law claims against the BOR for the attending physicians, Section 766.303 also dictates that no common law claim is available against UMC. By affirming the Trial Court's decision as to UMC but remanding for additional determinations as to other participants, the Appellate Court completely divorced the issue of UMC's ability to invoke NICA from the applicability of NICA to the other defendants. Under the express NICA statutory language, once NICA applies, all related common law claims against any person or entity are not permitted.

In fact, the Appellate Court's failure to recognize that if BOR could invoke NICA as a result of its employees, UMC could also invoke NICA was unexpected even to the Athey Claimants. In initial briefs to the First District Court of Appeal, the Athey Claimants themselves argued that UMC is immune from suit under NICA if the "obstetrician who performs the delivery in the hospital is immune from suit. (A. 5, p. 5). The Athey Claimants admitted that "if a 'participating physician' delivers a brain-damaged baby, both the 'participating physician' and the hospital (and everyone else involved in the labor and delivery, like the residents, anesthesiologists and the nurses) are immune from suit, and NICA is the exclusive remedy." (A. 5, p. 14).

UMC agrees with the Claimants that once immunity is granted to a participating physician, the hospital in which that physician engaged in the labor, delivery or resuscitation is also entitled to such immunity. If not, then again the exclusivity of NICA has been

destroyed. Simply stated, once a determination has been made that a NICA participating physician has been involved in labor, delivery or resuscitation that results in a birth-related neurological injury and that NICA may be invoked by the participating physician, a civil action is precluded against all members of the health care team who directly participated in the labor, delivery or resuscitation, including the hospital where the delivery occurred.

Such an interpretation comports not only with the public purpose behind NICA to provide an alternative exclusive remedy, but also comports with the practical realities of the situation. As Judge Klein pointed out in his dissent in Bradford v. Florida Birth-Related Neurological Injury Compensation Assoc., 667 So. 2d 401, 403 (Fla. 4th DCA 1995), "Physicians reading the above definition [definition of participating physician] would, in my opinion, conclude that if they elected to participate, they would unconditionally become part of this no-fault compensation plan and would no longer have to maintain malpractice insurance coverage for babies suffering brain or spinal cord injuries during birth. Making the giving of notice a condition precedent, where the legislature did not say it is a requirement, may leave these obstetricians without insurance coverage for a civil malpractice suit because they thought, relying on the statute, that they did not need it".

On remand, it is possible that because the resident physicians are exempt from the notice requirement or because the attending physicians did not have reasonable opportunity to provide notice,

that a NICA claim will exist against the BOR. Yet, the Appellate Court has already held that a common law claim is available against UMC. Accordingly, the Claimants would be allowed to proceed under two different systems for recovery of the same injury. Such a result frustrates the legislative purpose of avoiding the high costs associated with malpractice suits. If duplicative NICA and malpractice suits exist, providers will have to continue to face high priced insurance premiums and still pay the NICA assessments, thereby funding two sources of compensation. In short, under the Appellate Court's interpretation, obstetricians are more likely to cease delivering babies, thus reducing the availability of obstetric services to Floridians and undercutting the stated purpose of NICA.

The Appellate Court erred in holding that the notice requirement of Section 766.316 is a pre-delivery condition precedent to NICA exclusivity which must be given by anyone seeking to invoke the exclusivity of NICA. Even if notice is a condition precedent, once a notice is given or the physician is excused from giving such notice, the patient's exclusive remedy is NICA and the patient may not pursue a common law malpractice action against any health care provider who participated in the birth. The Appellate Court erred in affirming the decision as to UMC where it is clear that a NICA remedy may apply as to other defendants. Until it is determined that no defendant can invoke NICA, it is premature to hold that any related defendant, such as UMC, is subject to common law suit.

III. THE APPELLATE COURT ERRED IN RULING AS A MATTER OF LAW THAT UMC HAD A REASONABLE OPPORTUNITY TO PROVIDE THE "REQUIRED" NOTICE TO THE CLAIMANTS AND, THEREFORE, THAT SUIT AGAINST UMC CAN PROCEED.

