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JUN 10 1997
CLERK, SUPREME COURT
By
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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*

CASE NO. 89,991

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

Petitioners,

vs.

DEVIN ATHEY, etc. et al.,

Respondents.

Consolidated Petitions from the District Court of Appeal, First District Case No. 95-00229

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

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I. WHETHER SUMMARY JUDGMENT WAS INAPPROPRIATELY GRANTED WHERE **FACTUAL** ISSUES EXIST CONCERNING WHETHER UMC HAD **A PRACTICABLE** OPPORTUNITY **TO GIVE** NOTICE

This court established in Galen of Florida, Inc. v. Braniff, 22 Fla. L. Weekly S227 (Fla. May 1, 1997), that "as a condition precedent to invoking the Florida Birth-Related Neurological Injury Compensation Plan as a patient's exclusive remedy, healthcare providers must, when practicable, give their obstetrical patients notice of their participation in the plan within a reasonable time prior to delivery." Id. at 228 (emphasis added).

In Braniff, this Court explained that the purpose of providing NICA notice was to "give an obstetrical patient an opportunity to make an informed choice between using a healthcare provider participating in the NICA plan or using a provider who is not a participant." Accordingly, the Court held that predelivery notice must be given a reasonable time prior to delivery when practicable. Whether the healthcare provider was in a position to give such predelivery notice, and whether the notice was given a reasonable time before delivery, must be determined on a case-by-case basis with a jury determining all questions of fact. See Id. at 229.

Under the standards set forth in Braniff, the Trial Judge in the instant case erred in granting summary judgment where disputed issues of material fact exist as to whether University Medical Center's ("UMC") relationship with the Patients was such that pre-delivery notice was reasonable or practicable.

A. Factual Issues Exist Concerning The Relationship Between UMC and the Patients as well as Whether a Practicable Opportunity Existed for UMC to Provide Notice to the Patients who Presented in Extremis.

The Respondents/Patients argue that no material issues of fact exist, and that UMC waited until appeal to contend that an emergency situation existed which precluded a reasonable opportunity to give notice. In fact, UMC has consistently contended that issues of material facts, such as the emergent circumstances in which the Patients presented to TJMC, should have precluded the Trial Judge from entering summary judgment.

In the original hearing on Respondent's Motion for Summary Judgment, the Trial Judge appropriately expressed misgivings about granting a summary judgment because of factual issues UMC contended existed. The Trial Judge noted that:

> [I]t seems to me, that under certain circumstances, a physician or health care provider could be relieved of this notice if the situation presented itself that notice could not realistically or practically be given...I think that in the context of this case that there has got be fleshed out some, determine if there is some sort of relationship--or apparently there is a relationship--but what exactly is the relationship; did these residents who were apparently involved in the actual delivery, did they themselves provide services, you know, obstetrical services, prenatal services to these mothers previously ...or was it a situation where there really wasn't much contact and the mothers just showed up there <u>in extremis or with the water broke</u>, and at that point in time legal niceties take a back seat to health care requirements. (Transcript of Hearing, 4/13/93, p. 5, 1. 22-25; p. 6, l. 1, 11-19, 23-25; p.7, l. 1-3).

In that same hearing the Trial Judge indicated that he did not know if he could find as a <u>matter of law</u> that a practical opportunity to give NICA notice existed simply because informed consents for anesthesia were obtained. (Transcript of Hearing, 4/13/93, p. 15,

1, 11-18). However, that is in part exactly what the Trial Judge ultimately concluded. (A.1, **p.7)** The Trial Judge should not have deviated from his original position. Factual issues exist in this case which should have precluded the entry of a summary judgment.

Unfortunately, in the later hearing concerning the Patients' motion for summary judgment in which counsel argued about facts in the record, the Trial Judge made factual determinations and entered a summary judgment holding that UMC had a reasonable opportunity to give NICA notice. (Transcript of Hearing, 9/1/94). (A.1, p.9) The Trial Judge reasoned that:

> the issue is pretty squarely presented as a legal issue before me and I think it should be disposed of in that way. I don't think that -- these cases are expensive enough to handle without, you know, having to have a jury trial to establish some little fact that's probably not even material to support a ruling on the law.
>
> Having said all that, my finding is this: In these cases both Ms. Athey and Ms. Wilson signed medical consent forms, general medical consent forms that all of us sign when either we or our children go to the hospital before a surgical procedure. That means to me that had there been a notice form available... apparently there wasn't but again, I don't think that's material... that they could have been given the notice under the statute. In other words there was an opportunity and I don't think the facts of this case show me-- the hypothetical 1 think I raised the last time, and this is a digression, is if a woman is coming in and she's in extremist (sic) and she's unconscious and, you know, therefore cannot give a knowledgeable decision.

(Transcript of Hearing, 9/1/94 p. 49, lines 21-25; **p.** 50, line 1-19). (emphasis added) The Trial Judge stated that his purpose in so ruling was to allow appeal on the issue of whether notice is a condition precedent to the invocation of NICA, and he recognized that an appellate court might send the case back because factual

issues existed. (Transcript of Hearing, 9/1/94, p. 59, l. 12-22). This Court should do exactly that and reverse the summary judgment and remand to the trial court for factual determinations by the trier of fact.

Florida law is clear that where the record evidence raises any issue of material fact, conflicts, permits different reasonable inferences, or tends to prove the issues, such evidence should be submitted to the jury as a question of fact to be determined by it. Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985). A court before entering a summary judgment must draw every possible inference in favor of the party against whom summary judgment is sought. Id. A summary judgment proceeding, such as the hearing held on September 1, 1994, is not a trial by affidavit or deposition. Connell v. Sledge, 306 So. 2d 194, 196 (1st DCA 1975), cert. dismissed, 336 So. 2d 105 (Fla. 1976). Accordingly, the trial court may not weigh the evidence and make factual determinations. Hervey v. Alfonso, 650 So. 2d 644, 646 (Fla. 2d DCA 1995). The function of the trial court is solely to determine whether the appropriate record conclusively shows that a claim cannot be proved as a matter of law. Id. On appeal, the appellate court must draw every possible inference in favor of the party, in this case UMC, against whom the summary judgment was granted. Wills v. Sears Roebuck & Co., 351 So. 2d 29, 32 (Fla. 1977); Stroud v. Strong, 675 So. 2d 646, 647 (Fla. 2d DCA 1996).

These standards were not followed in the instant case. The Trial Judge inappropriately weighed the facts and determined that

he believed as a matter of law that UMC had a "reasonable" opportunity to provide predelivery notice to the Patients. (A.1, p. 6, 9) In so doing, the trial court usurped the function of the trier of fact in determining whether the facts showed a practicable opportunity for UMC to give notice. Certainly reasonable inferences can be made from facts in the record that UMC did not have a pre-natal relationship with the Patients before their presentation to the hospital in extremis, and that no practical opportunity existed to provide notice given the Patients' medical condition at the time of presentation.

