IN THE SUPREME COURT OF FLORIDA

Case No.: SC05-2164
L.T. Case No. 3D04-2763

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

Petitioner,

v.

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

Respondents.

ON DISCRETIONARY REVIEW OF A CERTIFIED CONFLICT BY THE THIRD DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENTS, THE RUIZ FAMILY

LINCOLN J. CONNOLLY
Fla. Bar No. 0084719
ROSSMAN, BAUMBERGER, REBOSO & SPIER, P.A.
Attorneys for Respondents, the Ruiz Family
44 West Flagler Street
Courthouse Tower, 23rd Floor
Miami, FL 33130
Ph: (305) 373-0708
Fax: (305) 577-4370
Email: ljc@rbrlaw.com

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PRELIMINARY STATEMENT

This is a proceeding before the Court based upon a certification of conflict by the Third District Court of Appeal below in *University of Miami v. Ruiz*, 916 So.2d 865 (Fla. 3d DCA 2005), with a decision of the Fifth District Court of Appeal in *Orlando Reg. Healthcare Sys., Inc. v. Alexander*, 909 So.2d 582 (Fla. 5th DCA 2005). The Fourth District Court of Appeal has also certified conflict with *Alexander* in *Northwest Med. Ctr., Inc. v. Ortiz*, – So.2d –, 31 Fla. L. Weekly D507, 2006 WL 348718 (Fla. 4th DCA Feb. 16, 2006) (No. 4D04-2028) (on motion for clarification). The Third District's decision affirmed a Final Order from the Division of Administrative Hearings, entered pursuant to the mandate of the Third District in the earlier decision of *University of Miami v. M.A.*, 793 So.2d 999 (Fla. 3d DCA 2001). The Final Order was entered by Administrative Law Judge William J. Kendrick (hereinafter "the ALJ"), making certain determinations under the Florida Birth-Related Neurological Injury Compensation Act, § 766.301, *et seq*., Fla. Stat. (hereinafter "the Act").

This proceeding, and the appeal below, was filed by Petitioner, University of Miami d/b/a University of Miami School of Medicine (hereinafter "UM"). UM's appeal was joined below by the Florida Birth-Related Neurological Injury Compensation Association (hereinafter "NICA"), which was the Respondent in the

administrative proceedings. UM and the Public Health Trust of Dade County, Florida (hereinafter "PHT") were intervenors in the administrative proceeding before the ALJ. PHT did not appeal the ALJ's decision.

The administrative proceedings were commenced at the Third District's mandate by Respondents, Juanita Ruiz and Miguel Angel Ruiz, individually and as parents and natural guardians of Michael A. Ruiz, a minor (hereinafter collectively "the Ruiz Family").

In this Answer Brief, citations to the Record on Appeal are made by "R. _" and the appropriate page number. The various exhibits introduced into evidence below are cited by the abbreviation for the party introducing same (UM, NICA, PHT, and RF for Ruiz Family), the exhibit number, and page number therein, if applicable. The transcript of the Final Hearing below is cited to as "T. _" followed by the appropriate page number. The transcript of oral argument before the Third District, filed in the Ruiz Family's Appendix at Tab A, is cited to as "OA __" followed by the appropriate page number.[1] The Fourth District's decision in *Northwest Med. Ctr., Inc. v. Ortiz*, which is as of yet unpublished in the Southern

[1]The mpg computer video file from which the transcript was prepared is being filed on a CD-ROM under a separate Notice of Filing. Same is viewable on Windows Media Player.

Reporter, is also contained in the Ruiz Family's Appendix as Tab B for the Court's convenience.

Unless otherwise stated, all references are to the 1997 version of Florida Statutes and all emphasis used in quotations is added by the author.

STANDARD OF REVIEW

For simplicity,[2] the Ruiz Family accepts Petitioner, UM's statement of the applicable standard of review, to wit: this Court should review the Third District's interpretation of the NICA statutes *de novo* and may only set aside the ALJ's conclusions of law if clearly erroneous and his findings of fact if not supported by competent, substantial evidence. *See* UM's Initial Brief, at 3.

[2]Below, the Ruiz Family argued that because the district courts have held an ALJ has jurisdiction over the issue of NICA notice under his compensability determination, his findings of fact as to notice are unreviewable on appeal under § 766.311(1), Fla. Stat. (stating that an ALJ's factual findings as to compensability are "conclusive and binding"). *See* Answer Brief of the Ruiz Family before the Third District (Tab 3 of the Ruiz Family's Agreed Motion to Supplement the Record), at 1, 14-17. Given that the Third District did not reach this issue, that this case is before this Court on conflict jurisdiction over a matter of interpretation of § 766.316, Fla. Stat. (Supp. 1998), and that UM has now conceded notice is now being given for the physicians at Jackson North Maternity Center and it was therefore obviously practicable to do so in 1998 (*see infra* notes 8 & 9 and accompanying text), the Ruiz Family has elected to drop this argument for simplicity's sake.

STATEMENT OF THE CASE AND FACTS

Statement of Facts

For the sake of brevity, the Ruiz Family generally accepts the Petitioner's Statement of Facts, subject to the following clarifications, amplifications, and corrections.

Michael A. Ruiz was born on August 14, 1998 with significant and permanent brain damage. All parties stipulated before the ALJ that Michael A. Ruiz sustained a compensable "birth-related neurological injury" (T. 12-13) and the ALJ found that "it is undisputed, and the proof is otherwise compelling, that Michael suffered severe brain injury caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in the hospital which rendered him permanently and substantially mentally and physically impaired." (R. 244-45, ¶ 4)

For their damages, pursuant to the terms of the Act, the ALJ awarded the Ruiz Family $100,190.65, which consisted of $100,000 to the parents and $190.65 for expenses previously incurred but not otherwise reimbursed, subject to any future expenses incurred but not reimbursed from other sources. (R. 265 ¶¶ 1-2) The Act forbids payment for medical and related expenses which are covered by other sources, such as Medicaid. §

766.31(1)(a), Fla. Stat. If accepted by the Ruiz Family, by law this award would appear to be exclusive and foreclose their rights to pursue a medical negligence action arising out of malpractice occurring during Michael Ruiz's birth. § 766.303(2), Fla. Stat.; § 766.304, Fla. Stat. (Supp. 1998). The Ruiz Family has taken no action with regard to the NICA award pending the outcome of this appellate process.

