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

INITIAL BRIEF OF PETITIONER UNIVERSITY OF MIAMI, d/b/a UNIVERSITY OF MIAMI SCHOOL OF MEDICINE

Steven E. Stark, Esq.
Co-Counsel for Petitioner
University of Miami Medical Group
Rosensteil Building, Room 1128
1600 NW 10th Avenue

FOWLER WHITE BURNETT P.A.
Counsel for Petitioner University of Miami
Espirito Santo Plaza, 14th Floor
1395 Brickell Avenue
Miami, Florida 33131-3302
Telephone: 305-789-9200

Miami, Florida 33136

Facsimile: 305-789-9201
By: JUNE GALKOSKI HOFFMAN
Fla. Bar No. 050120
MARC J. SCHLEIER
Fla. Bar No. 0389064

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page**

TABLE OF CITATIONS (Continued)

Cases **Page**

Florida Statutes

Other Authorities

PRELIMINARY STATEMENT

This case if before the Court upon the Third District Court of Appeal's certification of conflict with a decision of the Fifth District Court of Appeal, *i.e.*, *Orlando Regional Healthcare System, Inc. v. Alexander*, 909 So.2d 582 (Fla. 5th DCA 2005). The issue presented is whether the physicians providing obstetrical services at the birth of Michael A. Ruiz ("Michael") failed to comply with the notice provisions of the Florida Birth-Related Neurological Injury Compensation Plan ("the NICA Plan") under the facts presented. Petitioner, University of Miami d/b/a University of Miami School of Medicine, the Intervenor below, is referred to herein as "the University." Respondents, Juanita Ruiz and Michael Ruiz, as parents and natural guardians of Michael A. Ruiz, a minor, are referred to herein as "the Ruiz family" or "Respondents." The Respondent below, Florida Birth-Related Neurological Injury Compensation Association, is referred to herein as "NICA." The Public Health Trust of Miami-Dade County d/b/a Jackson North Maternity Center is referred to herein as "the Trust" or "the hospital."

The symbol "R.___" designates the record on appeal and corresponding page number. The exhibits introduced into evidence by the parties in the administrative tribunal are cited by identifying the parties [P-Petitioners, PHT-Intervenor, Public Health Trust, and UM-Intervenor, University of Miami], followed by the exhibit number and the appropriate page number(s). The symbol

"T.___" designates the transcript of the Final Hearing conducted on June 17, 2004.

STANDARD OF REVIEW

The interpretation of a statute is a pure question of law, thus the interpretation of the NICA Plan is reviewed *de novo*. *See Orlando Regional Healthcare System, Inc. v. Alexander*, 909 So.2d 582 (Fla. 5th DCA 2005); *Romine v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 842 So. 2d 148, 150 (Fla. 5th DCA 2003); *Schur v. Florida Birth-Related Neurological*, 832 So. 2d 188, 191 (Fla. 1st DCA 2002); *Nagy v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 813 So. 2d 155, 159 (Fla. 4th DCA 2002). The final order of an administrative law judge ("ALJ") is reversible on appeal where an interpretation of the law is clearly erroneous or the findings of fact are not supported by competent, substantial evidence. *See* Fla. Stat. § 120.68(7), (10); *Carreras v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 665 So. 2d 1082, 1084 (Fla. 3d DCA 1995); *Schur*, 832 So. 2d at 191; *Nagy*, 813 So. 2d at 159. Pursuant to Section 120.68(7)(d), Florida Statutes, if the "agency erroneously interpreted a provision of law and a correct interpretation compels a particular result," then the agency action should be set aside.

STATEMENT OF THE CASE AND FACTS

A. Statement of Facts

On July 22, 1998, Juanita Ruiz, accompanied by her husband, Miguel Ruiz, presented for pre-registration at Jackson North Maternity Center, which is a hospital owned and operated by the Trust. (R. 249; T. 79). At that time, Mrs. Ruiz was interviewed by a health service representative, Machele Lockhart Wadley, and was asked to provide pertinent personal and financial information for herself and her husband, including her address, telephone number, place of employment, monthly wages and expenses, and the identity of any commercial insurer. (R. 249). The service representative used this information to complete a number of forms, including an Application for Credit, an Indigent Income Attestation form, and a Patient Funding Source form, which Mrs. Ruiz signed at pre-registration. (P. Ex. 1; R. 249). Mrs. Ruiz was a hospital patient and not a private patient of any of the physicians on staff at the hospital. (P. Ex. 4, p. 58).

Following the interview process, Mrs. Ruiz was given three pamphlets: (1) an Advance Directives brochure (a pamphlet that explained the living will); (2) a Patient's Bill of Rights brochure; and (3) a NICA brochure, in Spanish, titled "Peace of Mind for an Unexpected Problem." (P. Ex. 1, 16, 17; R. 251; T. 80-81). The "Peace of Mind" brochure was developed by NICA to provide patients with a clear and concise explanation of their rights and limitations under the NICA Plan.

