IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC05-2164

UNIVERSITY OF MIAMI d/b/a UNIVERSITY OF MIAMI SCHOOL OF MEDICINE,

Petitioner,

-vs-

JUANITA RUIZ and MIGUEL ANGEL RUIZ, as parents and natural guardians of MICHAEL A. RUIZ, a minor, et al.,

Respondents.
_____/

BRIEF OF AMICUS CURIAE THE ACADEMY OF FLORIDA TRIAL LAWYERS ON BEHALF OF THE RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The Academy of Florida Trial Lawyers (AAcademy@) is a large, voluntary state-wide association of more than 4,000 trial lawyers, concentrating on litigation in all areas of the law. Members of the Academy are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts.

The case is important to the Academy because it involves a conflict between District Courts regarding the construction and application of the statutory notice requirement in NICA, '766.316, Fla. Stat. That notice requirement is a critical part of that statutory scheme, since it is intended to provide an opportunity for the patient to decide whether to waive her common law rights and remedies, as well as those of her child. Moreover, the decisional conflict is also significant because it raises the issue of whether NICA must be strictly construed, as this Court has held on numerous occasions, or whether a different standard will apply under the circumstances of these cases.

SUMMARY OF ARGUMENT

This Court should resolve the decisional conflict by approving the Third District=s decision in the case sub judice, and disapproving the Fifth District=s decision in Orlando Regional Healthcare System, Inc. v. Alexander, 909 So.2d 582 (Fla. 5th DCA 2005). This Court has held on numerous occasions that NICA must be strictly construed in favor of the patients and against the healthcare providers, because it is in derogation of common law. That standard of interpretation is particularly important here, where the issue is the proper construction of the notice requirement. That notice is the only means by which the mother is informed that her common law rights and remedies will be eliminated by NICA, unless she makes an affirmative decision to change healthcare providers. The legislature has imposed a strict notice requirement mandating that the hospital and physician(s) each notify the patient in writing of the limited alternative remedies available in NICA, '766.316, Fla. Stat. That statute provides an exception when the patient is an emergency medical condition or notice is otherwise impracticable. The Fifth District=s decision construed the exception so broadly as to potentially eliminate the notice requirement altogether. That is, the Fifth District held that even if there were prior opportunities to give the notice to the patient, if the patient is in an emergency medical condition when she presents to the hospital for delivery, the hospital and healthcare providers are relieved of any duty to notify the patient in accordance with the statute. The Third District, on the other hand, reasonably construes the statute to require notice

be given if practicable opportunities were available during the prior treatment of the patient, and that that duty is not eliminated if the patient arrives at the hospital in an emergency medical condition. The Third District=s decision is consistent with the extensive case law from this Court holding that NICA must be strictly construed, and it also preserves the legislature=s intent to require, where practicable, notice to the patient so they can make a reasonable decision regarding the NICA alternative remedy. For these reasons, this Court should resolve the decisional conflict by approving the decision of the Third District in the case sub judice, and disapproving the Fifth District=s decision in Alexander.

ARGUMENT

THIS COURT SHOULD RESOLVE THE DECISIONAL CONFLICT BY APPROVING THE THIRD DISTRICT=S DECISION IN RUIZ AND DISAPPROVING THE FIFTH DISTRICT=S DECISION IN ALEXANDER.

This case is before the Court as a result of the Third District=s express acknowledgment of conflict with the Fifth District=s decision in Orlando Regional Healthcare System, Inc. v. Alexander, 909 So.2d 582 (Fla. 5th DCA 2005). The Third District determined that if there is a reasonable opportunity for a healthcare provider to comply with the NICA notice statute during a patient=s previous visits to the hospital or physician, notice must be provided even if ultimately the mother arrives at the hospital for the birth in an emergency medical condition. The Fifth District concluded that as long as the patient was treated while in an emergency medical condition, it was irrelevant that there were prior opportunities for the hospital or the physician(s) to provide the statutory notice. Respectfully, the Fifth District=s reasoning does not strictly construe NICA, but rather broadly construes the exception to the notice requirement in a manner that could conceivably eliminate the duty to provide notice altogether. That is not a reasonable construction of NICA, nor is it consistent with decisions of this Court which require NICA, and particularly for the statute governing notice, to be strictly construed against the healthcare providers and liberally construed in favor of the patient.

In 1988, the Florida Legislature enacted NICA, '766.301, Fla. Stat., et seq., which was designed to establish a limited system of compensation, irrespective of fault, that would apply to a limited class of catastrophic injuries that arose from obstetric services, see '766.301(2), Fla. Stat. NICA was initially proposed by the 1987 Academic Task Force for Review of the Insurance Tort System, and was derived in large part from a similar plan enacted in Virginia, see Galen of Florida, Inc. v. Braniff, 696 So.2d 308, 310 (Fla. 1997). However, the Task Force specifically recommended a notice provision to be included in the NICA Act in order to ensure that it would be fair to obstetrical patients and to shield the Act from constitutional challenge.[1] Id.