The UM Physicians

This proceeding springs from a serious medical malpractice lawsuit arising from Michael Ruiz's birth and concerns the tortfeasor physicians' failure to give notice of their participation in NICA under the Act. Michael and his mother received treatment from Paul Norris, M.D. and Bel Barker, M.D., while his mother was in active labor. (R. 244-46, ¶¶ 1-2, 4) Both Dr. Norris and Dr. Barker were UM physicians and are hereinafter referred to collectively as such.[3]

The first erroneous factual assertion raised by UM is that Dr. Norris and Dr. Barker were working for PHT and not UM at the time of Michael

[3]Mrs. Ruiz also received treatment from two residents, Dr. McCreath and Dr. Butler. (R. 253, ¶¶ 15-16) Under the Act, they were not required to give NICA notice, *see* § 766.316, Fla. Stat. (Supp. 1998) ("each participating physician, *other than residents* . . . shall provide notice"), and hence their involvement is irrelevant to the issues on appeal. As such, discussion hereafter is limited to UM's participating physicians in NICA, Dr. Norris and Dr. Barker.

Ruiz's birth. UM (not PHT) billed for and was paid for the professional obstetrical services provided by them to Juanita Ruiz (RF Ex. 4, at 26-27, 57-59, 67) and UM paid their salary and benefits (PHT Ex. 2, at 11, 12, 19-22), including their annual NICA assessments. (UM Ex. 1, at 21; RF Ex. 20, at 5-6; PHT Ex. 2, at 18-19).[4] Moreover, while Michael was born at Jackson North Maternity Center (R. 43-44, ¶ 1), a facility owned by PHT (R. 249 ¶ 11), it advertised itself via outside signage as a University of Miami facility (T. 102; PHT Ex. 1, at 14; RF Exs. 8A-L) and listed physicians practicing at the facility as University of Miami professors, including Paul Norris, M.D. under the words "UNIVERSITY OF MIAMI OB/GYN PRACTICE." (RF Ex. 8H) Other signs included "Jackson North Maternity Center, A University of Miami/Jackson Medical Center Affiliate" (RF Ex. 8A) and "University of Miami/Jackson Memorial/Jackson North Maternity Center" (RF Exs. 8B & 8C).

[4]*See also* R. 170-171, ¶¶ 24-26 (the Ruiz Family's Proposed Final Order, which puts all these matters into full context). *Cf. Jaar v. University of Miami*, 474 So.2d 239, 243 (Fla. 3d DCA 1985) ("we conclude, as a matter of law, that Dr. Ward served as an employee and agent of [UM].... [A]t the time the tragic incident occurred, Dr. Ward was acting in accordance with the duties he assumed under the express and intertwining terms of his contracts with [UM] and [UM]'s contracts with [PHT]") (citation and footnote omitted), *rev. denied*, 484 So.2d 10 (Fla. 1986).

The ALJ referenced but did not resolve the issue of their employment status with UM at the time of labor and delivery (R. 252-53, ¶ 14) and indeed, was not required to because § 766.316, Fla. Stat. (Supp. 1998), imposes separate and independent obligations on the hospital and participating physicians to give NICA notice, *see* UM's Initial Brief, at 28 (conceding same), and properly did not because such is not within the scope of the ALJ's jurisdiction under the Act.[5] The Third District referred to Dr. Norris and Dr. Barker collectively as "University physicians" throughout in *University of Miami v. Ruiz*, 916 So.2d 865 (Fla. 3d DCA 2005), noted that Dr. Norris was "a University professor, who also served as a medical director and an attending physician at the hospital," *id*. at 867, and that Dr. Barker was "also employed by the University." *Id*.

Pre-Registration

Juanita Ruiz initially presented to Jackson North Maternity Center on Wednesday, July 22, 1998–more than three weeks before Michael's birth–for pre-registration. (R. 249, ¶ 11) At that time, Mrs. Ruiz met with Machele Lockhart Wadley, a health service representative for PHT. (RF Ex.

[5]*See* § 766.304, Fla. Stat. (Supp. 1998); *Rinella v. Abifaraj*, 908 So.2d 1126 (Fla. 1st DCA 2005) (ALJ's subject matter jurisdiction is limited to compensability and notice), *rev. denied*, –So.2d– (Fla. Jan. 10, 2006) (No. SC05-1595).

6, p. 8) During the pre-registration process, Juanita Ruiz supplied pertinent pre-admission data, signed several documents, and was given several brochures by Ms. Wadley, including one entitled Tranquilidad Mental, or "Peace of Mind" in English. (T. 87; R. 251, ¶ 13) Among the documents Ms. Wadley had her sign was a Progress Record page containing a stamp of acknowledgment of receipt of the NICA brochure. (PHT Ex. 3; R. 251-52 & n.6, ¶ 13) Ms. Wadley testified that the NICA brochure is always stapled in the middle of a group of three pamphlets. (RF Ex. 6, pp. 43-44; R. 251, ¶ 13)

The front of the brochure does not contain any reference to the Florida Birth Related Neurological Injury Compensation Act (T. 101), and shows a happy couple holding an apparently healthy baby. (RF Exs. 15 & 16) Ms. Wadley did not tell Juanita Ruiz to read the brochure, discuss it with her in any fashion, or tell her that it had any legal significance, and as a result Mrs. Ruiz did not read it, believing it to be yet another baby advertisement she often received as an expectant mother. (T. 87-88; PHT Ex. 1, at 27; RF Ex. 6, p. 53) Notably, she was also given a gift package for expectant mothers. (R. 252)

Ms. Wadley testified that she did not explain anything about NICA to Mrs. Ruiz, nor state that any physician on staff was a NICA participant. (T.

85, 86, 88) Indeed, Ms. Wadley testified that she is not familiar enough with the contents of the brochure to be qualified to explain it and that she does not even try to explain it. (RF Ex. 6, p. 37)

The brochure did not state that any physicians on staff were participants in NICA (RF Exs. 15 & 16), nor did the acknowledgment of receipt of the NICA brochure state any physician (including Dr. Norris or Dr. Barker) or entity (including PHT, Jackson North Maternity Center or UM) was a participant in NICA. (PHT Ex. 3; T. 86; UM Ex. 1, at 24-25)

Jackson North Maternity Center had an orientation policy in place to allow patients to meet their physicians on Wednesdays. (RF Ex. 6, pp. 40-41) "Orientation is held every Wednesday, 6:00 p.m. to 7:00 p.m., *during this time you will meet your* care givers (*physicians*, nurses, etc.), take a tour, and pre-register" (RF Ex. 17). Mrs. Ruiz pre-registered on a Wednesday evening, arriving between 5:30 and 6:00 p.m., but she was never offered or told about the opportunity to attend the orientation or to meet her physicians. (T. 80) She was simply told to come back and show her registration at the time of delivery (PHT Ex. 1, at 22), having been given no oral notice about