(P. Ex. 16, 17). The brochures were available in a number of languages, including English and Spanish, and the brochures were distributed to participating physicians and hospitals so they could furnish a copy of the brochure to their obstetrical patients. As Mrs. Ruiz was only conversant and literate in Spanish, she was given the Spanish-language version of the NICA brochure. (R. 267; T. 98).

Contemporaneous with the provision of the NICA brochure, Mrs. Ruiz was asked to sign a form acknowledging receipt of the brochure. (P. Ex. 1; PHT. Ex. 3; R. 251; T. 80-83, 89-90, 95). That form provided, as translated in English, the following: "I have received the brochure entitled 'Peace of Mind' prepared by the Florida Birth-Related Neurological Injury Compensation Association." (R. 267). (P. Ex. 1; PHT. Ex. 3; R. 251; T. 82-83, 89). Mrs. Ruiz signed the form, acknowledging receipt of the NICA brochure, and the service representative witnessed and dated the form. (P. Ex. 1; PHT. Ex. 3; R. 252; T. 82-83, 89). Thereafter, the service representative provided Mrs. Ruiz with a gift package for expectant mothers, and the pre-registration process was completed. (R. 252).

In all, the pre-registration process lasted approximately 10-15 minutes. (R. 252). Mrs. Ruiz did not see any of the physicians on the hospital's staff during the pre-registration process or at any time prior to her admission to the hospital for labor and delivery. (PHT. Ex. 1, pp. 23, 56; T. 95-96, 98). Mrs. Ruiz did not know who the physician would be who would ultimately deliver her baby. (PHT. Ex. 1,

pp. 23, 56; T. 96, 98). It was Mrs. Ruiz's understanding that whichever doctor happened to be on the shift that day would be the one that delivered her baby. (T. 96).

At or about 4:00 p.m. on August 13, 1998, with her fetus at term, Mrs. Ruiz presented to Jackson North Maternity Center in labor. (R. 253; T. 99). Following an initial assessment, Mrs. Ruiz was examined by Wayne McCreath, M.D., a physician in the Trust's resident training program. (R. 253). Dr. McCreath noted the cervix at 2 centimeters dilation, effacement at 90 percent, and the fetus at -1 station, and regular uterine contractions every 3 minutes. (P. Ex. 1; PHT. Ex. 2, pp. 48-53; R. 253). Membranes were noted to have ruptured spontaneously prior to Mrs. Ruiz' presentment at the hospital. (PHT. Ex. 2, pp. 48-53; R. 253). Dr. McCreath's impression was intrauterine pregnancy, at 39+ weeks gestation, in labor, and he proposed to admit Mrs. Ruiz to labor and delivery.(R. 253). Dr. McCreath's assessment and proposal to admit Mrs. Ruiz was reviewed by Paul Norris, M.D., the attending physician at the time, and approved. (P. Ex. 1; PHT. Ex. 2, pp. 53-54; R. 253). Dr. Norris did not have any prenatal or any professional relationship with Mrs. Ruiz prior to her admission to the hospital that day, nor did he know prior to Mrs. Ruiz's admission that he would be providing obstetrical services to Mrs. Ruiz. (PHT. Ex. 2; T. 95-96). In addition, although Dr. Norris also held an appointment as a member of the faculty at the University, he at all

times material hereto was acting in his capacity as an attending physician at Jackson North Maternity Center, pursuant to his employment contract with the Trust.[1] (PHT. Ex. 5; R. 252-53)

Dr. McCreath continued to provide medical care for Mrs. Ruiz, under the supervision of Dr. Norris, until 7:00 p.m., when Bel Barker, M.D. assumed the duties of attending (supervising) physician. (PHT. Ex. 2, pp. 47-48; R. 253). Like Dr. Norris, Dr. Barker did not have any prenatal or any professional relationship with Mrs. Ruiz prior to her admission to the hospital that day, nor did she know prior to Mrs. Ruiz's admission that she would be providing obstetrical services to Mrs. Ruiz. (T. 95-96). In addition, although Dr. Barker also held an appointment as a member of the faculty at the University, she at all times material hereto was acting in her capacity as an attending physician at Jackson North Maternity Center, pursuant to her employment contract with the Trust.[2] (PHT. Ex. 4; R. 252-53).

At 6:01 a.m. on August 14, 1998, Michael A. Ruiz ("Michael") was delivered by cesarean section, due to arrest in descent and a nonreassuring fetal heart rate pattern, and was born with significant and permanent brain damage. (P. Ex. 1; P. Ex. 2; R. 254). The operating report names Dr. Barker as the attending

[1] Among the terms of his agreement with the Trust, Dr. Norris agreed to supervise medical care to patients provided by resident physicians. (PHT. Ex. 5; R. 252-53)

[2] Like Dr. Norris, Dr. Barker agreed to supervise medical care to patients provided by resident physicians pursuant to her employment contract with the Trust. (PHT. Ex. 4; R. 252-53)

surgeon and George Butler, M.D., another physician in the Trust's resident training program, as a resident surgeon. (P. Ex. 1; R. 254). Neither Dr. Norris nor Dr. Barker provided separate NICA notice to Mrs. Ruiz at or following her hospital admission of August 13, 1998, and the only notice Mrs. Ruiz received was that provided by the hospital at pre-registration. (PHT. Ex. 2, p. 25; R. 254).

