

SUPREME COURT OF FLORIDA

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

Petitioner,

SC05-2164

L.T. Case No.: 3D04-2763

vs.

JUANITA RUIZ and MIGUEL
ANGEL RUIZ, as parents and natural
guardians of MICHAEL A. RUIZ, a
minor, and FLORIDA BIRTH-
RELATED NEUROLOGICAL INJURY
COMPENSATION ASSOCIATION
("NICA"),

Respondents.

**RESPONDENT FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY
COMPENSATION ASSOCIATION'S ANSWER BRIEF**

On Discretionary Review of a Certified Conflict by the District Court
of Appeal, Third District of Florida

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PRELIMINARY STATEMENT

In this Answer Brief, the following terms and abbreviations will be utilized:

Respondent, FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, will be referred to as “NICA.”

Petitioner, UNIVERSITY OF MIAMI d/b/a UNIVERSITY OF MIAMI SCHOOL OF MEDICINE, will be referred to as the “Petitioner.”

Drs. Norris and Barker, will be referred to collectively as the “Participating Physicians.”

Administrative Law Judge Kendrick will be referred to as the “ALJ.”

Sections 766.301, et seq., Florida Statutes, will be referred to as “the NICA Statute” or the “NICA Plan.”

SUMMARY OF THE ARGUMENT

The instant case is before this Court because the Third District Court of Appeal certified conflict with Orlando Regional Healthcare System, Inc. v. Alexander, 909 So. 2d 582 (Fla. 5th DCA 2005). NICA agrees with the holding in Alexander that Section 766.316, Florida Statutes, contains “two distinct exceptions, each of which independently provides an exception to the pre-delivery notice requirement.” Id. at 586. The Third District Court of Appeal, as well as the ALJ, erroneously held that the participating physicians did not comply with the notice requirements of Section 766.316, Florida Statutes. The Third District Court of Appeal and the ALJ effectively ignored the fact that the mother presented in an emergency medical condition which excuses the provision of notice pursuant to Section 766.316, Florida Statutes (1998).

ARGUMENT

THE THIRD DISTRICT ERRONEOUSLY CONCLUDED THAT THE PARTICIPATING PHYSICIANS DID NOT COMPLY WITH THE NICA NOTICE PROVISIONS OF SECTION 766.316, FLORIDA STATUTES.

A. Standard of Review.

The applicable standard of review for the interpretation of the NICA Plan is *de novo*. Nagy v. Florida Birth-Related Neurological Injury Compensation Association, 813 So. 2d 155, 159 (Fla. 4th DCA 2002). The standard of review for

appeals from final agency orders is whether the order is supported by competent substantial evidence. Id. at 159.

B. The Third District Court of Appeal Misinterpreted and Misapplied the NICA Notice Provision to Require Both a Finding of an Emergency Medical Condition and a Finding that the Provision of Notice was not Practicable as to the Participating Physicians.

This case is before the Court on conflict certified by the Third District Court of Appeal in University of Miami v. Ruiz, 916 So. 2d 865 (Fla. 3d DCA 2005), as being in direct conflict with Orlando Regional Healthcare System, Inc. v.

Alexander, 909 So. 2d 582 (Fla. 5th DCA 2005). In Alexander, the Court held:

The ALJ misapplied the law as expressed in the clear language of the statute by interpreting the statute to require both (1) a finding of an emergency medical condition, and (2) a finding that the provision of notice was not practicable. We hold that the statute contains two distinct exceptions, each of which independently provides an exception to the pre-delivery notice requirement. As such, ORHS was excused from providing notice to Alexander when she arrived at the ORHS under emergency conditions, and her previous visits to the hospital during the pregnancy did not negate this clear statutory exemption. [Emphasis added.]

Alexander at 586. NICA agrees with the holding in Alexander, that there are two separate and distinct exceptions provided in Section 766.316, Florida Statutes (1998), which operate independently to provide an exception to the pre-delivery

notice requirement.¹ NICA also concurs with and hereby adopts the Petitioner's argument in the Initial Brief that the Third District Court of Appeal erred in holding in the instant case that:

Appellants rely on *Orlando Regional Healthcare System, Inc. v. Alexander*, 909 So. 2d 582 (Fla. 5th DCA 2005) for authority, wherein the Fifth District concluded that a patient's previous visits to the hospital during her pregnancy did not negate the statutory exception which applied to her final visit, when she arrived in an emergency medical condition. *See id.* at 586. We expressly reject and disagree with this holding. 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 provider's 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 patient's hospital visit three weeks later, admittedly, on an emergency basis, did not negate the physician's earlier statutory duty to provide the NICA Plan notice.
[Emphasis added.]

¹ Before the Third District Court of Appeal, NICA argued that Section 766.316, Florida Statutes, contains two separate and distinct exceptions. In seeking rehearing, NICA argued that since both Courts acknowledged two distinct exceptions and because the cases are factually distinguishable, the two cases could be reconciled and that there is no clear conflict. However, since this Court accepted jurisdiction as to the conflict, NICA again submits that as a matter of law, Section 766.316, Florida Statutes, does provide two separate and distinct exceptions.

Ruiz at 870. As argued by the Petitioner in its Initial Brief, the plain and unambiguous language of Section 766.316, Florida Statutes, is clear that there are two separate and distinct exceptions to the notice requirement which operate independently of each other. If one exception applies, then notice is excused. See § 766.316, Fla. Stat.

Further, NICA also concurs with and adopts the Petitioner's argument in the Initial Brief that there is no competent substantial evidence in the record to support the ALJ's and the Third District Court of Appeal's determination that the Participating Physicians had a reasonable opportunity to provide notice prior to the mother's presentation to the hospital in an emergency medical condition.

CONCLUSION

Section 766.316, Florida Statutes, provides two separate and distinct exceptions to the requirement that participating physicians must provide NICA notice. The exceptions operate independently of each other. The Third District Court of Appeal's holding in the instant case that in spite of the mother's presentation to the Hospital in an emergency medical condition, the Participating Physicians were not excused from providing the requisite NICA notice, is contrary to the plain language of Section 766.316, Florida Statutes (1998).

WHEREFORE, Respondent, Florida Birth-Related Neurological Injury Compensation Association, respectfully requests that the Third District Court of Appeals opinion be reversed consistent with the holding in Orlando Regional Healthcare System, Inc. v. Alexander, 909 So. 2d 582 (Fla. 5th DCA 2005).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by U.S. Mail this ____ day of March, 2006, to:

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CERTIFICATION OF FONT SIZE AND STYLE

I HEREBY CERTIFY that this Respondent’s ANSWER BRIEF has been typed using the 14 point Times New Roman font as required by Rules 9.210(a) and 9.210(a)(2), Florida Rules of Appellate Procedure.

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