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

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

Steven E. Stark, Esq.
Co-Counsel for Petitioner Miami
University of Miami Medical Group
Rosensteil Building, Room 1128
1600 NW 10th Avenue
Miami, Florida 33136

FOWLER WHITE BURNETT P.A.
Counsel for Petitioner University of
Espirito Santo Plaza, 14th Floor
1395 Brickell Avenue
Miami, Florida 33131-3302
Telephone: 305-789-9200
Facsimile: 305-789-9201
By: JUNE GALKOSKI HOFFMAN
Fla. Bar No. 050120

MARC J. SCHLEIER
Fla. Bar No. 0389064

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REPLY STATEMENT OF CASE AND FACTS

Despite acknowledging that the ALJ did not and could not decide the physicians' employment or agency status relative to the University or the Public Health Trust, which by law exclusively owns and operates the Jackson North Maternity Center,[1] the Respondents improperly ignore the confines of the ALJ's factual findings. Instead, the Respondents promote their yet unadjudicated theory of liability against the University as "fact" by, *inter alia*, referring to the treating physicians as "UM physicians;" referring to Jackson North as a "University of Miami OB/GYN Practice" and pointing to other signage; and misleadingly suggesting that *Jaar v. University of Miami*, 474 So.2d 239 (Fla. 3d DCA 1985) establishes their agency theory as a matter of law when that case specifically involved *prior* versions of operative contracts. *Answer Brief, pp. 3-5.*[2] It is important to note that the University of Miami was compelled to intervene in the NICA proceedings because it is the deep pocket target, unlike the Trust that unquestionably enjoys sovereign immunity limitations on damages under Fla. Stat. §

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[1] Chapter 154, Florida Statutes (2000); Chapter 25A of the Dade County Code(establishing the Public Health Trust which "shall be responsible for the operation, maintenance, and governance . . . of Jackson Memorial Hospital and all related facilities."

[2] The Third District's opinion also overbroadly and inaccurately refers to the treating physicians as "University" physicians, especially where Judge Cortinas at oral argument expressly acknowledged that the capacity in which the physicians provided services to Ms. Ruiz at Jackson North was not an issue before the Court. *See Respondents' Appendix, Tab A, p. 28.*

768.28(9)(a), and it is alleged to be vicariously liable for the actions of Ms. Ruiz' treating physicians at Jackson North by sheer virtue of their faculty appointments at the University's medical school, and not due to some separate patient/physician relationship with Ms. Ruiz. (R. 21-23, 33-34, 242).

The Respondents also mischaracterize and unduly emphasize certain oral argument questioning in an effort to establish that the treating physicians here had a reasonable opportunity to provide NICA notice at the hospital's preregistration in July of 1998. In particular, the Respondent's selectively quote a certain exchange out of context. *Answer Brief, pp. 9-11, OA p. 7, 16-17.* A review of the relevant excerpt reflects that the University appropriately asserted that the record was devoid of any record evidence regarding impracticability because the physicians who first encountered Ms. Ruiz in active labor were statutorily exempted under the "emergency medical condition exception" from proving impracticability of notice.

REPLY ARGUMENT

The Respondents admit at the outset that there is no dispute that Ms. Ruiz presented to Jackson North for delivery in an "emergency medical condition," and that she never had any prior interaction or relationship whatsoever with either Dr. Norris or Dr. Barker. Nevertheless the Respondents argue that Third District

correctly determined that the treating physicians were not excused from providing NICA notice because it was "practicable" for them to have provided notice to Ms. Ruiz at the *hospital's* pre-registration three weeks earlier. In particular, Respondents erroneously contend that the Third District properly construed the NICA notice provision, Fla. Stat. § 766.316, to require a finding of *both* an "emergency medical condition" *and impracticability* in order for a health care provider to be excused from providing notice to a patient because a plain reading of the statute would lead to a result that would be inconsistent with the purpose of NICA's notice requirement.