B. Course of Proceedings

The Ruiz family filed a medical malpractice action against the University and the Trust in circuit court. (R. 002, 022). They asserted that Michael suffered fetal distress and perinatal asphyxia due to alleged negligence during Mrs. Ruiz' labor. (R. 002, 022). The Ruiz family also alleged that neither the physicians nor the hospital provided sufficient NICA Plan notice as required by Section 766.316, Florida Statutes (1998). (R. 244-245). The Ruiz family further alleged that the treating physicians acted as agents, servants, employees, or dual employees of the University and the Trust. (R. 022). In response, the Trust and the University moved to dismiss or abate, contending that the claim was governed by NICA and that the Ruiz family should bring the claim under NICA. The trial court denied this motion and the Third District granted certiorari. The Third District quashed the trial court ruling, finding that the ALJ, not the trial court, should determine whether or not a health care provider satisfied the notice requirement of the NICA Plan. *See University of Miami v. M.A.*, 793 So. 2d 999 (Fla. 3d DCA 2001).

The Ruiz family filed an amended petition with the Division of Administrative Hearings ("DOAH") for compensation under the NICA Plan. (R. 001-005, 241). Apart from contending that Michael suffered an injury compensable under the NICA Plan, the Ruiz family sought to avoid a claim of Plan immunity by contending that neither the hospital nor the physicians provided proper notice of participation in the Plan. (R. 003-004, 241). NICA responded by agreeing that the claim was compensable. (R. 035-042, 241). The University requested and was granted leave to intervene in the proceeding because it had a substantial interest in the outcome of the claim in that it was alleged to be vicariously responsible for the actions of Mrs. Ruiz's attending physicians. (R. 021-023, 033-034, 242). The Trust also requested and was granted leave to intervene. R. 0024-027,033,-034, 242). The case proceeded to final administrative hearing on the following issues:

1) Whether NICA's proposal to accept the claim as compensable should be approved.

2) If so, the amount and manner of payment of the parental award, the amount owing for attorney's fees and costs incurred in pursuing the claim, and the amount owing for past expenses.

3) Whether notice was accorded the patient, as contemplated by Section 766.316, Florida Statutes (Supp. 1998), or whether the failure to give notice was excused because the patient had an "emergency medical condition," as defined by Section 395.002(9)(b), Florida

> Statutes (Supp. 1998), or the giving of notice was otherwise not practicable.

(R. 240, 243).

At the hearing, Mrs. Ruiz testified and Petitioners' Exhibits 1, 2, 4-9, 11-17, 19, and 20 were received into evidence. (R. 243). NICA's Exhibits 1-3, the Trust's Exhibits 1-6, and the University's Exhibits 1, 2 (except the Trust's answer to Interrogatory 1c), 3, and 4 were received into evidence. (R. 243). On September 28, 2004, the ALJ issued a Final Order. (R. 239-269). The ALJ approved NICA's proposal to accept the claim and approved the amount of the award agreed upon by the Petitioners and NICA should the Petitioners elect to accept benefits under the NICA Plan.[3] (R. 239-269). The ALJ also determined that the hospital complied with the NICA notice provisions by providing the NICA brochure at pre-registration, but that the participating physicians did not. (R. 259, 265, 274-277).The University timely appealed the Final Order, which NICA joined. (R. 270-271, 278-281). The Ruiz family cross-appealed the ruling on notice with respect to the hospital, but later abandoned that issue during the briefing stage. (R. 274-277).

[3] The agreed award tracked the statutory requirements of Section 766.31, Florida Statutes, and consisted of (1) reimbursement of actual expenses already incurred, together with the right to receive reimbursement of actual expenses for future medical bills pursuant to Section 766.31(1)(a); (2) a lump sum payment in the maximum amount statutorily allowed of $100,000.00 in accordance with Section 766.31(1)(b); and (3) reimbursement of reasonable expenses, inclusive of

C. Disposition Below

The Third District court of Appeal affirmed the ALJ's Final Order that approved the claim for compensation and found that the participating physicians did not comply with the NICA notice provisions. The Third District reasoned as follows:

> ***Notwithstanding the absence of a prior professional relationship between the University physicians and Mrs. Ruiz,*** the physicians had a reasonable opportunity to furnish notice at pre-registration [at the hospital] or during the weeks after pre-registration but prior to the onset of active labor. The record indicates that all of the University physicians participated in the NICA Plan and that their services at the hospital were limited to maternity treatment at the onset of labor. 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 deliver 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. From July 22, 1998 until the advent of Mrs. Ruiz' emergency medical condition the NICA statute required proper notice to be given. The patient's hospital visit three weeks later, admittedly on an emergency basis, did not negate the physicians' earlier statutory duty to provide the NICA Plan notice.