NICA or that she had been given any documents of legal significance.[6] (T. 85-86, 88, 103)

Mrs. Ruiz then returned home. Although she had given her home address and phone number (R. 249), she did not receive any additional information from PHT, UM, or any physicians regarding NICA. (T. 100)

UM complains that neither Dr. Norris nor Dr. Barker "knew" they would ultimately deliver Mrs. Ruiz's child and therefore had no opportunity

[6]As an aside, the Ruiz Family strongly believes that PHT's procedure for giving notice, *i.e.*, handing the patient a pamphlet that appears to be a child-rearing advertisement (and which does not state that Jackson North Maternity Center is a hospital with NICA participating physicians on staff) stapled between two other pamphlets at the same general time the patient is given a gift basket, and flipping pages to sign for pre-registration, one of which is an acknowledgment of receipt of the pamphlet, without oral disclosure that a legal transaction of tremendous import is taking place (in circumstances it is wholly unexpected), is insufficient to convey proper notice. *See, e.g., Schauer v. General Motors Acceptance Corp.*, 819 So.2d 809, 814 (Fla. 4th DCA 2002) (cause of action stated for fraud and deceit arising from purchase of automobile where, *inter alia*, "Morse told him the papers he signed were an insignificant necessity to his stepdaughter's obtaining credit"); *Agress v. Granger*, 204 So.2d 342, 343 (Fla. 1st DCA 1967). Although the Ruiz Family elected not to appeal the ALJ's finding that PHT satisfied the notice requirements of the Act, we describe it to highlight that not only was Mrs. Ruiz *not* given notice that any physician who would or might later deliver her baby at Jackson North Maternity Center was a NICA participant when PHT "gave" its notice, but that at best she was given notice about NICA's existence, not actual notice that PHT or any physician was a NICA participant. *See Turner v. Hubrich*, 656 So.2d 970, 971 (Fla. 5th DCA 1995) ("[t]he statute is quite clear that the burden is upon the NICA participants to give the *enlightening* notice to their patients").

to provide her with notice of their participation in NICA. This argument was rejected by the Third District as follows:

> [The Ruiz Family] contends that the physicians had a reasonable opportunity and were required to provide notice to Mrs. Ruiz during her pre-registration on July 22, 1998 and during the three weeks after pre-registration leading up to her arrival at the hospital in active labor on August 13, 1998. We agree.
>
> . . . Dr. Norris, one of the University's treating physicians, testified that, although he was aware that he had a separate and independent responsibility under section 766.316 to provide notice, it was his belief that the hospital's provision of notice at pre-registration satisfied his statutory notice obligation....[7] However, the hospital's NICA Plan notice did not indicated that it was also given on behalf of any physician associated with the hospital or that any physician in the hospital was a NICA Plan participant. Therefore, the ALJ correctly found that the hospital's notice was inadequate to satisfy the University physicians' independent obligation to provide notice.

University of Miami v. Ruiz, 916 So.2d 865, 869 (Fla. 3d DCA 2005).

> [T]he physicians had a reasonable opportunity to furnish notice at pre-registration or during the weeks after pre-registration but prior to the onset of active labor. The record indicates that all

[7]Dr. Norris was instructed that he was not required to give NICA notice to obstetrical patients because that would be taken care of at pre-registration, testifying "I haven't and don't personally tell the patients [of my participation in NICA], that information's relayed even prior to me seeing the patient," though nothing prohibits him from doing so. (PHT Ex. 2, at 24-25) Although he acknowledged that he was aware that he was "required in the absence of an emergency condition to give notice to [his] obstetrical patients of his participation in NICA" from probably thirteen (13) sources (PHT Ex. 2, at 22-23), he nonetheless stated "[i]t's my understanding that I am not obligated to give independent notice." (PHT Ex. 2, at 62)

> of the University physicians participated in the NICA Plan.... *There is absolutely no record evidence that it was impracticable for Dr. Norris or Dr. Barker to give the NICA Plan notice to Mrs. Ruiz.* By pre-registering three weeks ahead of her eventual maternity admission, Mrs. Ruiz clearly manifested an intent to delivery at that hospital. In light of the fact that all of the University's physicians participated in the NICA Plan, and the University's awareness of the circumstances under which maternity patients typically arrived at the hospital, we find that pre-registration provided a reasonable opportunity for the University physicians to furnish the NICA Plan notice on July 22, 1998.

Id. at 870.

Moreover, at oral argument before the Third District, counsel for UM conceded that it has now been arranged for patients pre-registering for delivery at Jackson North Maternity Center to receive notice that the physicians are participants in NICA.[8] Obviously this demonstrates that they likewise had a reasonable opportunity to do so in July 1998,[9] though then as

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[8]

> MS. HOFFMAN: . . . as a function of the *Sunlife* [*OB/GYN Svcs. of Broward County, P.A. v. Million*, 907 So.2d 624 (Fla. 4th DCA 2005)–*see infra note 13*] case and certainly this particular case [*Ruiz*], the hospital is currently providing NICA notice to all incoming patients at the Jackson facilities and Jackson North which is operated by the Public Health Trust.

OA at 7.

[9]Again, UM has conceded this:

now, no particular physician will know whether he or she will be the physician who will ultimately be working when the patient arrives in labor. Indeed, Jackson North Maternity Center's own orientation procedure in place in July 1998–though never offered to Mrs. Ruiz–(RF Ex. 6, pp. 40-41; RF Ex. 17), would have afforded physicians the opportunity, had they so desired, to give NICA notice to pre-registering patients.

SUMMARY OF ARGUMENT

Three weeks before giving birth to her child, Juanita Ruiz arrived at Jackson North Maternity Center, where Petitioner, UM's physicians maintained an active OB/GYN delivery practice, to pre-register for delivery.

> JUDGE SUAREZ:. . . These are the doctors that are there. These are the doctors that do deliveries. Why wasn't it practicable when the lady first came in and got her first information sheet, for separate information to be given. It can be done. Now I'm back to that. Why wasn't it practicable?
>
> MS. HOFFMAN: . . . certainly given that the Jackson facility now is undertaking that effort in an effort to give enlightened notice to patients, *that would certainly suggest that it can be done.*

OA at 16-17. UM acting on behalf of all of its NICA participating physicians, rather than abandoning them to meet their NICA obligations on their own, is nothing new. UM notes that "NICA Plan participants pay *substantial premiums* to participate in NICA," UM's Initial Brief, at 17, but in fact here, as noted above, Dr. Norris and Dr. Barker did not pay their own NICA premiums–UM paid them for them. (UM Ex. 1, at 21; RF Ex. 20, at 5-6; PHT Ex. 2, at 18-19)

While aware of the requirement that they give separate notice of their participation in NICA, UM's physicians made no attempt to learn of Mrs. Ruiz's pre-registration, to give her NICA notice at that time, or to contact her with NICA notice before she returned to give birth. Under these circumstances, where UM's physicians knew that without taking some action, they would not see the expectant mother until she arrived in labor, the ALJ and the Third District correctly held that it was practicable for them to give NICA notice because they had a reasonable opportunity to do so at or after pre-registration. The ALJ's findings in this regard were supported by competent, substantial evidence and were properly affirmed by the Third District.