Material issues of fact exist as to whether a prenatal relationship existed between UMC and the Patients, and whether the Patients' medical condition was such that notice after presentation to the hospital was not practicable due to the emergent nature of their presentation. For example, some of the record evidence supporting UMC's position that no pre-natal relationship existed between UMC and the Patients includes:

(a) Athey and Broaden were not patients of UMC until they presented at UMC for labor and delivery (R. 11: 352-381, 11: 382-383) See also (Simcic 3/23/93 Deposition, p. 22, 23); (Wilson 3/23/93 Deposition, p.24)

(b) The Patients' received prenatal care from nurse midwives through the Public Health Department Clinic, and not through doctors (R. 11: 352-381) See also (Simcic 3/23/93 Deposition p. 13, 14, 22, 23) (Wilson 3/23/93 Deposition, p. 21, 24-25)

(c) the Broaden Patients' ultrasound testing was not performed by physicians but only by medical technicians (Medical Records, Large Black Notebook).

In contrast, the Respondents/Patients contend that a relationship existed between UMC and the Public Health Department Clinic which provided prenatal care due to

(a) a contract existing between UMC and the Department of Health & Rehabilitative Services between October 1, 1987 and March 31, **1989** (Large Black Notebook);

(b) testimony by the Patients that they were told their babies would be delivered at UMC. (Simcic **3/23/93** Deposition, p. 14-16) (Wilson **3/23/93** Deposition, p. **33);**

(c) legends in prenatal records referring to University Hospital of Jacksonville (Medical Records, Large Black Notebook) and,

(d) the fact that the Broaden Patient received prenatal ultrasounds at UMC. (Medical Records, Large Black Notebook).

The Trial Judge inappropriately weighed these facts, inappropriately relied on argument of counsel', and found that the Patients' prenatal care was received at clinics which were "operated" or "supervised" by UMC. (A.1, p. 6) The Court also found, as a matter of law, that a prenatal relationship existed

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See Proctor & Gamble Co. v. Swilley, **462** So. 2d 1188, 1194-95 (Fla. 1st DCA 1985); Chrysler Corp. v. Miller, 450 So. 2d **330**, **330** (Fla. 4th DCA 1984); Westinghouse Elevator Co. v. DFS Constru. Co., 438 So. 2d 125, 127 (Fla. 2d DCA 1983)

between the Broaden Patient (Wilson) and UMC and the Athey Patient and UMC so as to create a reasonable opportunity for notice to be given. (A.1, p. 6, 7).

As another example of a factual issue which should have precluded summary judgment, UMC presented evidence that the Athey Patient presented with active labor and spontaneous rupture of membranes (A,6) (Medical Records, Large Black Notebook) and that her condition was such that it would have been medically unsafe and inappropriate for transfer to another hospital (A.6). Likewise, the Broaden Patient (Wilson) presented with spontaneous rupture of membranes with meconium-stained amniotic fluid (Medical Records, Large Black Notebook) (A.7). The Broaden Patient's emergent condition also precluded her transfer to another hospital (A.7). The Trial Judge, however, ruled as a matter of law that UMC had a reasonable opportunity to give notice and, by implication, that the Patients' medical conditions did not preclude such an opportunity. (A.1, p. 6, 9)

In summary, the Trial Judge inappropriately made factual determinations concerning the relationship between UMC and the Patients based on argument of counsel concerning the evidence. Under this Court's Braniff decision, the factual issues relating to the practicalities of notice should have been submitted to the trier of fact for determination. Just as the issue of "reasonableness" of a person's action or inaction in negligence actions should generally be submitted to juries, whether notice is "practicable"

given the relationship between a hospital and its patients should also be an issue for the jury. cf. Moore, 475 So. 2d at 668.

B. UMC Consistently Argued to the Trial Court and District Court of Appeal That Factual Issues, Including the Emergent Situation in Which the Patients Presented to the Hospital, Precluded Entry of Summary Judgment.

UMC strongly disputes the statements by the Respondents/ Patients (and the First District Court of Appeal) that UMC and the Board of Regents ("BOR") have not consistently and strongly argued throughout proceedings at the trial court and appellate court level that the summary judgment in favor of the Patients was inappropriate given the existence of factual issues, including but not limited to, the emergent nature of the Patients' presentations. For example:

(1) In the September 1, 1994 hearing, counsel for UMC and BOR argued that issues of material fact existed as to UMC and BOR's reasonable opportunity to provide notice in that the Patients had not been seen by the physicians during their pregnancy and first presented to the hospital with spontaneous rupture of membranes at a time in which it was medically inadvisable and inappropriate to transfer these women (Transcript of Hearing, 9/1/94, p. 10, 11, 14).

(2) In UMC's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, UMC pointed out that the earliest time for UMC to provide notice was after labor and delivery had begun and the opportunity had expired. (R.II: 343)

(3) The Trial Judge recognized in his decision that UMC argued that factual issues existed as to the reasonable opportunity to provide notice. (A.1, p. 3, 6)

(4) In the rehearing of the motion for summary judgment before the Trial Judge, UMC's counsel again advised the Court that "the question of medical imperativeness as that relates to timeliness" is an issue of fact which should have precluded summary judgment. (Transcript of Hearing, 12/19/94, p. 25, 1. 13-23).

(5) UMC and BOR argued in their initial brief to the First District Court of Appeal that "unlike the situation in Turner [Turner vs. Hubrick, 656 So. 2d 970 (Fla. 5th DCA 1995)] Athey and Broaden presented to UMC for the first time when they were in labor and experienced the type of emergency medical situation that the Turner court specifically declined to address". (A.2, p. 23). UMC and BOR also argued that the facts did not support the trial court's conclusion that UMC "supervised" the public health clinic. (A.2, p. 33)

(6) UMC and BOR argued in their reply brief before the First District Court of Appeal, that factual issues existed concerning whether UMC and the physicians had a reasonable opportunity to provide notice. (A.3, p. 10-13)

(7) In UMC's Motion for Rehearing before the First District Court of Appeal, UMC reminded the appellate court that UMC contends that factual issues exist as to the existence of a medical emergency (A.4, p. 6-7).

In summary, UMC has consistently argued that the emergent nature of the patients' physical condition is a factual issue which prohibits entry of summary judgment. The Respondents/Patients continue to try to limit UMC's argument to the "efficacy" of notice. To the contrary, review of the transcripts, motions and briefs filed by UMC clearly demonstrate that, UMC has consistently argued that factual issues exist concerning the reasonable (or practicable) opportunity to provide notice, given the record facts, UMC has consistently contended that factual issues exist as to whether UMC had a reasonable opportunity to provide notice given the relationship between the Patients and UMC and the Patients' presentations in extremis.