---

attorney's fees and costs, in the total sum of $10,580.33, pursuant to Section 766.31(1)(c). (R. 246).

(*University of Miami v. Ruiz*, 2005 Fla. App. LEXIS 17215, pp. 12-13) ("Ruiz Opinion") (emphasis added). The Third District noted that it expressly rejected and disagreed with the Fifth District's decision in *Orlando Regional Healthcare System, Inc. v. Alexander*, 909 So.2d 582 (Fla. 5th DCA 2005), wherein that court applied a strict statutory construction analysis to conclude that a patient's prior visits to a hospital to treat pregnancy conditions did not negate the statutory exception that applied to her final visit, when she arrived in an emergency medical condition. In this regard, the Third District observed:

> Although we concur that the provision of notice is excused when a 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 [they] will lose their NICA Plan exclusivity.

Ruiz Opinion, p. 11. The Third District, *sua sponte*, certified direct conflict with *Alexander*. Although NICA was originally aligned with the University, both as a party appellant and with respect to briefing on the merits in support of reversing the ALJ's notice determination, NICA filed a Motion for Rehearing that sought to decertify the conflict that the Third District had unilaterally certified with respect to *Alexander*. The University responded and filed a Cross-Motion for Certification of the following question of great public importance:

> DOES SECTION 766.316, FLORIDA STATUTES, EXEMPT INDIVIDUAL TREATING PHYSICIANS ON A HOSPITAL STAFF FROM PROVIDING PRE-DELIVERY NOTICE OF THEIR PARTICIPATION IN THE NICA PLAN WHERE THE PATIENT FIRST PRESENTS TO THE PHYSICIAN AT THE HOSPITAL IN AN EMERGENCY MEDICAL CONDITION, IRRESPECTIVE OF WHETHER THE PARTICULAR STAFF PHYSICIAN PREVIOUSLY HAD A REASONABLE OPPORTUNITY TO PROVIDE PRE-DELIVERY NOTICE TO THE PATIENT THROUGH THE HOSPITAL PRE-REGISTRATION?

The Third District denied NICA's motion for rehearing and functionally denied the University's cross-motion for certification by thereafter issuing its Mandate. (R. 689-691). The University timely filed a Notice to Invoke Discretionary Jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

This Court should quash the Third District's decision that determined under the facts of this case that the participating physicians did not properly comply with the NICA notice provisions and were not otherwise excused therefrom by the "emergency medical condition" exception. The Third District erroneously interpreted Section 766.316, Florida Statutes (the "NICA notice statute") or to otherwise misapplied it to the facts presented in this case. The ALJ correctly found that the evidence demonstrated that there was "evidence of the onset and persistence of uterine contractions" and "the rupture of the membranes" at the time Mrs. Ruiz presented to the hospital and first encountered Dr. Norris and Dr. Barker, and that she was in an "emergency medical condition." Therefore, as a matter of law, and in accordance with the plain and unambiguous language of Section 766.316, Florida Statutes, the participating physicians, Dr. Norris and Dr. Barker, were not required to provide NICA notice to Mrs. Ruiz in the instant case, or to otherwise also demonstrate impracticability with respect to the provision of NICA notice. The Third District and the ALJ, however, further erred in determining that the participating physicians had a "reasonable opportunity" and failed to provide Mrs. Ruiz with notice during the *hospital*'s pre-registration process because there was no competent, substantial evidence in the record to support such a finding. Nor is such a finding required under the NICA notice

statute according to ordinary principles of statutory construction. In the alternative, under the particular circumstances of this case, where all physicians on staff at the hospital were participants in the NICA Plan and where the record evidence is uncontroverted that the physicians who provided obstetrical services had no prior contact with Mrs. Ruiz, the notice that the hospital provided to Mrs. Ruiz was sufficient to satisfy the physicians' obligation to provide notice, especially where the Third District imputed the hospital's "reasonable opportunity" to provide notice at preregistration to the hospital's staff physicians. Given the foregoing, this Court should quash the Third District's decision and remand with directions to the ALJ to enter an order that the participating physicians were properly excused from complying with the NICA notice requirements according to the "emergency medical condition" exception under the facts presented in this case.