UM argues that § 766.316, Fla. Stat. (Supp. 1998), should be interpreted to excuse the giving of notice when the mother is ultimately in an emergency medical condition such as labor, even if there was a reasonable opportunity to give notice beforehand. Such an interpretation would completely swallow the rule, would lead to absurd results, and would contravene rather than further the legislative policy of requiring hospitals and participating physicians to give NICA notice so as to allow expectant mothers to make informed decisions about whether they should give birth in a setting where their healthcare providers would be immune from suit for

any malpractice committed while delivering their children. Accordingly, UM's argument was properly rejected by the ALJ and the Third District in this case (and the same argument was properly rejected by the Fourth District in the *Ortiz* case).

Finally, NICA has indicated it intends to file an Answer Brief. It failed to take any position on the notice issue before the ALJ, however, and hence waived the right to appeal it, whether directly as an appellant as it was before the Third District, or indirectly as a respondent in support of UM in this proceeding.

ARGUMENT

I. UM's Physicians Were Required to Give NICA Notice but Failed to Do So, Despite Having a Reasonable Opportunity to Give Such Notice

There is no dispute that when Mrs. Ruiz presented to Jackson North Maternity Center on August 13, 1998, she was in an emergency medical condition as defined in § 766.316, Fla. Stat. (Supp. 1998) and § 395.002(9)(b), Fla. Stat.[10] What the ALJ and the Third District held, however, is that just because a woman is eventually in the emergency medical condition of active labor, a participating physician is not excused from having to give NICA notice if he had a reasonable opportunity to do so prior to the patient going into labor. (R. 259 ¶ 23 & 264 ¶ 30); *Ruiz*, 916 So.2d at 869, 870. This is an entirely common-sense, rational holding. For to read § 766.316 as UM wishes–that a patient being in an emergency medical condition excuses prior opportunities to have given notice–would excuse notice in all circumstances, for before delivering a live infant, all women by definition are eventually in an emergency medical condition and

[10]"'Emergency medical condition means' . . . [w]ith respect to a pregnant woman: 1. That there is inadequate time to effect safe transfer to another hospital prior to delivery; 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." § 395.002(9)(b), Fla. Stat.

incapable of transfer to another facility, whether due to active labor or an open abdomen during a just-commenced cesarian section, and all providers who failed to give pre-delivery notice could rely upon such a crutch to obtain NICA immunity. Moreover, accepting UM's argument that the "plain meaning" of an "unambiguous statute" must be followed–that the "or" in "emergency medical condition *or* when notice is not practicable" can only mean the disjunctive "or"–would require that if the patient is in an emergency medical condition at some point *and* notice was never previously practicable, the exception excusing notice in either circumstance would vanish because both circumstances existed. That is, if *both* conditions occurred (notice was not practicable *and* an emergency medical condition existed), notice would *not be* excused. In such cases, although it would be impossible to have given notice, to their detriment, the health care providers would absurdly lose their NICA immunity under § 766.316 for failure to give both the impracticable and the impossible. *Cf. Dotty v. State*, 197 So.2d 315 (Fla. 4th DCA 1967) (quoted and discussed *infra* and rejecting such a "plain meaning" argument for the word "or").

The ALJ's and the Third District's implicit interpretation of the word "or" between these two exceptions is well-supported by the rules of statutory construction in Florida. "If possible, the courts should avoid a statutory

interpretation which leads to an absurd result." *Amente v. Newman*, 653 So.2d 1030, 1032 (Fla. 1995) (citation omitted).

> One of the fundamental rules of construction dictates that when the language under review is unambiguous and conveys a clear meaning, it must be given its plain and ordinary meaning. *However, that principle is tempered by another cardinal tenet of statutory construction* that cautions against giving a literal interpretation if doing so would lead to an *unreasonable or absurd conclusion*, plainly at variance with the *purpose of the legislation as a whole*.

Castillo v. Vlaminck de Castillo, 771 So.2d 609, 610-11 (Fla. 3d DCA 2000) (citations omitted). "[A] literal interpretation of the language of a statute need not be given when to do so would lead to an unreasonable or ridiculous conclusion." *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984) (citation omitted).

Florida's courts have repeatedly held that statutes reading "or" or "and" may be interpreted vice-versa as necessary to avoid ridiculous results which would defeat the legislative intent. *See, e.g., Byte Intern. Corp. v. Maurice Gusman Residuary Trust No. 1*, 629 So.2d 191, 192 (Fla. 3d DCA 1993) (statute allowing recovery of attorneys fees and costs for the "plaintiff in the judgment for possession *and* money damages" properly interpreted to allow recovery of attorneys fees and costs where only possession sought and obtained; "Courts may construe 'and' as 'or' in statutes where a construction based on the strict reading of the statute would lead to an unintended or

unreasonable result and would defeat the legislative intent of the statute") (citation omitted); *Infante v. State*, 197 So.2d 542, 544 (Fla. 3d DCA 1967) (interpreting statute allowing appeal by defendant from "excessive *or* illegal" sentence to mean "excessive *and* illegal" sentence); *Pinellas County v. Woolley*, 189 So.2d 217, 219 (Fla. 2d DCA 1966) ("Plaintiff contends that the italicized word 'or' should be construed to mean the conjunctive 'and.' This contention has considerable merit").

> In ascertaining the meaning and effect to be given in construing a statute the intent of the legislature is the determining factor. Although in its elementary sense the word 'or' is a disjunctive participle that marks an alternative generally corresponding to 'either' as 'either this or that'; a connective that marks an alternative. There are, of course, familiar instances in which the conjunctive 'or' is held equivalent to the copulative conjunction 'and', and such meaning is often given the meaning 'or' in order to effectuate . . . the legislative intent in enacting a statute when it is clear that the word 'or' is used in the copulative and not in a disjunctive sense.... Particularly do these rules apply, even if the results seem contrary to the rules of construction to the strict letter of the statute, when a construction based on the strict letter of the statute would lead to an unintended result and would defeat the evident purpose of the legislation.