II. WHETHER AS A MATTER OF LAW UMC IS ENTITLED TO ASSERT THE EXCLUSIVITY OF NICA IF PHYSICIANS PROVIDING SERVICES AT UMC ARE ENTITLED TO INVOKE THE EXCLUSIVITY OF NICA

Respondents/Patients contend that UMC's argument that Section 766.303(2), Florida Statutes (1995) dictates that if NICA applies as to one participant, it is the exclusive remedy of the claimants is a "new" argument dealing with a "hypothetical" situation. To the contrary, there is nothing "hypothetical" about the position UMC has now been placed. Under the decision of the First District Court of Appeal, a common-law action will proceed against UMC even if the very physicians who delivered the infants at UMC are immune from common-law liability either because notice was not practicable or because notice was not required due to automatic NICA participation. Subjecting an entity such as UMC, which may be held to be vicariously liable, for the actions of participating

physicians who themselves may not be sued pursuant to NICA's exclusivity provision, is illogical and not contemplated by the statutory language or purpose. For reasons set forth in its initial brief, UMC contends that Section 766.303(2) dictates that once NICA is invoked by any Defendant, the only remedy against all other health care providers is NICA.

Respondents/Patients are correct in noting that the interplay of Section 766.303(2) and Section 766.316, Florida Statutes (1995) was not the subject of counsels' arguments before the First District Court of Appeal. Such argument was unnecessary as both sides agreed that if the participating physicians could invoke the exclusivity of NICA then so could UMC. For example, the Athey Respondents contended in their brief before the First District Court of Appeal that UMC would be 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 Respondents also admitted that "if a single '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, anesthesiologist and the nurses) are immune from suit, and, NICA is the exclusive remedy". (A.5, p. 14)

In addition, the Respondents/Patients' argument that Section 766.303(2), does not apply unless notice is given by both the hospital and physicians judicially engrafts condition precedent language to Section 766.303(2), destroys the exclusive NICA statutory scheme, and makes Section 766.303(2) meaningless for many

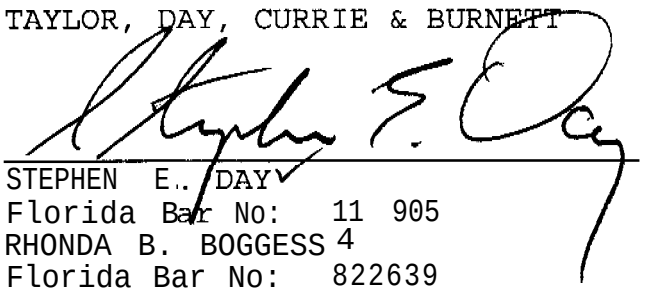
factual situations. Under the Respondents/Patients' interpretation, many plaintiffs will be able to recover benefits pursuant to a NICA claim, while at the same time pursuing a common-law claim for damages. Under the Patients' interpretation, Section 766.303(2) establishing the exclusivity of NICA is therefore meaningless. Under rules of statutory construction, Section 766.316 should be construed so as to give it meaning. Unruh v. State, 669 So. 2d 242, 245 (Fla. 1996). The Appellate Court erred by affirming the Trial Court's decision as to UMC while holding at the same time that factual issues concerning notice existed as to physicians providing the obstetrical care received by the Patients at UMC.

CONCLUSION

UMC, wherefore respectively requests that this court reverse the decision of the First District Court of Appeal and rule as a matter of law that UMC is entitled to invoke the exclusivity of NICA if on remand it is established that the physicians who practiced at UMC are entitled to invoke the exclusivity of NICA. In the alternative, UMC respectfully requests that this Court reverse the decision of the First District Court of Appeal and remand this **case** to the trial court for factual determinations relating to whether UMC had a practicable opportunity to provide NICA notice.

Respectfully submitted,

TAYLOR, DAY, CURRIE & BURNETT



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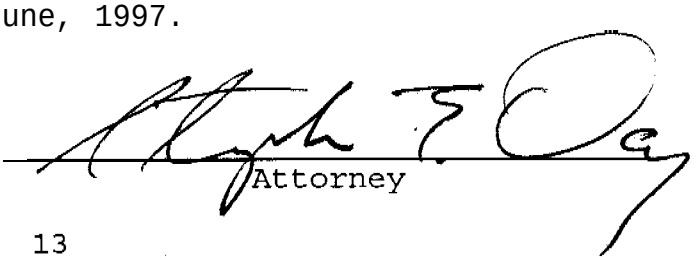
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to the individuals listed on the attached service list, this 9th day of June, 1997.



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Appendix Part 1

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA.

CASE NO. 91-4222 consolidated
with Case No. 91-4223

THE BOARD OF REGENTS OF THE STATE OF FLORIDA, and UNIVERSITY MEDICAL CENTER, INC., a Florida corporation,

Plaintiffs,

vs.

CHANYSE CHANNEL WILSON BROADEN, a Minor, by her Mother and Next Friend, THERESA LYNN WILSON, and THERESA LYNN WILSON, Individually, and ERIC JEROME BROADEN, the Father of the Infant Claimant, and THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,

Defendants.
_____/

CHANYSE CHANNEL WILSON BROADEN, etc., et al.,

Counterclaimants,

vs.

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

Counterdefendants.
_____/

SUMMARY DECLARATORY JUDGMENT

This cause came before the Court on the Motions of all parties for Summary Judgment. The Court originally heard arguments on the Motions and then requested that the

parties conduct further discovery or stipulate among themselves in order to resolve certain potential factual issues. After this had been done the Court heard further argument of counsel for the respective parties and determined the issues on these motions as follows:

This is an action for declaratory judgment brought by University Medical Center, Inc. and the Board of Regents of the State of Florida against two families who were potential claimants in common law actions for bodily injury damages allegedly resulting from medical negligence. After each of the claimant families filed the Notice of Intent to Initiate Litigation for damages allegedly caused by medical negligence required by Florida Statute § 766.106, the potential Defendants, University Medical Center, Inc. and the Board of Regents of the State of Florida, brought this action against both of the claimant families seeking a Declaratory Judgment that the exclusive remedy available to the claimant families in these circumstances was under the Neurologically Injured Infants Compensation Act (NICA), Florida Statute § 766.301, et seq.

Each of these potential claims involved brain damage suffered by an infant during labor and delivery. In both instances labor and delivery occurred at University Medical Center, Inc. in Jacksonville, Florida, and some of the physicians caring for these patients were obstetric residents employed by the Board of Regents of the State of Florida.

However, the claimant families contend that the failure of University Medical Center, Inc. or the attending obstetricians to give these expectant mothers notice of the limitation of their common law rights to recover damages for medical negligence and of their more limited rights of recovery under NICA relieves the claimant families from the limitation of their remedies to the benefits available under NICA and allows them to maintain common law actions for negligence against these potential medical defendants. Alternatively, the claimant families contend that if they are limited to the remedies provided by NICA despite the failure of the hospital or the

physicians to give them the required statutory notice, then the statute is unconstitutional for violation of due process of law, equal protection of the law or access to the Courts.

Initially, University Medical Center, Inc. and the Board of Regents of the State of Florida denied that the hospital or the participating staff obstetric physicians had failed to give the notice required by Florida Statute § 766.316. However, after the initial hearing and in lieu of further discovery, the hospital and the Board of Regents of the State of Florida stipulated that the notice required by the statute was not given to either of these patients.