ARGUMENT

THE THIRD DISTRICT ERRONEOUSLY CONCLUDED THAT THE PARTICIPATING PHYSICIANS DID NOT COMPLY WITH THE NICA NOTICE PROVISIONS OF FLA. STAT. § 766.316

A. The NICA No-Fault Remedy and Notice Provisions

Sections 766.301-316, Florida Statutes (1998), establish NICA, which is a limited, no fault administrative compensation system for certain statutorily-defined some birth-related neurological injuries pursuant to section 766.302(2). *See Romine v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 842 So.2d 148, 151-152 (Fla. 5th DCA 2003). The NICA Plan was established by the Florida Legislature "for the purpose of providing compensation, irrespective of fault, for certain birth-related neurological injury claims." *See* Fla. Stat. §766.303(1). The Legislature's intent in enacting the NICA Plan was to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries to infants that result in unusually high costs for custodial care and rehabilitation in an effort to stabilize and reduce malpractice insurance premiums for providers of obstetric services in Florida. *See* Fla. Stat. §766.301(2). The rights and remedies granted by the Plan exclude all other rights and remedies of the infant and his parents arising out of the labor and delivery during which an injury is suffered. *See* Fla. Stat. §766.303(1); *see also* Fla. Stat. § 766.304 ("If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be

brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303."). Thus, a proceeding under the Act forecloses a tort action unless the injury is found to be non-compensable according to section 766.304, and it allows a form of immunity from suit for participating providers in some circumstances under Section 766.303(2). *See Romine v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 842 So.2d 148, 151-152 (Fla. 5th DCA 2003).

NICA Plan participants pay substantial premiums to participate in NICA, which partially fund the NICA compensation scheme for the benefit of a certain class of catastrophically injured infants, irrespective of fault of the physician. The compensation scheme consists of (1) reimbursement of actual expenses already incurred, together with the right to receive reimbursement of actual expenses for future medical bills pursuant to Section 766.31(1)(a); (2) a lump sum payment in the maximum amount statutorily allowed of $100,000.00 in accordance with Section 766.31(1)(b); and (3) reimbursement of reasonable expenses, inclusive of attorney's fees and costs, pursuant to Section 766.31(1) (c). *See* Fla. Stat. § 766.31.

Section 766.316, Florida Statutes (1998), outlines the NICA notice requirements as follows:

> ***Each hospital with a participating physician on its staff and each participating physician***, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4) (c), ***under the Florida***

> ***Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries***. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met. ***Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(9)(b) or when notice is not practicable***.

§766.316, Fla. Stat. (emphasis added). Thus, while each participating hospital and each participating physician are generally required to provide NICA notice to their obstetrical patients, Section 766.316, Florida Statutes provides two separate and independent exceptions such that notice is excused when: (1) the patient has an emergency medical condition as defined in Section 395.002(9)(b), Florida Statutes, or (2) notice is not practicable. An "emergency medical condition" is defined by Fla. Stat. § 395.002(9)(b)to mean, with 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.

See Fla. Stat. §395.002(9)(b) (emphasis added).

The purpose of the pre-delivery NICA notice provision is to provide obstetrical patients an opportunity to make an informed choice between using a health-care provider who participates in the NICA Plan or using a provider who does not, thereby preserving available civil remedies. *See Galen of Florida, Inc. v. Braniff*, 696 So. 2d 308, 309-310 (Fla. 1997). A participating physician's failure to provide such notice results in the preclusion of the NICA Plan's exclusive administrative remedy provision and allows the patient to pursue civil remedies. *Id*. at 310.

B. The Third District 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

There is no dispute in the record below that there was "evidence of the onset and persistence of uterine contractions" and "the rupture of the membrane" at the time Mrs. Ruiz presented to the hospital and first encountered the participating physicians. Further, Dr. Norris testified in his deposition, which was admitted into evidence at the final hearing, that "there was inadequate time to effect safe transfer to another hospital prior to delivery" and that a transfer could have posed "a threat to the health and safety of the patient or fetus." (PHT. Ex. 2, pp. 48-53). Thus, Mrs. Ruiz unquestionably presented the physicians in an "emergency medical

condition," as that term is defined by Section 395.002(9)(b), Florida Statutes. Accordingly, under the plain language of Section 766.316, Florida Statutes, Dr. Norris and Dr. Barker were not required to provide NICA notice to Mrs. Ruiz and not otherwise obliged to demonstrate impracticability concerning provision of NICA notice.

Consistent with the evidence, the ALJ correctly determined that Mrs. Ruiz was in an "emergency medical condition" when she presented to the hospital on August 13, 1998 and that her physicians were not required to provide Mrs. Ruiz with NICA notice at or following that time:

> . . . Doctors Norris and Barker were not required to give notice when they assumed Mrs. Ruiz's care at the hospital, because there was "evidence of the onset and persistence of uterine contractions or rupture of the membranes" . . .

(R. 259). Nevertheless, despite the fact that neither Dr. Norris nor Dr. Barker had any contact with Mrs. Ruiz prior to her presentation to the hospital in an emergency medical condition (let alone any prenatal or any other prior professional relationship), the Third District and the ALJ determined that Dr. Norris and Dr. Barker failed to comply with the notice provisions of the NICA Plan because, "although there was a reasonable opportunity for them to do so, they failed to give Mrs. Ruiz notice at [the hospital] pre-registration." (R. 259). This interpretation of the NICA notice statute as applied to the ALJ's factual findings is clearly

erroneous and requires reversal according to the plain and unambiguous language of Section 766.316, Florida Statutes.