A. Whether a factual issue exists as to whether the emergent nature of the claimants' presentations prevented a reasonable opportunity to give notice.

Even assuming that the 766.316 notice is a condition precedent to invoking NICA, the Appellate Court also erred in not reversing the decision **as** to UMC and remanding to the Trial Court for a determination of whether an emergency prevented UMC from having **a** reasonable opportunity to give the required notice.

The Appellate Court affirmed the Trial Court's decision as to UMC, holding that UMC is not entitled to invoke the NICA exclusivity provisions because UMC failed to give notice and that UMC had, as a matter of law, a reasonable opportunity to give such notice. (A.1, p.11). Under the Appellate Court's analysis of reasonable opportunity to give notice, the court must determine whether such an emergency existed so that reasonable notice was not possible. (A.l, p. 9-11). The Appellate Court just stated that UMC did not argue that a medical emergency prevented the giving of notice in the instant case (A.l, p. 9) and stated that "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 or similar situation, or in which patients with real delivery alternatives have provided notice too late to allow for the

exercise of an informed choice. Thus, we do not address these hypothetical situations here". (A. 1, p. 10-11).

In fact, that is exactly what UMC argued before the Appellate Court. In their initial briefs on the merits UMC and BOR contended that "unlike the situation in Turner, [Turner v. Hubrich, 656 So. 2d 970 (Fla. 2d DCA 1995)] Athey and Broaden presented to University Medical Center for the first time when they were in labor and experienced the type of emergency situation that the Turner court specifically declined to address". (A. 6, p. 23).

Under the First District Court of Appeals analysis, an emergency situation will constitute circumstances in which a reasonable opportunity for notice is not available to the provider to provide such notice, and notice will not be required to invoke NICA exclusivity. (A.1, p. 10 note 1). Given the facts of this case, whether an emergency prevented notice is not a hypothetical question but instead is an existing factual issue that should have precluded the summary judgment against UMC.

Because the First District Court of Appeal does recognize an emergency situation could obviate the need for notice, the First District Court of Appeal erred by failing to consider UMC's argument that the evidence presented to the Trial Court established an emergency situation in which reasonable opportunity for giving notice does not exist.

UMC respectfully submits that the affidavit of Robert Thompson, M.D. (A. 7) and the affidavit to Lewis Sanchez-Ramos, M.D. (A. 8) show that an emergency existed, or at least created a

factual issue as to whether an emergency existed, so as to preclude reasonable opportunity to give notice of NICA participation. UMC contends that the patient's condition of active labor after spontaneous rupture of membranes (R. II:352-381, II:384-400) constituted a "medical emergency" for which notice by issue is not required.

While the Trial Court's order granting summary declaratory judgment does not make any reference to any determination of whether an emergency existed, the Trial Court did not believe that whether an emergency existed was the appropriate standard for determining whether the notice is required. Under the Appellate Court standard, whether an emergency existed is an issue. UMC presented evidence in the Trial Court that an emergency existed with both Athey and Broaden. Given the standard, if this case is reversed and remanded, UMC should have the right to further develop and present evidence of the existence of a medical emergency which would obviate the NICA notice requirement. A court may not grant summary judgment, and the case should be submitted to the fact finder to determine a question of fact "[i]f the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the **issues**". Moore v. Moore, 475 So. 2d 656, 668 (Fla. 1985). In cases where the record **raises** the slightest doubt that material issues could be present, motion for summary judgment must be denied. Henderson v. CSX Transportation, Inc., 617 So. 2d 770, 773 (Fla. 1st DCA 1993); Jones v. Directors Guild of America, Inc., 584

So. 2d **1057,** 1059 (Fla. 1st DCA 1991). Summary judgment is also improper where different inferences and deductions could reasonably be made to reach different conclusions as to whether a genuine issue of material fact existed. Mecier v. Broadfoot, 584 So. 2d 159, **160** (Fla. 1st DCA 1981); Skipper v. Barnes Supermarket, '373 so. 2d 411, 413 (Fla. 1st DCA 1991).