However, both the hospital and the Board of Regents of the State of Florida contend that the exclusiveness of remedies provided in Florida Statute § 766.303(2) is not conditioned upon their giving the notice required of them in Florida Statute § 766.316. It is also their position that this interpretation of the statute does not render it unconstitutional. Additionally, the hospital and the Board of Regents of the State of Florida argue that either they did not have time to give the notice, or that there was an issue concerning their reasonable opportunity to give the required notice to these patients.

The Florida Birth-Related Neurological Injury Compensation Plan was based on a very similar Virginia statutory plan. When the Academic Task Force for Review of the Insurance and Tort Systems reported its findings and recommendations to the Florida Legislature in 1987, the Task Force recommended the addition of a notice provision which does not appear in the Virginia statute.

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

Academic Task Force for Review of the Insurance and tort Systems, "Medical Malpractice Recommendations" (November 6, 1987), page 34.

The Florida Legislature responded to this recommendation by adopting the following provisions for notice to the patient:

> "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 provide a clear and concise explanation of a patient's rights and limitations under the plan."

Although the resident physicians who treated these obstetric patients in the hospital were not required to give such notice, the hospital was clearly and explicitly required to give the notice. The mandatory statutory term "shall" was used to express the duty of the hospital to provide this notice to the patient.

Neither the Task Force nor the Legislature has the power to determine the constitutionality of this statute. However, the recommendation by the Task Force and the adoption of that recommendation by the Legislature would seem to indicate the legislative purpose and function of the statute and the notice provision.

It should be noted that the NICA statute creates an ~~exclusive remedy~~ only when a "participating physician" or a "certified nurse midwife supervised by a participating physician in a teaching hospital" is involved in the labor, delivery or resuscitation of the injured infant. Florida Statute § 766.303(2) and Florida Statute § 766.309(1)(b). All hospitals and physicians other than participating physicians are ~~required~~ to pay assessments into the fund. Florida Statute § 766.314(4)(a)(b). Physicians performing obstetrical services may become participating physicians

by payment of a significantly higher assessment into the fund. However, only the involvement of a participating physician performing obstetrical services gives rise to the exclusive remedy afforded by NICA.

Obviously, the legal rights of both the patients and the non-obstetrical health care providers are affected by the election of an obstetrician to be a participating physician. Hospitals have the opportunity to protect themselves and their non-obstetrical staff from legal liability by determining which physicians performing obstetrical services are participating in NICA and even to require that staff obstetricians become participating physicians.

The patients' only practical opportunity to preserve their common law legal rights in this situation is provided by the notice required in Section 766.316, Florida Statutes. Since not all physicians providing obstetrical services are participating physicians under NICA, an obstetric patient has some opportunity to preserve her common law remedies by obtaining treatment from a non-participating physician. However, she can exercise that option only if she has reasonable notice that her current treating obstetrician has elected to become a participating physician under NICA and her legal remedies are limited to the benefits available under NICA.

Florida Statute § 766.316 provides that the statutory notice "shall include a clear and concise explanation of a patient's rights and limitations under the plan." However, the statute does not expressly indicate when the notice should be given to the patient. In order to serve the purpose and function intended by the Task Force and the Legislature the notice should be given before the delivery of the infant, if possible; and as soon as reasonably possible in order to allow the patient time to evaluate her legal rights and the opportunity to obtain the services of a non-participating obstetrician, if she so chooses.

In this case the Court does not have to determine whether the notice was timely,

since the health care providers have stipulated that no notice was ever given. However, the Court must determine the issue raised by the health care providers that they did not have reasonable time to give the notice required by the statute.

There is evidence that both of these patients received prenatal care at clinics which were operated or supervised by University Hospital. For at least several weeks, University Hospital directly employed the nurse-midwives who provided prenatal care to each of these women. The prenatal medical records of both women are on forms bearing the heading:

"University Hospital of Jacksonville
Maternal and Child Health Project"

The Court has received copies of contracts and exhibits between Florida HRS and University Hospital which clearly show the direct involvement of University Hospital in the operations of these clinics after the effective date of this statute and during the time these women were receiving prenatal care at the subject clinics.

However, for the purposes of this decision, the evidence undisputably shows and the Court determines, that University Hospital had reasonably sufficient time and opportunity to give the notice required by the statute after each woman arrived at the hospital and before delivery was accomplished.

The medical records before the Court show that Theresa Wilson arrived at University Hospital for delivery of her infant at approximately 1:45 a.m. on May 20, 1989. Her baby was not delivered until 8:45 a.m. on May 21. She was in the hospital for thirty-one hours before delivery. The medical records further show that she signed a consent for "Obstetrical Delivery. To Deliver My Baby Vaginally or by Caesarean Section with Anesthesia as Necessary" on May 19, the day before she was actually admitted. The records further indicate she had been

sent to University Hospital on May 17, for a prenatal ultrasound examination.

From these records the Court concludes the hospital had more than sufficient time to give this patient the notice required by the statute. It is significant that the hospital had the time on May 19, the day before admission, to have the patient sign a surgical consent form for the legal protection of the hospital. There is no apparent reason why the hospital could not have used that same opportunity to give the patient the statutory notice of her rights and limitations under NICA. Nevertheless, the hospital certainly had ample time to give the patient this notice after admission and a reasonable time before delivery of the infant.

The other patient, Karen Athey Simcic, was admitted to University Hospital at 10:30 p.m. on June 3, 1989 and her infant was delivered approximately four and three-quarters hours later at 3:14 a.m. on June 4. It is significant that the "Resume" in the hospital records for this patient indicates:

> "The patient had been through prenatal care at the University Hospital of Jacksonville and had had no significant complications."

She also had been sent to University Hospital for prenatal ultrasound on May 16, 1989. On June 3, the day of her admission, she signed two medical consent forms: a consent for "Obstetrical Delivery: To Deliver My Baby Vaginally or by Caesarean Section with Anesthesia as Necessary" and a consent for "Elective Removal of the Foreskin" of the penis. Although the time the consents were executed is not shown, they must have been executed at least three and one-quarter hours before the delivery of the infant, given the date on the forms.

Likewise, there is no apparent reason why the patient could not have been given notice of her rights and the limitations under NICA at that time.

The significance of the notice required by the statute can be measured by the

significance of the common law rights which are abrogated by the statute. It is clear that this statute is intended and designed to apply only to the most severely injured infants. The statute is only applicable to those infants who are "permanently and substantially mentally and physically impaired."

In lieu of the damages available at common law, infants so injured may recover under NICA their "actual expenses for medically necessary and reasonable medical and hospital, habilitative and training, residential and custodial care and service, for medically necessary drugs, special equipment, and facilities and for related travel." However, before any of these benefits may be recovered, the claimant must exhaust the similar benefits available under the welfare programs of the State or Federal governments. The statute expressly provides that the medical, custodial and rehabilitative benefits described above are excess over "(e)xpenses for which the infant has received reimbursement, or for which the infant is entitled to receive reimbursement, under the laws of any state or the Federal Government, except to the extent such exclusion may be prohibited by law." (emphasis added) Florida Statute § 766.31(a)(3).