Section 766.316 expressly provides that notice of a health care provider's participation in the NICA Plan need not be given to a patient "when the patient has an emergency medical condition . . . ***or*** when notice is not practicable" (emphasis added). When used in a statute, the term "or" is generally to be construed in the disjunctive. *See Telophase Society of Florida, Inc. v. State Board of Funeral Directors and Embalmers*, 334 So. 2d 563, 566 (Fla. 1976). Furthermore, the use of a disjunctive in a statute indicates alternatives and ***requires*** that those alternatives be treated separately. *See Ellinwood v. Board of Architecture and Interior Design*, 835 So. 2d 1269, 1270 (Fla. 1st DCA 2003); *Kirksey v. State*, 433 So. 2d 1236, 1241 n. 2 (Fla. 1st DCA 1983).

In accordance with this tenet of statutory construction, the Fifth District Court of Appeal in *Orlando Regional Healthcare System, Inc. v. Alexander*, 909 So. 2d 582 (Fla. 5th DCA 2005) interpreted the clear language of the NICA notice provision to determine that the statute contains ***two*** distinct exceptions -- each of which *independently* provides an exception to the pre-delivery notice requirement. *See Alexander*, 909 So. 2d at 586. The Third District below purportedly agreed with this particular holding, stating that "there are two separate and distinct exceptions to NICA's notice requirement: situations when the patient presents in an emergency medical condition or when notice is not practicable." *University of Miami v. Ruiz*, 916 So. 2d 865, 869 (Fla. 3d DCA 2005). Nevertheless, the Third District proceeded to recede from this pronouncement by essentially requiring a showing of impracticability in any circumstance where a health care provider relies upon the "emergency medical condition" exception:

> In the instant case, ***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 or during the weeks after pre-registration but prior to the onset of active 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***. . . .

Ruiz, 916 So. 2d at 870 (emphasis added).

Respondents cannot reasonably suggest that the Third District correctly

imposed the additional requirement of impracticability in applying the "emergency medical condition" exception because a plain reading of that exception" "would completely swallow the rule." *Answer Brief at p. 12.* Respondents maintain that, because all women are eventually in an emergency medical condition and incapable of transfer to another facility prior to delivering a live infant, notice could conceivably always be excused under the exception. As such, Respondents argue that the interpretation espoused in *Alexander* would lead to ridiculous results and that it contravenes rather than furthers the legislative purpose of NICA's notice provision.[2] While Respondents' concerns may arguably have merit in circumstances where the "emergency medical condition" exception is applied too broadly, the Respondents neglect to address the absurd effects that their own interpretation of the statute would generate.

If the duty to provide notice is excused only when the patient has an emergency medical condition ***and*** when notice to the patient is not practicable, as

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[2] Pursuant to *Castillo v. Vlaminick de Castillo*, 771 So. 2d 609 (Fla. 3d DCA 2000), which Respondents cite in their Answer Brief, courts must examine whether a statutory interpretation is "plainly at variance with ***the purpose of the legislation as a whole***" in determining whether such interpretation leads to an unreasonable or absurd conclusion. *See Castillo*, 771 So. 2d at 611 (emphasis added). As reflected in Fla. Stat. § 766.301, the Legislature's intent in enacting the NICA statutes was to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries in an effort to stabilize and reduce malpractice insurance premiums for providers of obstetric services in Florida. This purpose, however, is decidedly not fulfilled by allowing a patient to circumvent the exclusivity of the Plan in order to pursue a civil action against her health care providers when her claim is otherwise compensable under the Plan.