As a threshold matter, there is no requirement contained in Section 766.316, Florida Statutes that if an emergency medical condition existed, the ALJ must also determine whether there was a "reasonable opportunity" to provide NICA notice prior to the onset of the emergency medical condition. To the contrary, the plain language of Section 766.316, Florida Statutes only states that "***[n]otice need not be given to a patient when the patient has an emergency medical condition*** or when notice is not practicable." (emphasis added). Thus, once the ALJ found that Mrs. Ruiz had an emergency medical condition when she presented to the hospital in active labor for the delivery of her child, the ALJ's inquiry into the notice issue should have been complete. Instead, the ALJ and the Third District improperly proceeded to determine that health care providers were not excused from providing notice when a patient presented to them with an "emergency medical condition" if the health care providers previously had an opportunity to provide such notice and did not do so. With respect to this issue, the ALJ's clearly erroneous interpretation of the NICA notice statute, as affirmed by the Third District, is evident in the Final Order:

> . . . [W]hile the Legislature clearly expressed its intention in Section 766.316, Florida Statutes, that notice was not required when a patient presented with an "emergency medical condition," the Legislature did not absolve a

> health care provider from the obligation to give notice when the opportunity was previously available.

(R. 259). Notably, neither the ALJ nor the Third District cited any legislative history or specific language in the NICA notice statute in support of this proposition, nor does any such authority exist.

Where, as here, statutory language is unambiguous, it is well established that courts are constrained to apply the plain meaning of the statute. It is well established in Florida that:

> Legislative intent must be derived primarily from the words expressed in the statute. If the language of the statute is clear and unambiguous, courts enforce the law according to its terms and there is no need to resort to rules of statutory construction. Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity. (Citations and quotation marks omitted).

Florida Dep't of Revenue v. Fla. Municipal Power Agency, 789 So. 2d 320, 323 (Fla. 2001) (emphasis added); *see also Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (holding that courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications). A reading of the plain language of Section 766.316, Florida Statutes does not reveal any intention by the Legislature to excuse the provision of notice only upon a determination that there

is both an "emergency medical condition" and lack of a previous opportunity to provide notice, which is an additional requirement that the ALJ and the Third District improperly imposed upon the participating physicians in this case without any legal authority. Rather, as the Fifth District Court of Appeal correctly recognized in *Alexander*, the NICA notice statute contains two separate and distinct exceptions, each of which independently provides an exception to the pre-delivery notice requirement. As such, the participating physicians were legally excused from providing NICA notice to Mrs. Ruiz when she first presented to them under an emergency medical condition as statutorily defined, and her previous visit to the hospital for preregistration did not negate this clear statutory exemption.

Furthermore, there is nothing in the legislative history of the 1998 amendments to Section 766.316, Florida Statutes or case law interpreting the amended statute that would suggest that the Legislature intended such a requirement. In support of his conclusions regarding the Legislature's intent, the ALJ relied on *Galen of Florida, Inc. v. Braniff*, 696 So. 2d 308 (Fla. 1997); *Board of Regents of the State of Fla. v. Athey*, 694 So. 2d 46 (Fla. 1st DCA 1997); *Schur v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 832 So. 2d 188 (Fla. 1st DCA 2002); and *Turner v. Hubrich*, 656 So. 2d 970 (Fla. 5th DCA 1995). None of the foregoing cases, however, addressed circumstances where the patient presented

with an "emergency medical condition," let alone the issue of whether the health care providers would be excused from providing notice if they had a previous opportunity to provide notice prior to the onset of the "emergency medical condition." Furthermore, *Galen*, *Braniff*, *Athey*, and *Turner* were decided prior to the 1998 amendment that added the "emergency medical condition" exception and cannot serve to guide any construction of the Legislature's intent in amending the statute. Finally, to the extent that *Athey* and *Schur* require that health care providers give notice if they have a reasonable opportunity to do so, such requirement is addressed in the 1998 version of Section 766.316, Florida Statutes, which excuses the provision of NICA notice when it is "not practicable." As reflected by the plain language of the NICA notice statute, the "not practicable" exception is a separate and distinct exception from the "emergency medical condition" exemption.

Even assuming *arguendo* that there exists a "reasonable opportunity" exception to the "emergency medical condition" exception set forth in Section 766.316, Florida Statutes, despite the clear and unambiguous language of that statute, there was no competent, substantial evidence in the record below to support the conclusion of both the ALJ and the Third District that either Dr. Norris or Dr. Barker had a "reasonable opportunity" to provide Mrs. Ruiz with NICA notice at the hospital facility's pre-registration, which occurred several weeks prior

to her presentment in an emergency medical condition. While there is no case law that specifically addresses what circumstances constitute a reasonable opportunity for hospitals and physicians to provide notice prior to a patient's presentation in active labor for delivery, the First District Court of Appeal's analysis in *Athey* is instructive on this issue:

> The undisputed facts here support the trial court's conclusion that as a matter of law UMC had a reasonable opportunity to provide a NICA notice to the appellees. ***Weeks 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. . . .***
>
> . . . [T]he order on appeal does not address whether the attending physicians, who are required to provide section 766.316 notice, had a reasonable opportunity to provide that notice. In fact, the limited record does not indicate, for example, ***whether prior to delivery these attending physicians had any prenatal or other prior professional relationship with these patients such that the NICA notice could reasonably have been given***. . . .