Consistent with the Task Force=s recommendation, the legislature enacted '766.316, Fla. Stat., which provides, in pertinent part:

> Each hospital with a participating physician on its staff and each participating physician . . . shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the associations and shall

[1]/In Galen, supra, this Court noted that one of the constitutional arguments would be that without notice to the patient of the tort immunity granted under the plan, patients would be deprived of their common law remedies without due process (696 So.2d at 310 n.2).

> include a clear and concise explanation of a patient=s rights and limitations under the plan...

However, that statute does include a narrow exception, defining certain situations in which notice is not required (Id.): ANotice need not be given to a patient when the patient has an emergency medical condition as defined in '395.002(9)(b), Fla. Stat., or when notice is not practicable.@

This Court has held that the NICA statutory scheme is in derogation of a patient=s common law rights and remedies and, therefore, its provisions, including the notice requirements of '766.316, Fla. Stat., must be strictly construed against the health care providers and liberally construed in favor of the patient; Florida Birth-Related Neurological Injury Comp Ass=n v. McKaughan, 668 So.2d 974, 979 (Fla. 1996); Florida Birth-Related Neurological Injury Comp Ass=n v. Florida Division of Administrative Hearings, 686 So.2d 1349, 1354 (Fla. 1997). Clearly, under that standard, exceptions to the notice requirement must be narrowly construed. However, the Fifth District in Alexander construed the Aemergency@ exception broadly, even to the point of potentially eliminating the notice requirement, while the Third District strictly and reasonably construed the notice requirement, and strictly construed the emergency exception. Thus, the Third District=s analysis is consistent with the extensive case law of this Court and other District Courts which have construed NICA. It is also consistent with the legislature=s intent in establishing a notice requirement.

Under the strict construction of NICA, each health care provider is required to provide pre-delivery notice to the patient that complies with the requirements of '766.316, Fla. Stat., Board of Regents v. Athey, 694 So.2d 46 (Fla. 1st DCA 1997), aff=d, 699 So.2d 1350 (Fla. 1997). Notice given by a hospital is not sufficient to constitute statutory compliance for the participating physicians. Id. The First District stated in Schur v. Florida Birth-Related Neurological Injury Comp Ass=n, 832 So.2d 188, 192 (Fla. 1st DCA 2002):

> AThis Court in Athey established a bright-line rule requiring pre-delivery notice for each health care provider in order to preserve his or her NICA plan immunity. This Court held that Ahealth 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.@ Athey, 694 So.2d at 50-51.

The notice required is not limited to the existence and effect of the NICA plan, but must also inform the patient of which, if any, of their healthcare providers are participants in the plan, '766.316, Fla. Stat. This Court stated in Galen of Florida, Inc. v. Braniff, 696 So.2d 308, 309 (Fla. 1997):

> [T]he only logical reading of the statute is that before an obstetrical patient=s remedy is limited by the NICA plan, the patient must be given pre-delivery notice of the health care provider=s participation in the plan.

See also, Schur, supra, at 832 So.2d at 192 (A[T]he Legislature, in clear and unambiguous terms, required that each participating physician must provide notice of participation in the NICA plan@). The burden of proof is on the healthcare provider(s) to Ademonstrate, more likely than not, that the notice provisions of the plan were satisfied,@ Tabb v. Florida Birth-Related Neurological Injury Compensation Assoc., 880 So.2d 1253, 1260 (Fla. 1st DCA 2004), quoting Galen, supra, 696 So.2d at 311. In Turner v. Hubrich, 656 So.2d 970, 971 (Fla. 5th DCA 1995), the court stated: AThe statute is quite clear that the burden is upon NICA participants to give the enlightening notice to their patients.@

As discussed previously, the notice provision is a critical component of the statutory scheme because it is not only designed to preserve it from constitutional challenge, but it is also necessary to ensure fundamental fairness, Galen, supra. Not only does the Act require the mother to make an election that could eliminate all her common law rights and remedies with respect to the hospital and participating physicians, but she also must make that decision on behalf of her unborn child. In light of the catastrophic and permanent consequences to the child that can result from neurological injuries during the birthing process, that decision is of immense importance. The legislature acknowledged the significance of the decision by requiring, inter alia, that the patient be given written notice by the hospital and each physician which Ashall include a clear and concise explanation of a patient=s rights and limitations under the [NICA] plan@ '766.316. This Court also recognized the significance of the mother=s decision in Galen, supra,

where it held that the notice requirement must be strictly construed and that the burden of proof was on the health care provider to prove compliance with this statute.