Respondents propose, the "emergency medical condition" exception would, for the most part, be swallowed by the impracticability exception. Under Respondents' interpretation, the fact that a patient presents for delivery in a statutorily defined "emergency medical condition" would be rendered meaningless if it were also feasible or practicable for the patient's health care providers to provide notice subsequent to such presentation but prior to delivery. Additionally, under that interpretation, health care providers would be foreclosed from relying upon the impracticability exception in the absence of a corresponding "emergency medical condition." There is nothing in Section 766.316 or its legislative history that would suggest that the legislature intended that courts look beyond the plain language of the statute and interpret the statute in a manner such that the applicability of the exceptions contained therein would be severely abrogated. Therefore, there is no legitimate basis to find that the exceptions contained in Section 766.316 are intertwined in any way and the Court should adopt the Fifth District's determination in *Alexander* that the statute contains two distinct exceptions, each of which ***independently*** provides an exception to the pre-delivery notice requirement.

It appears that the problem encountered by the ALJ and the Third District in applying the "emergency medical condition" exception as a separate and distinct exception to the notice requirement stems from the fact that Section 766.316 is

silent as to the operative time period in which the "emergency medical condition" must be examined, as the statute merely states that the notice requirement is excused when the patient has an emergency medical condition or when notice is not practicable. The University agrees with Respondents that the statute should not be read to mean that if the patient is ***ever*** in an statutorily defined "emergency medical condition" prior to delivery, a health care provider is excused from providing NICA notice. Such an interpretation would, indeed, swallow the rule. However, it is equally improper for the ALJ and the Third District to require health care providers to demonstrate the lack of a "reasonable opportunity" to provide notice or impracticability when relying upon the "emergency medical condition" exception, where the statute does not expressly impose such requirements and the case law interpreting the statute has not adequately set forth the factors to be considered in whether a "reasonable opportunity" or impracticability exists in a particular case.

Accordingly, the University proposes that the Court adopt a bright-line rule establishing the relevant time period to consider in determining whether an "emergency medical condition" exists so as to appropriately excuse a health care provider from its obligation to provide notice. The advent of such a rule would require the ALJ to apply the plain meaning of Section 766.316 while contemporaneously addressing the concerns set forth by Respondents in their

Answer Brief and the ALJ in his final order. In the absence of any legal authority establishing a relevant time period, the ALJ has routinely assumed that the operative time in determining the existence of an "emergency medical condition" is the time that the patient presented to the hospital for delivery. However, based on his belief that the legislature did not absolve a health care provider from the obligation to provide notice when the opportunity was previously available, the ALJ carved out a "reasonable opportunity" exception to the "emergency medical condition" exception, ostensibly on the authority of the First District Court of Appeal's decision in *Board of Regents of the State of Fla. v. Athey*, 694 So. 2d 46 (Fla. 1st DCA 1997).[3]

While *Athey* cannot properly provide a basis for a judicial exception to the clear language of Section 766.316, its analysis is instructive in determining the relevant time period in which to determine whether an "emergency medical condition" exists. The First District in *Athey* determined that 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. *See Athey*, 694 So. 2d at 51. The court further suggested that a reasonable opportunity for a physician to provide

[3] Curiously, the ALJ elected to utilize *Athey* in this manner notwithstanding the fact that such case did not address a situation where the patient presented with an "emergency medical condition" and the fact that the case was decided ***prior*** to the 1998 amendment to Section 766.316 that added the "emergency medical condition" exception.

notice prior to delivery should ordinarily focus on whether the physician had any prenatal or other prior professional relationship with the patient. *See id.* Using the foregoing analysis, a reasonable and effective bright-line rule should state that the relevant time period for determining the existence of an "emergency medical condition" is: (1) with respect to a hospital, when the hospital first provides prenatal care to the patient or otherwise has knowledge that the patient would deliver her child in the hospital; and (2) with respect to a participating physician, when the physician first commences a prenatal or other professional relationship with the patient. At a minimum, the relevant time period should be no earlier than that particular health care provider's first interaction with the patient.

In the instant case, the evidence reflects that Jackson North first interacted with Ms. Ruiz at pre-registration and was aware at that time that Ms. Ruiz intended to deliver at that hospital. Thus, the determination of whether an "emergency medical condition" existed so as to excuse the hospital from its obligation to provide notice would properly focus on Ms. Ruiz's condition at pre-registration. Because Ms. Ruiz was indisputably not in an "emergency medical condition" at pre-registration, the exception could not apply to the hospital. Consequently, the hospital was required to provide notice at pre-registration and the ALJ correctly found that the hospital satisfied its obligation.