Dotty v. State, 197 So.2d 315, 317 (Fla. 4th DCA 1967) (citations omitted). *See id*. (statute providing that state attorney "or" assistant state attorney shall attend grand jury sessions did not render void indictments because both were in attendance; "or" interpreted to also mean "and"); *Rudd v. State ex. rel. Christian*, 310 So.2d 295, 298 (Fla. 1975) (quoting and agreeing with the

Dotty analysis). *See also Queen v. Clearwater Elec. Co.*, 555 So.2d 1262, 1265 (Fla. 2d DCA 1989) (interpreting § 95.11(5)(d), Fla. Stat., which required that suit be filed "against any guaranty association *and* its insured" within one year to require suit be filed against FIGA "and/or" the insured as "the only rational construction" of the statute) (citations and footnote omitted).[11]

[11]Although not mentioned by UM in its briefs here or below, it is important to distinguish *Florida Birth Related Neuro. v. Florida Div. of Admin. H'rings*, 664 So.2d 1016 (Fla. 5th DCA 1995), *approved on other grounds and disapproved in part*, 686 So.2d 1349 (Fla. 1997). In that case, the ALJ determined that the infant, who sustained a birth-related neurological injury that primarily caused a physical impairment, also sustained a mental impairment, even though his mental functioning was at or above average. 664 So.2d at 1017-19. On appeal, the Fifth District affirmed, but held that the italicized "and" in § 766.302(2)'s requirement that the injury "renders the infant permanently and substantially mentally *and* physically impaired" should be interpreted to mean "and/or". *Id*. at 1021.

This Court approved the decision on different grounds, specifically rejecting the Fifth District's conclusion that the subject "and" in § 766.302(2) should be interpreted to mean "and/or", because reading it "in the conjunctive *does not* lead to absurd results, nor does it undermine the *legislative policy* in enacting the NICA statute." 686 So.2d at 1355. This Court described that policy as "to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries...." *Id*. (internal quotation marks and citation omitted).

By contrast in this case, interpreting the subject "or" in § 766.316 in the strict disjunctive *does* lead to absurd results, as demonstrated above, and the policy furthered by requiring notice is to give expectant mothers the opportunity to make an informed choice between losing her legal rights by using a NICA participating provider or seeking other providers in order to preserve them. *See infra* note 12. Adopting UM's interpretation and

The purpose of the notice provision is to give pregnant mothers notice of NICA immunity and to allow them the opportunity to switch providers so they do not lose the right to bring a civil action should their child be seriously injured as a result of medical negligence in the birthing process.[12] The only meaningful reading of § 766.316 to satisfy this purpose is to properly interpret it to require that notice be given *if* practicable, *unless* there was no opportunity to give notice before the patient is in an emergency medical condition, when giving notice of *anything* should necessarily take a

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allowing providers to avoid giving notice (where there is a reasonable opportunity to do so) because every expectant mother is by definition eventually in an emergency medical condition does not further this policy.

[12]This Court described the legislative intent and purpose of the notice requirement as follows:

> . . . the 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.... [T]he purpose of the notice is to give an obstetrical patient an opportunity to make an informed choice between using a health care provider participating in the NICA plan or using a provider who is not a participant and thereby preserving her civil remedies.

Galen of Florida, Inc. v. Braniff, 696 So.2d 308, 309 (Fla. 1997). *See also Turner v. Hubrich*, 656 So.2d 970, 971 (Fla. 5th DCA 1995) ("[i]f that notice was not given, the plaintiffs/respondents were deprived of an opportunity to seek the services of a health care provider who did not participate in the NICA program and who was free of the administrative remedies and limitations of NICA").

back-seat to reacting to the emergency by rendering medical care (and after which giving NICA notice would be useless).

As discussed *supra*, Jackson North Maternity Center was specifically designated as "UNIVERSITY OF MIAMI OB/GYN PRACTICE" (RF Ex. 8H) and the UM physicians delivering babies there knew that they would not meet expectant mothers there until they presented in active labor. (R. 268 n. 9) There was no evidence that they objected at all to this set-up, and indeed, Dr. Norris confessed that, while aware of the requirement to give notice from as many as thirteen (13) sources (PHT Ex. 2, at 22-23), and while aware of the preregistration process at which notice could be given, it was his belief that he was not obligated did not have to give notice and therefore he chose not to (PHT Ex. 2, at 62), even though nothing prohibited him from doing so (PHT Ex. 2, at 24), because "in the case of Jackson North, . . . patients would be informed . . . even prior to admission in most cases."[13]

[13]Strikingly, while conceding that "Florida law . . . provides that a hospital and its physicians have *separate and independent obligations* to accord the patient notice," UM's Initial Brief, at 28, UM later goes on to argue that "the notice provided to Mrs. Ruiz by the hospital at pre-registration was sufficient to satisfy Dr. Norris and Dr. Barker's obligation to provide notice," *id*. at 31, in part because "all physicians on [Jackson North Maternity Center]'s staff were participants in the NICA Plan...." *Id*. This interpretation, of course, wholly ignores § 766.316's requirement that "each" hospital *and* "each" participating physician "shall" give notice and was appropriately rejected by the ALJ, who found that "although joint notice may have been the intention of the hospital, and the participating physicians,

(PHT Ex. 2, at 24) There was no evidence that anything prohibited UM or its physicians from participating in the pre-registration process, or from asking PHT for the names and contact information for patients who had pre-

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the notice provided was inadequate to achieve that result" because "the hospital's notice did not reveal that it was also given on behalf of the physicians or that any physicians were participating physicians in the Plan." (R. 267 n.8) He rejected UM's argument to the contrary, finding that it "lack[ed] a rational basis in fact or, stated otherwise, any compelling proof that a patient, similarly situated as Mrs. Ruiz, would reasonably conclude, from the hospital's notice, that notice was also given on behalf of Doctors Norris and Barker." (R. 258 ¶ 23) The Third District agreed with this analysis. *University of Miami v. Ruiz*, 916 So.2d 865, 869 (Fla. 3d DCA 2005) ("the hospital's NICA Plan notice did not indicate that it was also given on behalf of any physician associated with the hospital or that any physician in the hospital was a NICA Plan participant. Therefore, the ALJ correctly found that the hospital's notice was inadequate to satisfy the University physicians' independent obligation to provide notice").