Respectfully, the Fifth District=s decision in Orlando Regional Health Care System, Inc. v. Alexander, 901 So. 2d 582 (Fla. 5th DCA 2005), does not recognize the significance of the notice requirement, nor strictly construe it as required by this Court=s precedent. Instead, the Fifth District authorizes a construction which could permit the exception to eliminate the notice requirement entirely. Obviously, at some point any pregnancy becomes an emergency, as the mother begins labor and requires immediate care and treatment. The exception to the notice requirement in '766.316, Fla. Stat., adopts the definition of Aemergency medical condition@ provided in '395.002(a)(b), Fla. Stat., which states:

> (9) AEmergency medical condition@ means:
>
> * * *
>
> (b) With respect to a pregnant woman:
>
> 1. That there is inadequate time to effect safe transfer to another hospital prior to deliver;
>
> 2. That a transfer may pose a threat to the health and safety of the patient or fetus; or
>
> 3. That there is evidence of the onset and persistence of uterine contractions or rupture of the membranes.

Obviously, '395.002(9)(b)(3), Fla. Stat., necessarily means that virtually every pregnancy will reach the point at which the mother is an Aemergency medical condition.@ Accepting the Alexander decision, there would never be an enforceable notice requirement because once that point was reached during the birthing process, notice could be dispensed with based on the Aemergency@ exception in the statute. Under the Fifth District=s rationale, the fact that there were prior practicable opportunities to provide notice is simply irrelevant. Clearly, that was not the intention of the Task Force that proposed the NICA Act, nor the legislature which enacted it.

The Fourth District in Northwest Medical Center, Inc. v. Ortiz, 920 So.2d 781, 785 (Fla. 4th DCA 2006),[2] wisely rejected that contention, stating:

> If the purpose of the notice requirement is to give the patient the choice to choose a NICA facility or not, hospitals should give notice at a time where such choice can still be made. By waiting until an emergency arises, the hospital is depriving the patient of this choice.

[2]/The Appellants in Northwest Medical v. Ortiz, supra, filed for discretionary review on March 14, 2006 based on the Fourth District=s express acknowledgment of conflict with Alexander, supra.

Similarly, the Third District in the case sub judice properly rejected the Fifth District=s holding stating, Ruiz v. University of Miami, 916 So.2d 865, 870 (Fla. 3d DCA 2005):

> Although we concur that the provision of notice is excused when the patient presents in an emergency medical condition, we find that, if a reasonable opportunity existed to provide notice prior to the onset of the emergency medical condition, the participating health care providers' failure to do so will not be excused and the participating health care providers will lose their NICA Plan exclusivity. We cannot conceive that the Legislature intended to discharge health care providers from the obligation to provide notice when the opportunity was previously available to them and, as such, they were legally required to provide notice at that time.

The Third District in Ruiz properly construed the statute in a reasonable manner that is consistent with the strict construction required by this Court=s decision in Galen supra, and McKaughan, supra. The Fifth District in Alexander, on the other hand, did not employ strict construction, but rather broadly construed the exception in '766.316, Fla. Stat., to the point that it subsumes the rule and directly interferes with the legislatures intent in promulgating that notice statute. Thus, the decisional conflict should be resolved by this Court disapproving Alexander and approving Ruiz. This will reestablish consistency regarding the standard by which NICA should be construed, and uphold the legislature=s intent to protect the rights of mothers and their children.

CONCLUSION

For the reasons stated above, this Court should resolve the decisional conflict by approving the Third District=s decision in Ruiz, supra, and disapproving the Fifth District=s decision in Alexander, supra.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to JUNE G. HOFFMAN, ESQ. and MARC J. SCHLEIER, ESQ., 1395 Brickell Ave., 14th FL, Miami, FL 33131; WILBUR E. BREWTON, ESQ. and KELLY B. PLANTE, ESQ., 225 S. Adams St., Ste. 250, Tallahassee, FL 32301; STEPHEN A. STIEGLITZ, ESQ., 111 N.W. 1st St., Miami, FL 33128; and LINCOLN J. CONNOLLY, ESQ., CHARLES H. BAUMBERGER, ESQ., and MANUEL A. REBOSO, ESQ., 44 W. Flagler St., 23rd FL, Miami, FL 33130, by mail, on April 17, 2006.

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CERTIFICATE OF TYPE SIZE & STYLE

The Academy of Florida Trial Lawyers hereby certifies that the type size and style of the Brief of Amicus Curiae is Times New Roman 14pt.

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