Whenever common law remedies are changed or abrogated by legislative action, the constitutionality of such action may be called into question. However, statutes are presumed to be constitutional, and Courts are required to apply them so as to preserve their constitutionality, if that is reasonably possible. Florida Dept. of Education v. Glasser, 622 So. 2d 944 (Fla. 1993); Capital City Country Club, Inc. v. Tucker, 613 So. 2d 448 (Fla. 1993); Firestone v. News-Press Publishing Co., Inc., 538 So. 2d 457 (Fla. 1989). This Court can resolve the legal issue presented in this case without resorting to a determination of the constitutionality of the statute. Tenets of statutory construction include the notion that the Legislature, in enacting a law, does so for some finite purpose. That is, a presumption arises that the Legislature did not intend

to promulgate a meaningless or hollow statutory provision. As stated above, the enactment of Florida Statute § 766.316 would appear to have significance as an attempt to assure that this legislative program would pass constitutional muster.

Although the Legislature did not expressly provide any penalty for failure of physicians or hospitals to give the statutory notice, it makes no legal or logical sense that no mechanism to stimulate or assure compliance was intended. That these patients did not receive such notice before their deliveries in May and June of 1989, even though this statute was enacted in 1988, gives a good indication that at least this hospital would not give the notice without some sufficient, legal stimulus.

Such a stimulus is provided by the statute if the giving of the required notice is a condition to the limitation on the patients' rights of recovery at common law. This statute provides an exclusive remedy against any medical defendant when the infant is delivered by a "participating physician." However, unlike patients, the statute does not require physicians to participate. Nevertheless, if the physician attending at delivery does participate, then both the physician and the hospital are required to give the patient notice of the rights and limitations under NICA.

Under these circumstances, it seems only appropriate and just that the patients' rights may not be limited unless the physician and the hospital at least perform their statutory duty of giving the required statutory notice to the patient. Such a construction allows the expectant parents to make an informed decision.

The parties have stipulated that the notice was not given. The Court finds beyond any question of material fact that the hospital had reasonable opportunity to give the notice before delivery of each of these infants. Under these circumstances, the Court determines and declares

that the claimant families in this consolidated case are not limited to their remedies under NICA; and they are free to pursue their common law actions and remedies. Accordingly, it is

ORDERED AND ADJUDGED that:

1. The Court grants the request of all parties to determine and declare the rights of these parties in the legal dispute presented in this action.

2. The Court grants the Motions for Summary Judgment of the Defendants, Athey/Simcic and Wilson/Broaden and denies the Motions for Summary Judgment of the Plaintiffs, University Hospital and Board of Regents.

3. The Court finds there are no disputed issues of material fact involved in or arising out of the issues in this cause and that the Defendants, Athey/Simcic and Wilson/Broaden, are entitled to Summary Judgments on all issues as a matter of law.

4. The Court finds and declares that Florida Statute § 766.301, et seq. requires that the common law rights and remedies of patients otherwise subject to those statutes may not be abrogated unless the patient is given the notice provided in the statute before delivery of the infant, unless such notice is not reasonably possible. Notice to the obstetric patient under Florida Statute § 766.316 is a condition precedent to the privileges and protection enjoyed by participating physicians under Florida Statute § 766.301, et seq., unless such notice is not reasonably possible.

5. Therefore, the Court finds and declares that these claimant families are not limited to the exclusive remedy provided under NICA, and they are free to pursue their common law remedies. The temporary injunction prohibiting them from prosecuting their common law actions is hereby lifted and dissolved.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 1st day of December, 1994.

P. KEVEN DAVEY, CIRCUIT JUDGE

Copies furnished to:

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T. Michael Kennedy, Esq.
Stephen E. Day, Esq.
Francis E. Pierce, III, Esq.
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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORID.1

CASE NO. 91-4222

THE BOARD OF REGENTS OF THE STATE OF FLORIDA, and UNIVERSITY MEDICAL CENTER, INC., a Florida corporation,

Plaintiffs,

vs.

CHANYSE CHANNEL WILSON BROADEN, etc., et al.,

Defendants.

CHANYSE CHANNEL WILSON BROADEN, etc., et al.,

Counterclaimants,

vs.

THE BOARD OF REGENTS OF THE STATE OF FLORIDA, UNIVERSITY MEDICAL CENTER, IX., a Florida corporation; and THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,

Counterdefendants.

/

ORDER DENYING RENEWED MOTION FOR SUMMARY JUDGMENT; MOTION FOR REHEARING

This cause came before the Court on December 19, 1994 at 4:00 p.m. At issue were the Renewed Motion for Summary Judgment and Motion for Rehearing filed by the Defendants. After reviewing the motions and hexing argument of counsel, the Court finds that

the Defendants' motions should be denied. Accordingly, it is

ORDERED AND ADJUDGED that the Renewed Motion for Summary Judgment and the Motion for Rehearing filed on behalf of the respective Defendants are denied.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 15th day of December, 1994.

P. KEVIN DAVEY, CIRCUIT JUDGE

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Appendix Part 2

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

THE BOARD OF REGENTS OF THE STATE OF FLORIDA, etc., et al.,
Appellants,

v.

CASE NO. 95-00229

CHANNYSE CHANNELLE WILSON BROADEN, etc., et al.,
Appellees.

BOARD OF REGENTS OF THE STATE OF FLORIDA, etc., et al.
Appellants,

v.

DEVIN ATHEY, etc., et al.,
Appellees.
/

INITIAL BRIEF OF APPELLANTS, BOARD OF REGENTS OF THE STATE OF FLORIDA, ROBERT THOMPSON, M.D., MATTHEW JOHNSON, M.D., K. COOPER, M.D., AND UNIVERSITY MEDICAL CENTER, INC.

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notice.

Athey and Broaden will likely attempt to rely on ~~Turner v.~~ Hubrich, 20 Fla. L. Weekly D703 (Fla. 5th DCA March 17, 1995), which addressed the question of NICA's notice requirement as a condition precedent to the exclusive-remedy provision of NICA. However, a motion for rehearing ~~en banc~~ was filed on March 31, 1995, and, therefore, Turner is non-final. Caldwell v. State, 232 So. 2d 427 (Fla. 1st DCA 1970) (opinions of appellate courts are not final until the time for rehearing and disposition has run). In Turner, the Fifth District Court of Appeal found that a failure to give a patient notice of participation in NICA deprived the patient of an opportunity to seek the services of a health care provider who does not participate in NICA. Turner, 20 Fla. L. Weekly at 704. The court declined to address the doctor's argument that in an emergency situation it would be difficult to give the required advance notice. *Id.* The court did not address this issue because in Turner the patient had made sixteen visits to the physician prior to her admission to the hospital for childbirth. ***Id.***

In comparing Turner to this case, several important differences arise. Unlike the situation in Turner, Athey and Broaden presented to University Medical Center for the first time when they were in labor and experienced the type of emergency medical situation that the ~~Turner~~ court specifically declined to address. Another important distinction can be found in the Turner court's finding that failure to provide notice deprived the

was reasonable opportunity to provide notice and whether any failure to provide notice deprived the Appellees of an opportunity to preserve their common-law remedies by seeking alternate obstetrical care from a non-participating physician.