As set forth above, UMC contends that the Appellate Court's decision should be reversed because the Section 766.316 notice is not a condition precedent to invoking NICA. However, even if this Court finds that notice is a condition precedent, this Court should reverse the Appellate Court's decision and order **a** remand to determine whether an emergency existed so as to relieve UMC of the notice requirement. The Trial Court erred in granting a summary judgment against UMC, and the Appellate Court erred in affirming such summary judgment. Disputed issues of material fact continue to exist concerning whether the existence of an emergency obviated the NICA notice requirement.

B. Because the court found that the purpose of Section 766.316 is to allow the exercise of informed choice between alternatives, the summary judgment was in error as the claimants did not have any alternatives.

In addition, UMC contends that **a** factual issue exists as to whether the failure to provide notice deprived the Claimants of an opportunity to preserve their common law remedies **by** seeking alternative obstetrical care from a non-participating physician. The Appellate Court rejected UMC's contentions that the Claimants had no reasonable alternatives and affirmed the Trial Court's

decision. The Appellate Court characterized UMC's argument as an invitation for the court to determine at which point prior. to delivery the notice must be given to provide "an informed choice between alternatives before delivery". (A. 1, p. 10). The Appellate Court reasoned that they should instead establish a bright line test basically stating that the notice must be given prior to delivery. (A. 1, p. 10) However, the Appellate Court also held that the purpose of the notice of requirement is to allow the plaintiff to make an informed choice between alternatives before delivery. (A.l, p.10). The Appellate Court stated "that this case was not one in which patients with 'real delivery alternatives' are provided notice too late to allow for the exercise of informed choice". (A.1, p.10 n.1). In short, the Appellate Court implied that if no reasonable delivery alternatives exist and notice is not provided, that the notice requirement may not be required. Yet the Appellate Court refused to address whether "real delivery alternatives" were available in the instant case.

The Appellate Court did recognize that there were no hospitals or birthing centers in the county where the Claimants could have gone for the birth of their children because of their Medicaid status (A. 1, p. 4), but the court misunderstood UMC's argument relating to the lack of alternatives for the patients. UMC was not just arguing that the notice must be "efficacious", although given the rationale of the Appellate Court, the efficacy of the notice should be an issue. UMC was arguing that given the rationale of the Appellate Court, no NICA notice should be required where the

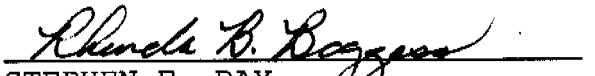
patient has no "real delivery alternatives". The Appellate Court itself recognized that issues exist as to patients with a real delivery alternative. (A. 1, p. 11, n. 1). While UMC as set forth above disagrees with the court's statement of the purpose of the notice requirement, if the purpose of the notice requirement is to allow patients to chose between participating physicians and non-participating physicians, there is no reason for the notice to be given where the patient's only choice are participating physicians, such as here.

In short, given the Appellate Court's analysis of the notice requirement that the purpose of the notice is to allow patients to be informed as to alternatives, no reason exists for any notice where no alternatives are available. The Appellate Court erred in affirming the Trial Court's issuance of a motion for summary judgment.

CONCLUSION

Based upon the foregoing analysis, the decision of the First District Court of Appeal should be reversed, and UMC should be entitled to invoke NICA exclusivity as the Section 766.316 notice is not a condition precedent to invocation of NICA. In the alternative, the decision of the First District Court of Appeal decision should be reversed as UMC, and this Court should rule that even if Section 766.316 notice is a condition precedent to the applicability of NICA, once the notice requirement is satisfied by a holding that one participant is exempt, that notice was given or that notice was not required because of the factual scenario, NICA may be invoked by all other health care providers, including UMC, pursuant to Section 766.303(2). Finally, even if the Court agrees with the Appellate Court's decision interpretation of the notice requirements, the Appellate Court should be reversed and the cause remanded to determine the existence of emergencies which would obviate UMC's notice requirement.

TAYLOR, DAY, CURRIE & BURNETT



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I HEREBY CERTIFY that a copy of the foregoing brief has been furnished by U.S. Mail to the individuals listed below this 4th day of April, 1997.

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