The Fourth District, in *Sunlife OB/GYN Svcs. of Broward County, P.A. v. Million*, 907 So.2d 624 (Fla. 4th DCA 2005), is in agreement with this interpretation. In that case, only the hospital gave NICA notice to the patient. The court noted that the defendants "acknowledge[d] that the physicians and midwife would not be covered . . . by a notice that informed patients only that the hospital was covered by NICA," *id.* at 626 (which is precisely what happened here). As noted above, UM initially makes this same concession in its brief, before beating a hasty retreat from it 3 pages later by trying to rely upon PHT's notice. In *Sunlife*, however, the hospital's notice *also provided* that "I . . . have been advised that the Sunline Physicians and Certified Nurse Midwives are participating in the [NICA] program," *id*. at 625, which led the Fourth District to hold that the patient was furnished notice on behalf of the physicians. No such disclosure was made here in the NICA brochure or the acknowledgment of receipt of notice signed by Mrs. Ruiz (RF Exs. 15 & 16; PHT Ex. 3; T. 86; UM Ex. 1, at 24-25), and Ms. Wadley made no such oral disclosure to her either. (T. 85, 86, 88)

registered so they could contact them, or from informing expectant mothers about the orientation procedure where they could meet their physicians (RF Ex. 17; RF Ex. 6, pp. 40-41), obviously during which participating physician NICA notice could be given. Yet UM and its physicians made no attempt to do so, although they had three weeks from Mrs. Ruiz's pre-registration to Michael A. Ruiz's birth in which to effect it.

If UM and its physicians had no knowledge that Mrs. Ruiz would arrive in active labor three weeks after pre-registration, it can only be because they *chose* not to seek knowledge about it by declining to make appropriate inquiries of PHT or to set up a policy (prior to this case–*see supra* notes 8 & 9 and accompanying text) where they would be given automatic notice of pre-registrants so they could then or thereafter give their own NICA notice.[14] Indeed, UM concedes that the Third District was likely

[14]UM argues that Dr. Norris did not know he would be Mrs. Ruiz's physician prior to her presentation in labor and she, too, did not know in advance who would deliver her child. This argument is a complete red herring. Obviously, like any other doctor, obstetricians cannot work 24 hours per day, 365 days per year. And obviously, like any other person, obstetricians sometimes go out of town, go on vacations, *et cetera*. (Indeed here, Mrs. Ruiz first came into Dr. Norris' care, but then his shift ended and her labor was then managed by Dr. Barker. (R. 253 ¶ 16)) Because the exact time and date of an expectant mother's onset of labor is obviously not subject to precise prediction (although Mrs. Ruiz did go into labor on her due date (T. 100)), it would be nearly impossible for any obstetrical group to know in advance which physician will be working when a patient goes into labor and thus which physician will ultimately deliver a patient's baby. But

concerned that by adopting UM's argument "the physicians on the hospital's staff would *always* be excused from providing notice because the physicians regularly have no contact with the patient prior to presentation at the hospital for labor [and] delivery." UM's Initial Brief, at 29. Whether UM and its physicians misunderstood their NICA notice obligations, incorrectly assumed that PHT could or would properly give NICA notice for them, or for any other reason a scheme developed or evolved allowing UM's physicians to avoid ever having to meet their patients before presenting for delivery and therefore to avoid ever having to give NICA notice,[15] this Court should follow the Third and Fourth Districts in *Ruiz* and *Ortiz* and not allow UM and its physicians to take advantage of the system in this manner. *See also Board of Regents v. Athey*, 694 So.2d 46, 50 (Fla. 1st DCA) (courts

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this is true of *any* physician obstetrical group practice and accepting UM's argument would excuse *all* obstetricians from giving notice, because none would or will "know" they will be the delivering physician before the patient is in the "emergency medical condition" of labor. This Court in *Galen of Florida, Inc. v. Braniff*, 696 So.2d 308 (Fla. 1997), and the Legislature in § 766.316 recognized that notice must be given when "practicable." And when a patient pre-registers at a facility that maintains a group obstetrical practice, as here (*see* RF Ex. 8H), the ALJ and the Third District correctly found that it is "practicable" for the physicians as a group (or here UM as their employer) to give notice on behalf of all of its employee physicians.

[15]*See* Sandy Martin, M.D., "NICA–Florida Birth-Related Neurological Injury Compensation Act: Four Reasons Why This Malpractice Reform Must Be Eliminated," 26 *Nova L. Rev.* 609, 624 (Winter 2002) (describing "the notice requirement . . . [a]s burdensome and unfriendly to both the patient and the physician").

should not encourage or permit "health care providers to 'ignore the notice requirement and then assert the NICA exclusivity to defeat a civil action'"), *approved*, 699 So.2d 1350 (Fla. 1997); *Braniff v. Galen of Florida, Inc.*, 669 So.2d 1051, 1053 (Fla. 1st DCA 1995) ("we reject the notion that a NICA health care provider can ignore the notice requirement and then assert NICA exclusivity to defeat a civil action"), *approved*, 696 So.2d 608 (Fla. 1997).

The Court should be mindful that whether notice is required to be given is not some trifling technicality. In this case, UM seeks immunity from having to compensate Michael A. Ruiz for a lifetime of brain damage and his attendant substantial injuries, caused by the alleged negligence of its employees, and is hoping this Court will impose an NICA recovery of $100,190.65 (R. 265 ¶¶ 1-2) upon his family (notably, the terribly injured infants themselves recover nothing directly under the Act) in its stead. The Legislature has required as a condition precedent to obtaining such immunity, physicians must give notice to their patients of their participation in NICA. § 766.316, Fla. Stat. (Supp. 1998); *Galen of Fla., Inc.*, 696 So.2d at 308. This is not a mindless, bureaucratic hoop to jump through which should be overlooked by the courts, but is instead an important disclosure the Legislature has required so that expectant mothers are made aware that their legal rights, and those of their unborn children, would be limited should

their physicians be negligent during labor and delivery, and allow them to go elsewhere for medical care should they so choose. *See supra* note 12.

UM and its physicians overlooked or ignored this legal requirement in the hopes of gaining NICA immunity without ever giving notice. This was clearly not the intent of the Legislature in requiring notice be given to patients under § 766.316, Fla. Stat. (Supp. 1998), and it cannot and should not be tolerated by the courts. *Cf. Florida Birth-Related Neuro. Inj. Comp. Ass'n v. McKaughan*, 668 So.2d 974, 979 n.3 (Fla. 1996) (noting Art. I, § 21, Fla. Const., guaranteeing access to the courts was properly taken into consideration in interpreting the Act).