In the portion of the trial court's order discussing whether there was a reasonable opportunity to provide notice, the trial court stated that both the Athey and Broaden patients received pre-natal care from clinics "supervised" by UMC and that there was "direct involvement" by UMC in the operations of these clinics. (R.648). The "clinic" discussed by the trial court was identified in the affidavit of Donald Hagel, M.D., as the Duval County Public Health Unit, a subdivision of the Florida Department of Health and Rehabilitative Services. (R.352-354). Although the trial court made no determination that UMC could or should have provided NICA notice to the patients during the time they received pre-natal care at the Duval County Public Health Clinic, the suggestion by the trial court that UMC "supervised" the public health clinic or had "direct involvement" with the clinic is not supported bv the record. Moreover, as Dr. Hagel indicated in his uncontroverted affidavit, all of the pre-natal care received by Athey and Broaden at the Duval County Clinic was provided by nurse midwives and registered nurses, and no physicians were involved in the patients' pre-natal care at the clinic. Gbviously, there is no requirement under §766.316 for nurse midwives or registered nurses to provide NICA notice; Consequently, no credible contention can be made that the patients should have received NICA notice while they were receiving

Appendix Part 3

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA .

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

Appellants,

v. CASE NO. 95-00229

CHANNYSE CHANNELLE WILSON BROADEN, etc., et al.,

Appellees.

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

Appellants,

v.

DEVIN ATHEY, etc., et al.,

Appellees.
/

REPLY BRIEF OF APPELLANTS, BOARD OF REGENTS OF THE STATE OF FLORIDA, ROBERT THOMPSON, M.D., MATTHEW JOHNSTON, M.D., K. COOPER, M.D., AND UNIVERSITY MEDICAL CENTER, INC.

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Finally, Athey's brief cites numerous decisions holding that notice provisions are conditions precedent under various and sundry statutes. By referencing these decisions, Appellees seem to suggest that notice provisions inexorably constitute conditions precedent. Space limitations preclude Appellants from distinguishing these decisions on a case by case basis. However, a careful review of each cited case will reveal that each decision was based on statutory language distinguishable from the NICA notice provision. Moreover, many of the cases cited construed statutes previously distinguished by the Appellants in their initial brief at page 21, note 3.

II. REPLY TO APPELLEES' ARGUMENT THAT NO GENUINE ISSUE OF MATERIAL- FACT EXISTED TO PRECLUDE ENTRY OF SUMMARY JUDGMENT

The Appellees, Mrs. Athey and Mrs. Wilson, have contended that "reasonable opportunity" existed on the part of UMC to give the NICA notice based partly on the fact-that both women had undergone ultrasound testing at UMC prior to their admissions. (Athey's Brief, p. 3, 32; Wilson's Brief, p. 4-6). Mrs. Athey contended that the ultrasound testing which was done at the hospital approximately a month prior to her admission provided an opportunity to UMC to give her NICA notice. Mrs. Wilson also underwent an ultrasound test prior to her admission. However, these ultrasound tests were performed by technicians and nothing in the record suggests that either woman was seen by a physician at that time. Mrs. Athey tried to support her claim by the fact that Dr. Johnston had signed the record of ultrasound test. There was

nothing in the records before the trial court to suggest that Dr. Johnston saw either patient or to suggest a physician/patient relationship with Dr. Johnston existed when the ultrasound tests were performed. A clear reading of §766.316 indicates that notice requirement is only placed on a participating physician and there is clearly no requirement on technicians to provide NICA notice.

Mrs. Athey also improperly emphasizes the fact that a resume, dictated by Dr. Thompson, stated that the patient had been through prenatal care at UMC and listed the date of her ultrasound as a "previous admission date." This resume only made reference to the ultrasound test which had been done by the technician and the prenatal care that Mrs. Athey had received at the Women's Health Clinic. Mrs. Athey also testified in her deposition that, with the exception of admission for her daughter's birth, she had never been admitted to UMC prior to the birth of her son. (Athey deposition, p. 22-23). Mrs. Athey additionally--emphasized that she had been told at the time that she underwent her ultrasound test that she would be admitted to UMC for delivery of her child. Even if this statement was actually made, this statement in no way triggered any NICA notice requirements under §766.316 since Mrs. Athey was only seen by a technician. Additionally, by her own admission, Mrs. Athey has stated that she is not sure if she had ever been seen by a physician at the Women's Health Clinic. (Athey's deposition, p. 14). In this same regard, Mrs. Wilson received her prenatal care at the Beaches Health Clinic by nurses who were under no obligation to provide NICA notice.

The Appellees attempted in their brief to discredit the significance of the fact that, under the unique circumstances of this case, Mrs. Athey and Mrs. Wilson had no ability to go anywhere else because of their Medicaid status by unfairly mischaracterizing the Appellants' argument in a footnote. As the Appellees have pointed out themselves, the most recent decision emphasizes that the importance of giving notice lies in the fact that, if it is not given, the patients are deprived of an opportunity to seek the services of a non-NICA participant. Turner v. Hubrick, 20 Fla. L. Weekly D1529 (Fla. 5th DCA June 30, 1995). However, in the case before this Court, it has clearly been established by affidavit that the patients could not have gone elsewhere for delivery so the rationale for giving notice, as found by the Turner court, is not present in this case. It is for this reason, and only this reason, that the Appellees' Medicaid status became a factor.

The argument from Turner which i-s most applicable to our case was not addressed by the court in Turner. The physicians in Turner argued that the requirements for giving notice would be different in an emergency situation. Because the patient had made sixteen visits to the physicians preceding her admission in Turner, the court in Turner declined to address this argument. The type of emergency situation not addressed in Turner is applicable here. Despite the Appellees' contentions, the first real opportunity to give notice by the NICA participants arose when the Appellees presented to UMC with ruptured membranes. There was no requirement to give NICA notice during the visits for ultrasound tests nor

during visits by the Appellees to the prenatal clinics because the Appellees were not seen by NICA physicians at these times.

As was pointed out in the Appellants' initial brief, the trial court's decision is silent on the issue of whether the physicians employed by the BOR had a "reasonable opportunity" to provide NICA notice and, hence, failed to resolve this material issue of fact. It was also observed that the trial court decision was silent on the ramifications of the fact that the resident physicians are *exempt* from the notice requirements of 5766.316. In response, the Appellees argue that since the attending physicians for the birth of -Mrs. Athey's and Mrs. Wilson's children did not provide the required notice, the resident physicians are bound thereby and cannot avail themselves of the immunity which they would otherwise have. The difficulty with Appellees' position, however, is that it overlooks the fact that the trial court made absolutely no effort to determine whether or not the attending physicians (Dr. Thompson and Dr. Sanchez-Ramos) had a "reasonable opportunity" to provide notice. The trial court's decision clearly held that NICA notice is required only where there is a "reasonable opportunity" to do so. (R. 647). By completely failing to address the issue of whether or not the attending physicians **had** a reasonable opportunity to provide notice, the trial court erred. There is also no support for Appellees' assertion that the resident physicians are somehow "bound" by the attending physicians' failure to provide notice. As indicated, resident physicians are statutorily;-exempt from the notice requirement. Nothing in the

Appendix Part 4

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

CASE NO. 95-00229

THE BOARD OF REGENTS OF THE STATE OF FLORIDA, ROBERT THOMPSON, M.D., AS AN EMPLOYEE OF THE BOARD OF REGENTS OF THE STATE OF FLORIDA, MATTHEW JOHNSTON, M.D., AS AN EMPLOYEE OF THE BOARD OF REGENTS OF THE STATE OF FLORIDA, K. COOPER, M.D., AS AN EMPLOYEE OF THE BOARD OF REGENTS OF THE STATE OF FLORIDA, and UNIVERSITY MEDICAL CENTER, INC., A FLORIDA CORPORATION,

Appellants,

v.