Athey, 694 So. 2d at 51 (emphasis added). As explained in *Athey*, a reasonable opportunity for a hospital to provide notice prior to delivery may arise where the hospital provided prenatal care to the patient or otherwise had knowledge that the patient would deliver her child in the hospital. Further, the determination of whether there was a reasonable opportunity for a physician to provide notice prior to delivery will ordinarily focus on whether the physician had any prenatal or other prior professional relationship with the patient. While the *Athey* case does not

purport to list all circumstances in which a "reasonable opportunity" may exist, it is clear from a reading of that decision that there must, at a minimum, be some type of contact or relationship between the patient and the health care provider for such an opportunity to arise prior to delivery.

In the instant case, the evidence reflects that the hospital had a "reasonable opportunity" to provide notice to Mrs. Ruiz at pre-registration, which took place three weeks prior to Mrs. Ruiz's presentation to the hospital for delivery, and the ALJ correctly found that the hospital satisfied its obligation to provide notice at that time. The ALJ, however, also determined that Dr. Norris and Dr. Barker had a "reasonable opportunity" to provide notice at the hospital's pre-registration process, even though the record was devoid of any evidence to support this finding, and indeed under the plain language of the NICA notice provisions it was decidedly not the participating physicians obligation to demonstrate impracticability in light of the clear exemption for an emergency medical condition. Rather, the evidence in the record demonstrated that: (1) neither Dr. Norris nor Dr. Barker was present at pre-registration; (2) neither Dr. Norris nor Dr. Barker knew at the time of Mrs. Ruiz's pre-registration (or at any time prior to Mrs. Ruiz's presentation to the hospital for delivery) that they in particular would be providing obstetrical services to Mrs. Ruiz; and (3) Mrs. Ruiz did not know at the time of pre-registration which physicians would be providing obstetrical

services to her when she ultimately presented to the hospital for delivery. In addition, the unconflicting evidence established that neither Dr. Norris nor Dr. Barker ever provided pre-natal care to Mrs. Ruiz, ever had any prior professional relationship with Mrs. Ruiz, or ever had contact with Mr. Ruiz prior to Mrs. Ruiz's presentation to the hospital on August 13, 1998.

In view of the foregoing, there was no evidence in the record from which the ALJ could conclude that the physicians had *any* opportunity to provide NICA notice to Mrs. Ruiz prior to her presentation with an "emergency medical condition," much less a reasonable one. Specifically, the ALJ's conclusion that the physicians had a reasonable opportunity to provide notice at the hospital's pre-registration lacks any rational basis and is contrary to Florida law. In determining that the physicians had a reasonable opportunity to provide notice at the pre-registration (even though the physicians were not present and did not know that they would be providing obstetrical services to Mrs. Ruiz), it appears that the ALJ and the Third District either imposed an obligation upon the hospital to provide notice for the physicians during pre-registration, or otherwise improperly imputed the *hospital's* opportunity to provide notice to the physicians on the hospital's staff.

Florida law, however, provides that a hospital and its physicians have *separate and independent obligations* to accord the patient notice. *See* 766.316,

Fla. Stat. ("Each hospital with a participating physician on its staff and each participating physician . . . under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries); *Athey*, 694 So. 2d at 49 ("Under section 766.316, therefore, notice on behalf of the hospital will not by itself satisfy the notice requirement imposed on the participating physician(s) involved in the delivery."); *See also Alexander*. Thus, because a hospital's provision of notice to a patient does not automatically satisfy the independent requirement of a physician to provide notice, it follows that a hospital's opportunity to provide notice cannot necessarily and categorically be imputed to the physicians on its staff. Rather, as hospitals and physicians have separate and distinct obligations to provide notice, Dr. Norris and Dr. Barker were entitled to separate consideration with respect to whether the physicians on an individualized basis had an opportunity to provide notice at pre-registration. As Dr. Norris and Dr. Barker were not present at the hospital's pre-registration and did not know that they would be providing obstetrical services to Mrs. Ruiz at that time, it is unmistakably clear that the pre-registration did not present a reasonable opportunity for the physicians to provide notice to Mrs. Ruiz.

Notwithstanding the plain language of the NICA notice provisions and Florida law construing them, in support of the conclusion that Dr. Norris and Dr.