As correctly noted by the ALJ, "[a]s the proponent of the immunity claim, the burden rested on the health care providers to demonstrate, more likely than not, that the notice provision[s] of the Plan were satisfied" (R. 262 ¶ 28 (citing *Galen of Fla., Inc. v. Braniff*, 696 So.2d 308, 390, 311 (Fla. 1997); *Balino v. Department of Health & Rehab. Svcs.*, 348 So.2d 349, 350 (Fla. 1st DCA 1977))[16] and the ALJ found that they were not. There was

[16]*See also Tabb v. Florida Birth-Related Neuro. Inj. Comp. Ass'n*, 880 So.2d 1253, 1260 (Fla. 1st DCA 2004) ("[t]he ALJ . . . properly found that '[a]s the proponent of the issue, the burden rested on the health care providers to demonstrate, more likely than not, that the notice provisions of the Plan were satisfied'") (citing *Galen of Fla., Inc.*, 696 So.2d at 311).

competent and substantial, *i.e.*, "legally sufficient" evidence[17] to support the ALJ's determination that UM's physicians had a "reasonable opportunity" to give notice but failed to do so (R. 259 ¶ 23), and the Third District appropriately affirmed the ALJ in this case. *See, e.g., Athey*, 694 So.2d at 51 ("[w]eeks prior to these obstetrical patients presenting for delivery, UMC performed prenatal ultrasound procedures for these patients and had knowledge that these patients would deliver their babies at UMC"), *approved*, 699 So.2d 1350 (Fla. 1997).

II. This Court Should Adopt *Ruiz* and *Ortiz* As Correctly Decided and Disapprove *Alexander*

As explained above, the Third District in *University of Miami v. Ruiz* correctly held that where a NICA participant has a reasonable opportunity to provide NICA notice, the participant is required to do so, even if the patient ultimately is in an emergency medical condition. The Fourth District agreed in *Northwest Med. Ctr., Inc. v. Ortiz*, –So.2d–, 31 Fla. L. Weekly D507, 2006 WL 348718, at *1 (Fla. 4th DCA Feb. 15, 2006) (No. 4D04-2028) (on motion for clarification) ("we agree with the trial court that Northwest had a reasonable opportunity to give notice prior to Mrs. Ortiz's arrival at the

[17]"Competent substantial evidence is tantamount to legally sufficient evidence." *Florida Power & Light Co. v. City of Dania*, 761 So.2d 1089, 1092 (Fla. 2000).

hospital for delivery. By failing to give Mrs. Ortiz such notice when it had the opportunity to do so, Northwest failed to comply with the statute"). The Fifth District in *Orlando Reg. Healthcare Sys., Inc. v. Alexander*, 909 So.2d 582 (Fla. 5th DCA 2005), earlier held to the contrary that "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 her pregnancy did not negate this clear statutory exemption." *Id*. at 586. This case is before this Court on conflict jurisdiction with *Alexander* and, as respectfully explained below, this Court should approve *Ruiz* (and *Ortiz*) and disapprove *Alexander* as having been wrongly decided.

In *Ortiz*, Mrs. Ortiz arrived at Northwest Medical Center ("NMC") nearly four months before delivery to pre-register. 2006 WL 348718, at *1, *2. Although NMC gave her several documents at that time, it did not even attempt to give her NICA notice until she arrived in labor when it was too late to allow her to consider other hospital options, and even then it flubbed the attempt.[18] Unlike in the present case, in *Ortiz* the hospital failed to give

[18]According to the *Ortiz* opinion, the nurse gave Mrs. Ortiz a NICA form to sign five hours after her admission in labor, but did not explain to her what she was signing or give her a NICA brochure. Like Ms. Wadley in this case, the nurse was not even trained to answer questions about NICA. *Id*. at *2.

NICA notice.[19] But like UM here, NMC there argued that because Mrs. Ortiz ultimately presented to its facility in active labor, it was excused from giving NICA notice. And like the Third District below, the Fourth District rejected this argument.

> . . . Northwest knew that Mrs. Ortiz intended to deliver her child there months before her actual admission. At that time she was given substantial information regarding her medical care at the hospital and she signed several consent forms. If the purpose of the notice requirement is to give the patient the choice to choose a NICA protected delivery 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. Therefore, by failing to give notice of NICA participation a reasonable time prior to delivery, *although able to do so*, Northwest lost the protection of NICA....

Id. at *4 (emphasis added).

In *Alexander*, Mrs. Alexander presented to the hospital on three occasions prior to labor with concerns about her pregnancy. 909 So.2d at 586. The ALJ held that "notice should have been given to Alexander by ORHS during one of her three previous visits and that ORHS's failure to do so was in violation of NICA, regardless of the fact that eventually Alexander delivered under emergency conditions." *Id*. The Fifth District, which ruled

[19]The opinion mentions that one of Mrs. Ortiz's physicians was a NICA participant and the other was not, but does not reference whether either gave NICA notice. *Id*. at *1.

first and therefore did not have the benefit of the Third and Fourth Districts' decisions in *Ruiz* and *Ortiz*, held in summary fashion that § 766.316

> 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 ORHS under emergency conditions, and her previous visits to the hospital during her pregnancy did not negate this clear statutory exemption.

Id. In so ruling, the Fifth District did not evaluate the exceptions to the notice requirement in light of the purpose of notice, to allow the expectant mother a choice of whether to deliver her child under typical or NICA immune circumstances, as did the courts in *Ruiz* and *Ortiz*. Nor did the Fifth District apparently recognize or reject, as explained above, that its interpretation of the "emergency medical condition" exception will swallow the notice rule if triggered even when prior opportunities to give notice existed, for all expectant mothers will eventually be in the emergency medical condition of active labor or surgical cesarian delivery, thereby excusing notice in all circumstances.

The Third District unanimously rejected *Alexander*. "We expressly reject and disagree with this holding.... 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." *Ruiz*, 916 So.2d at 870. The Fourth District also unanimously rejected *Alexander*.

> We note express conflict with . . . *Alexander* . . . , which held under similar facts that the statutory exception to NICA notice where a patient is admitted with an emergency medical condition was not negated by prior hospital visits by the patient. We do not read the statutory provision exempting notice in an emergency situation as covering those cases where the hospital has pre-admitted a patient for the very medical condition for which she is subsequently admitted in an emergency medical condition. We note that the third district has also disagreed with *Alexander*.

2006 WL 348718, at *4 (citing *Ruiz*). Because of these practical and analytical failings in the Fifth District's approach to this issue, this Court should disapprove *Alexander* as wrongly decided and adopt the common sense and reasonable reasoning of the Third and Fourth Districts in *Ruiz* and *Ortiz*.

III. NICA Failed to Raise Any Issue as to Notice Before the ALJ And Accordingly Has Waived the Right to Appeal Same

Finally, NICA has moved for and was granted an extension of time within which to file an Answer Brief as a Respondent. It was an Appellant below, but did not petition for review of the Third District's decision. Although the arguments in its brief will likely be adverse to the Ruiz Family, they will not have an opportunity to review and respond to them as the party

alignment now stands.[20] Should NICA seek to argue issues of notice, however, the Ruiz Family objects to NICA being able to do so, because it waived the right to seek review of the ALJ's findings on notice by not arguing them before him.