DEVIN ATHEY, A MINOR, BY AND THROUGH HIS GUARDIANS AND NATURAL PARENTS, DAVID ATHEY AND KAREN D. ATHEY, a/k/a KAREN SIMCIC, DAVID ATHEY AND KAREN D. ATHEY, a/k/a KAREN D. SIMCIC, INDIVIDUALLY; CHANYSE CHANNELLE WILSON BROADEN, A MINOR, BY AND THROUGH HER MOTHER AND NEXT FRIEND, TERESA LYNN WILSON, AND TERESA LYNN WILSON, INDIVIDUALLY, AND ERIC JEROME BROADEN, THE FATHER OF THE INFANT CLAIMANT; AND THE FLORIDA NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,

Appellees.

APPELLANT UNIVERSITY MEDICAL CENTER, INC.'S MOTION FOR REHEARING, REHEARING EN BANC, CLARIFICATION AND CERTIFICATION

Appellant, University Medical Center, Inc., ("UMC"), by and through its undersigned counsel, hereby moves this Court pursuant to Florida Rules of Appellate Procedure 9.330 and 9.331 for a rehearing, rehearing en banc, clarification of its opinion filed September 11, 1996, and certification of an additional question to

the Florida Supreme Court. UMC respectfully submits. that **this** Court has overlooked the provisions of Section 766.302(2), **Florida** Statutes (1995) which provides that the rights and remedies ***granted*** by the Florida Birth Related Neurological Injury Compensation Plan ("NICA") shall exclude all other rights and remedies against any person or entity involved with the labor, delivery **and** immediate post-delivery of such infant. UMC respectfully submits that this Court has destroyed the exclusive compensation scheme of NICA and allowed duplicative recovery by claimants by requiring notice as a condition precedent for every physician involved as well as notice by the hospital.

In addition, UMC respectfully submits that this court misapprehended UMC's position. concerning whether UMC **had a** reasonable opportunity to provide notice under Section 766.316, Florida Statutes (1995). This Court stated that appellants (including UMC) did not argue that a medical emergency prevented the giving of notice in the instant case. (Opinion, p. 9)...In fact; that is exactly what UMC contended in its briefs. UMC contends that its affidavits in the record show that a medical emergency did exist, or that a question of fact exists as to the existence of such an emergency, thereby precluding the granting of the summary declaratory judgment by the trial court.

Finally, because this Court's decision may result in recoveries under both NICA and common law, this opinion raises an issue of exceptional importance such that consideration by the District Court en banc is requested.

I. REQUIRING THAT EACH HOSPITAL AND EACH PHYSICIAN GIVE NOTICE AS A CONDITION PRECEDENT TO IMMUNITY UNDER NICA DESTROYS THE EXCLUSIVENESS OF THE NICA REMEDY

This Court held in its opinion that generally p&-delivery notice under Section 766.316, Florida Statutes (1995) must be given by the hospital and by the participating physicians as a condition precedent to the invocation of NICA exclusivity. This 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". This Court upheld the trial court's decision that UMC had the opportunity to provide the NICA notice but did not. This Court also -held that the residents, assistant residents and interns who practiced at UMC, are exempt from-the notice requirement. This case was remanded to the trial court for the issue of whether the attending physicians had a reasonable opportunity to provide notice.

The unintended result of this Court's ruling is that the claimants/appellees may be able to proceed against UMC in a medical. malpractice action for the vicarious liability- of alleged agents who themselves are immune from suit.' As this Court held that residents, assistant residents and interns are exempt from the notice requirement, these individuals may arguably invoke NICA. If the trial court rules that the attending physicians did not have reasonable opportunity to give notice, NICA will again be invoked. Accordingly, the claimants/appellees potentially could receive a

NICA award and yet still seek damages for the same injury by a medical malpractice suit against UMC. Such a result was clearly not intended by the Florida Legislature and contradicts the express *language* of Section 766.303(2), Florida Statutes (1995). Section 766.303(2) provides that:

> 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, 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 Section 766.301-766.316. Such suit shall be filed before the award of the division becomes conclusive and binding as provided for in Section 766.311.

(emphasis added);

As stated by this Court in Braniff v. Galen of Florida, Inc., 669 So. 2d 1051, 1052-3 (Fla. 1st DCA 1995), review granted, 670 so. 2d 938 (Fla. 1996), the NICA plan is a "limited no-fault alternative for birth-related neurological injuries". NICA is not an additional remedy. To require the entity and physicians involved to each give notice (or be exempt form the provisions of Section 766.316) provides claimants with duplicative remedies: a NICA claim and a medical malpractice claim. Such a result. effectively abolishes the exclusivity of NICA.

In fact, even the appellees contended in their brief that UMC will be immune from suit under NICA if the "obstetrician who

performs the delivery in the hospital is immune from suit". (Brief of Athey, p. 5.) The appellees admit 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". (Brief of Athey, p. 14). In short, even the appellees did not contend that a hospital is required to give notice *if* the participating physician gives notice. UMC agrees with the appellee that once immunity is granted as to a participating physician, the hospital also is entitled to such immunity. If not, then again the exclusivity of NICA has been destroyed.

Accordingly, the appellant, UMC, respectfully requests that this Court clarify its decision in light of Section 766.303(2). This Court has held that if a reasonable opportunity is present to present NICA notice, and if the physician is not a resident, assistant resident and intern, notice must be given as a condition precedent to invocation of immunity under NICA. This Court did not address the effect of the waiver of notice requirement for residents, interns and assistant residents whereby they automatically are granted NICA immunity. This Court also did not address the effect of a determination by the trial court that the attending physicians did not have a reasonable opportunity to provide that notice and therefore are entitled to the NICA immunity. As a matter of law, UMC and The Board of Regents of the State, of Florida ("BOR") should then be able to invoke the

exclusive **nature of the** NICA scheme. To **hold** otherwise destroys the exclusivity of NICA.

Simpiy 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, 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.