Barker had a "reasonable opportunity" to provide notice at pre-registration, the Third District determined that because the first services a patient received at the hospital typically followed the onset of labor (when the patient presented to the hospital for the birth of her child), the only opportunity the hospital and the physicians it employed ever had to give notice prior to the onset of labor was at pre-registration. It appears that the Third District's determination was based on the concern that 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 delivery. Nevertheless, there is nothing in Section 766.316, Florida Statutes, the statute's legislative history, or case law interpreting the statute that would permit the ALJ to impute to a physician a "reasonable opportunity" to give notice based on policy reasons where such opportunity did not otherwise, as a practical matter, exist. Indeed, it is not the judiciary's function to substitute its judgment for that of the Legislature as to the wisdom or policy of a particular statute. *See generally State v. Rife*, 789 So. 2d 288, 292 (Fla. 2001); *Brown v. Rice*, 716 So. 2d 807, 810 (Fla. 5th DCA 1998). If the Legislature had wanted to preclude physicians providing obstetrical services in hospitals from relying on the "emergency medical condition" exception, it would have included the appropriate language in Section 766.316, Florida Statutes.

In any event, contrary to the ALJ's findings, the record demonstrates that, under certain different circumstances not presented in this case, Dr. Norris, Dr. Barker, and other physicians at the hospital have an opportunity to provide notice prior to the onset of an "emergency medical condition." First, although the hospital here does not typically provide prenatal services, Dr. Norris and Dr. Barker do provide prenatal services to their private patients. (PHT. Ex. 2, pp. 46-47, 72-74). Thus, under the *Athey* analysis, Dr. Norris and Dr. Barker would have a reasonable opportunity to provide notice at some point during the provision of prenatal care to their private patients. Further, the onset of labor does not in all instances become an "emergency medical condition." Presumably, a patient could present to the hospital in the latent phase of labor, in which she is experiencing intermittent, rather than persistent, uterine contractions. Under such circumstances, the hospital's physicians may have a reasonable opportunity to provide notice prior to the onset of an "emergency medical condition." Accordingly, even if this Court could properly decline to apply the "emergency medical condition" exception where no prior opportunity to give notice would ever exist, such application would be inappropriate with respect to Dr. Norris and Dr. Barker.

In the alternative, this Court should determine 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 under the circumstances of this case. Indeed, if the Court were to affirm the ALJ's imputation of a "reasonable opportunity" to provide notice at pre-registration upon Dr. Norris and Dr. Barker even though the physicians were not present at pre-registration and never had any previous contact with Mrs. Ruiz, the Court would necessarily be rejecting the First District's determination in *Athey* that the hospital and the physicians have independent obligations to accord the patient notice. Consequently, if the hospital's "reasonable opportunity" may be imputed to the physicians on its staff under the circumstances of this case, it reasonably follows that the notice provided by the hospital should also be imputed to its physicians under such circumstances. This should particularly result where, as here, all physicians on a hospital's staff were participants in the NICA Plan and where the physicians who provided obstetrical services had no prior contact with the patient. Under the foregoing circumstances, applying *de novo* review, the Third District erred as a matter of law in failing to enforce the clear language of Section 766.316, NICA's notice statute. The Third District also misapplied the law as expressed in the clear language of that statute by interpreting it to require both (1) a finding of emergency medical condition; and (2) a finding that provision of notice was not practicable. Accordingly, the Third District's decision must be quashed and NICA Plan

immunity for the participating physicians established.

CONCLUSION

For the foregoing reasons, this Court should quash the Third District's decision that determined that the participating physicians in this case failed to comply with the notice requirements of Section 766.316, Florida Statutes.

Respectfully submitted,

June Galkoski Hoffman
Fla. Bar No. 050120
Marc J. Schleier
Florida Bar No. 0389064

FOWLER WHITE BURNETT P.A.
Counsel for Petitioner University of Miami
Espirito Santo Plaza, 14th Floor
1395 Brickell Avenue
Miami, Florida 33131-3302
Telephone: (305) 789-9200
Facsimile: (305) 789-9201

and

Steven E. Stark, Esq.
Fla. Bar No. 516864
Co Counsel for Petitioner University of Miami
University of Miami Medical Group
Rosensteil Building, Room 1128
1600 NW 10th Avenue
Miami, Florida 33136

CERTIFICATE OF TYPEFACE COMPLIANCE

The undersigned hereby certifies that the typeface of this brief is 14 point Times New Roman and complies with the font standards prescribed by Fla.R.App.P. 9.210.

June Galkoski Hoffman

CERTIFICATE OF SERVICEError! Bookmark not defined.

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this ____ day of February 2, 2006, to Lincoln J. Connolly, Esq. and Manuel A. Reboso, Esq., *Counsel for the Respondents Ruiz family* Rossman Baumberger & Reboso, P.A., 23rd Floor - Courthouse Tower, 44 West Flagler Street, Miami, FL 33130; Wilbur E. Brewton, Esq., *Counsel for NICA*, Roetzel & Andress, L.P.A., 225 South Adams Street, Suite 250, Tallahassee, Florida 32301; and Stephen A. Stieglitz, Esq., Assistant County Attorney, *Counsel for The Public Health Trust of Miami-Dade County*, Miami-Dade County Attorney's Office, Suite 2810, Stephen P. Clark Center, 111 N.W. 1st Street, Miami, FL 33128-1993.

June Galkoski Hoffman

W:\54133\BRIEF368-Initial Merits Brief.JGH