In the administrative proceeding, NICA did not take a position on whether proper notice was given, not given, or excused. It did not take a position upon notice in its pre-trial stipulation,[21] did not object to or contest the Ruiz Family's presentation on the lack of notice at hearing before the ALJ,[22] did not make any argument at hearing before the ALJ on notice, did not submit any proposed findings of fact or conclusions of law to the ALJ after hearing though permitted to do so (T. 128), did not object to the Ruiz Family's proposed findings of fact and conclusions of law (R. 161), and did

[20]For this reason, the Ruiz Family may seek leave of this Court to file a supplemental brief in response to NICA's Answer Brief, if one is filed.

[21]Under "Statement of Each Party's Position," NICA simply asserted that "[t]he Respondent has determined that the claim qualifies for coverage under the NICA Plan and has accepted the Claim as compensable, subject to approval by the ALJ," (R. 63 ¶ B), without asserting NICA was taking any position on notice.

[22]The only objection made by NICA at the hearing before the ALJ was as to the admission of the deposition of Deborah Rushing, who testified about the photographs of the "University of Miami" signage at Jackson North Maternity Center. And regardless, the objection was immediately withdrawn. "Mr. Black [counsel for NICA]: Having said that, *it doesn't go to my issue* [*i.e.*, compensability], so I would defer to the Intervenors' counsel. If they don't object, *I don't particularly care*" (T. 31).

not join in UM's proposed findings of fact and conclusions of law. (R. 142) Accordingly, the record is conclusive that NICA never raised the notice issue before the ALJ, thus never preserved this issue as an appellate issue before the Third District, and therefore waived the right to appeal the ALJ's findings on notice to the Third District, and to appear and argue the issue here as well.[23]

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[23]*See, e.g., National Dairy Products Corp. v. Odham*, 121 So.2d 640, 642 (Fla. 1959) ("appellant . . . elected not to object to, examine, question or contradict anything contained in [exhibits filed with the Commission]. Having remained silent when it should have spoken and failing to show injury, it will not be heard at this time"), *cert. dismissed*, 131 So.2d 720 (Fla. 1961); *Estate of Herrera v. Berlo Industries, Inc.*, 840 So.2d 272, 273 (Fla. 3d DCA 2003) ("Herrera seeks to raise issues which were not raised in the trial court. However, issues not presented in the trial court cannot be raised for the first time on appeal") (citation omitted); *United Services Auto. Ass'n v. Porras*, 214 So.2d 749, 750 (Fla. 3d DCA 1968) ("the other point urged by the appellant . . . [is] not to be well taken, because same was not originally raised in the trial court") (citations omitted); *Keech v. Yousef*, 815 So.2d 718, 719 (Fla. 5th DCA) ("[a] legal argument must be raised initially in the trial court by the presentation of a specific motion or objection at an appropriate stage of the proceedings.... The failure to preserve an issue for appellate review constitutes a waiver of the right to seek reversal based on that error") (citation omitted), *cause dismissed*, 829 So.2d 918 (Fla. 2002); *Bill's Equip. & Rentals v. Teel*, 498 So.2d 536, 537-38 (Fla. 1st DCA 1986) ("[t]he general rule is that issues not preserved for appeal are waived.... The E/C here not only failed to assert the applicability of this statute at the hearing before the deputy, but also failed to mention the matter of apportionment of attorney's fees under the statute in a motion for rehearing after the order awarding fees was entered.... We adhere again to the well-settled rule that the failure to preserve issues below waives such questions on appeal"); *South Puerto Rico Sugar Co. v. Tem-Cole*, Inc., 403 So.2d 494 (Fla. 4th DCA 1981) (defendant must object to co-defendant's motion for directed verdict to preserve error), *rev. denied*, 412 So.2d 470 (Fla. 1982).

CONCLUSION

For the foregoing reasons, Respondents, the Ruiz Family, respectfully requests that the Court approve the Third District's and the ALJ's determinations in this case that, despite having a reasonable opportunity to do so, UM's physicians failed to give the statutorily required NICA notice, approve the Fourth District's decision in *Ortiz*, and disapprove the Fifth District's decision in *Alexander*.

Respectfully submitted,

ROSSMAN, BAUMBERGER, REBOSO & SPIER, P.A.

Attorneys for Appellees, the Ruiz Family
44 West Flagler Street
Courthouse Tower, 23rd Floor
Miami, FL 33130
Ph: (305) 373-0708
Fax: (305) 577-4370
Email: ljc@rbrlaw.com

By:_____
LINCOLN J. CONNOLLY
Fla. Bar No. 0084719

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail on all counsel listed on the attached service list on March 20, 2006.

_____
LINCOLN J. CONNOLLY
Fla. Bar No. 0084719

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the foregoing was printed in 14-point Times New Roman and thus complies with the font requirements of Fla. R. App. P. 9.210 (a)(2).

_____

LINCOLN J. CONNOLLY
Fla. Bar No. 0084719

SERVICE LIST
University of Miami v. Juanita Ruiz
In the Supreme Court of Florida
Case No. SC05-2164

CHARLES H. BAUMBERGER, ESQ.
MANUEL A. REBOSO, ESQ.
LINCOLN J. CONNOLLY, ESQ.
Rossman, Baumberger, Reboso, & Spier, P.A.
Counsel for Respondents, the Ruiz Family
44 West Flagler Street
Courthouse Tower, 23rd Floor
Miami, FL 33130
(305) 373-0708
(305) 577-4370 (fax)

JUNE G. HOFFMAN, ESQ.
MARC J. SCHLEIER, ESQ.
Fowler White Burnett
Counsel for Petitioner, University of Miami
Espirito Santo Plaza, 14th Floor
1395 Brickell Avenue
Miami, FL 33131
(305) 789-9200
(305) 789-9201 (fax)

STEPHEN A. STIEGLITZ, ESQ.
Assistant County Attorney
Counsel for Public Health Trust of Dade County
Metro-Dade Center, Suite 2800
111 N.W. 1st Street
Miami, FL 33128-1993
(305) 375-5151
(305) 375-5611 (fax)

WILBUR E. BREWTON, ESQ.
KELLY B. PLANTE, ESQ.
General Counsel for NICA
Roetzel & Andress, L.P.A.
225 South Adams Street
Suite 250
Tallahassee, FL 32301
(850) 222-7718
(850) 222-8222 (fax)