II. THIS COURT MISAPPREHENDED THE APPELLANT'S ARGUMENT THAT AN EMERGENCY SITUATION EXISTED PREVENTING A REASONABLE OPPORTUNITY TO GIVE THE NICA NOTICE

In its opinion this Court stated that appellants do not argue that a medical emergency prevented the giving of the notice in the instant case. (Opinion, p. 9) In fact, that is exactly what UMC does contend. In their initial brief on the merits, appellants, including UMC, 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 medical situation that the Turner court specifically declined to address" . (Brief of Appellants, p. 23). This Court did note that appellants contend that it was "medically unsafe and inappropriate" to transfer the patients to another health care institution for delivery". (Opinion, p. 9). However, this Court merely considered this fact as to whether the patients were denied "informed choice". Appeliant's respectfully submit that the affidavit of Robert

Thompson, M.D. (A-l)[1] and the affidavit of Luis Sanchez-Ramos, M.D. (A-2) show that an emergency existed, or at least created a factual issue as to whether an emergency existed, so as to preclude the reasonable opportunity to give notice of NICA participation. UMC contends that the patients.' condition of active labor after spontaneous rupture of membranes constituted a "medical emergency" for which notice by UMC is not required. At the least, the issue of whether an emergency existed so as *to* relieve UMC of the notice requirement should be an issue before the trial court on remand.

III. THIS DECISION RAISES AN ISSUE OF EXCEPTIONAL IMPORTANCE

This Court's Order may result in simultaneous NICA and state court proceedings with the potential of duplicative recovery, thereby effectively destroying the exclusiveness of NICA. Accordingly, this case presents issues of exceptional importance so as to justify a rehearing en banc *or* certification of an additional question concerning the interplay of Sections 766.303(2) and 766.316, Florida Statutes (1995) to the Florida Supreme Court as a question of great public importance.

SUMMARY

In summary, UMC contends that this Court overlooked the effect of requiring notice by both the hospital and the participating physicians for each to invoke NICA immunity. Section 766.303(2)

[1] This reference is to the appendix to Appellants' Initial Brief on the Merits.

expressly provides that once NICA is invoked the NICA remedy is exclusive and that all other. persons and entities, including the hospital, are also immune. This Court overlooked the effect of its decision that the resident physicians are not required to provide Section 766.316 notice. While this Court directed the trial court on remand to determine whether the resident physicians' exemption from the NICA notice limits the NICA remedies against the resident physicians and the BOR, UMC respectfully submits that the resident physicians' exemption from the NICA notice also limits the appellees to pursuing NICA remedies against UMC pursuant to Section 766.303(2).

In addition, UMC respectfully submits that this Court misapprehended its argument concerning the fact that it was medically unsafe and inappropriate to transfer the patients to another health care institution for delivery. UMC contends that the patients' presentation to the hospital with active labor after spontaneous rupture of the membranes constituted an emergency in which no reasonable opportunity existed to give notice. This issue should have precluded entry of the summary declaratory judgment by the trial court. This issue should also be before the trial court as to UMC on remand.

Finally, UMC respectfully'submits that this ruling with its effect on the exclusivity of NICA is of exceptional importance so as to warrant rehearing en banc or certification of an additional question to the Florida Supreme Court.

REQUIRED STATEMENT PURSUANT TO RULE 9.331(d)(2)

I. express a belief, based on a reasoned and professional judgment, that the panel decision is of exceptional importance.

WHEREFORE, UMC requests that this Court grant a rehearing or -rehearing en banc concerning its opinion, clarify its opinion concerning implications of Section 766.303(2) and UMC's argument that an emergency in fact existed, and certify an additional question to the Florida Supreme Court concerning the interplay of Sections 766.302(2) and 766.316, Florida Statutes (1995).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to the individuals listed on the attached Service List, this 25th day of September, 1996.

Rhonda B. Boggess
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FIRST DISTRICT COURT OF APPEAL

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Appendix Part 5

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA FIRST DISTRICT

CASE NO. 95-229

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

Appellants,

vs.

CHANYSE CHANELLE WILSON BROADEN, et al.,

Appellees.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

BRIEF OF AF'PELLEES, DEVIN ATHEY, ETC.

SEARCY, DENNEY, SCAROLA,
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delivered to the "obstetrical patient, " because the ordinary, everyday meaning of "obstetrical" is "of, relating to, or associated with childbirth," and the potential plaintiff simply cannot be considered an "obstetrical patient" after the delivery of her child.

Even if the statute were not explicit in that respect, that is the only reasonable construction which can be placed upon it -- because the obvious purpose of the notice requirement is to ensure that the patient can make an informed decision as to whether to forego her legal rights and continue under the care of the physician whose liability is limited, or to seek the care of a physician who has elected to have his or her liability for birth-related injuries depend upon proof of negligence by opting out of the Plan. The *only* point in time at which such a decision can be made is ***before*** delivery of the child, of course, and to read the statute as authorizing notice after the fact, or not at all, is to render its notice requirement al together meaningless.

The same observation applies to the hospital, because the hospital's immunity from suit under NICA depends upon whether the obstetrician who-performs-the-deliver-y in-the hospital is immune from suit. This conclusion will require a somewhat detailed analysis of the statutory scheme, and a comparison with the Virginia statutes upon which NICA was modeled, and we will not trouble the Court with a summary of those details here, Instead, we simply alert the Court that our conclusion will be well-supported in the argument. We point out here simply that, because the hospital stands in the obstetrician's shoes for purposes of obtaining immunity under NICA, the same reasons which underlie the need for a pre-delivery notice by the obstetrician also underlie the need for a predelivery notice by the hospital. In short, the statute simply must mean what it says -- that notice must be given to "obstetrical patients"! before any incident occurs which triggers the draconian limitations imposed upon the patient- by NICA.

Because $766.316 is relatively new, there has only been one appellate decision

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delivered by *a participating physician* at the birth," and not whether any "participating hospital" was involved. Section 766.309(1)(b), Fla. Stat. (1988 Supp.) (emphasis supplied). Once that determination is made, the hospital gains its immunity not from the fact that it has paid its "assessment," but from the fact that obstetrical services during the delivery in the hospital were supplied by a "participating physician."

While that is not entirely clear from the initial enactment of the statutory scheme (which is more or less silent on immunities for hospitals, and which can reasonably be read to create no immunities at all for hospitals), it was made reasonably clear in the revised version of the statutory scheme, which now ties immunity of hospitals directly to the immunity of "participating physicians":

> The rights and remedies granted by this plan on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents, and next of kin, at common law or otherwise, *against any person or entity directly involved with the labor, delivery, or immediate post-delivery resuscitation during which such injury occurs,* arising out of or related to a medical malpractice claim with respect to such injury; . . .

Section 766.303(2), Fla. Stat. (1989) (emphasis supplied; italicized language inserted by Ch. 89-186, §1, Laws of Florida),

In other words, if a "participating physician" delivers a braindamaged baby, both the "participating physician" and the hospital (and everyone else involved in the labor and delivery, like the residents, the anesthesiologist and the nurses) are immune from suit, and NICA is the exclusive remedy. But if a non-participating physician performs the delivery, then neither the physician nor the hospital (nor anyone else) is immune from suit for an injury which they may have negligently caused. This, we submit, is the conclusion to which the statutory scheme plainly points, and we are reinforced in that conviction by the legislature's additional, post-incident revision of the statute in issue here, $766.316. which

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Appendix Part 6