On the other hand, the evidence reflects that Dr. Norris did not interact with Ms. Ruiz or otherwise enter into a physician-patient relationship with her until approximately 4:00 p.m. on August 13, 1998, the day of Ms. Ruiz's delivery at Jackson North. Dr. Barker did not interact with Ms. Ruiz or otherwise enter into a physician-patient relationship with her until approximately 7:00 p.m. on that date. There is no evidence in the record that either Dr. Norris or Dr. Barker previously knew of Ms. Ruiz's intent to deliver at Jackson North or that they, in particular, would be involved in her care. Thus, the determination of whether an "emergency medical condition" existed so as to excuse Dr. Norris and Dr. Barker from their obligation to provide notice would properly focus on Ms. Ruiz's condition when she first interacted with the physicians. Because Ms. Ruiz was indisputably in an "emergency medical condition" when the physicians first saw her subsequent to presentation at Jackson North for delivery, the exception would clearly apply and the physicians should be excused from providing notice.

As reflected above, the application of a bright-line rule would ensure that Dr. Norris and Dr. Barker are afforded separate consideration from Jackson North as to whether they individually satisfied the notice requirements, rather than having the hospital's opportunity to provide notice at its pre-registration unfairly and arbitrarily imputed to them.[4] As Respondents concede in their Answer Brief, Florida law is

[4] As alternatively argued in the University's Initial Brief, if this Court were to determine that Dr. Norris and Dr. Barker are deemed to have had an opportunity to provide notice prior to Ms. Ruiz's delivery, the Court would necessarily be holding

clear that a hospital and its physicians have separate and independent obligations to accord the patient notice under Section 766.316. Nevertheless, Respondents conveniently support the Third District's decision not to consider whether Dr. Norris and Dr. Barker, on an individualized basis, should have provided notice at pre-registration. Rather, the Third District found that the physicians had a reasonable opportunity to provide notice at that time because "***the University*** was aware of the circumstances under which maternity patients typically arrived at Jackson North." *Ruiz*, 916 So. 2d at 870 (emphasis added).

As a threshold matter, the University has always maintained that Dr. Norris and Dr. Barker were not acting pursuant to their employment contracts with the University at the time of the medical care and treatment at issue in this case, but rather were acting pursuant to their ***separate*** individual employment contracts with the Public Health Trust of Miami-Dade County, which entity governs the hospitals in the Jackson Health System, including Jackson North. *See, e.g., Public Health Trust of Dade County v. Geter*, 613 So. 2d 126 (Fla. 3d DCA 1993) (affirming directed verdict in favor of the University of Miami on the basis that the University could not be held vicariously liable for the malpractice of a physician acting solely as an employee of the Public Health Trust at the time of the complained-of medical

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that the obligations of the hospital and its physicians to provide NICA notice are not separate and independent, but instead are intertwined. Under such circumstances, the notice provided by Jackson North should be imputed to the hospital's staff physicians.

services). To the extent that the ALJ made ***any*** finding relating to the employment or agency status of Dr. Norris and Dr. Barker, he found that the physicians were working at Jackson North pursuant to their contracts with the Public Health Trust.(R. 252-53). Notwithstanding the fact that the ALJ never made any finding that the University was responsible for Ms. Ruiz's medical care and treatment and this issue was not submitted to the ALJ for determination, the Third District improperly characterized the physicians as University employees throughout its opinion and essentially concluded that the University was obligated to ensure that pre-delivery notice was given to Ms. Ruiz on behalf of Dr. Norris and Dr. Barker, without citing any legal authority to support such conclusion. The University, however, is neither a "physician" nor a "hospital" as defined by the NICA Plan and, therefore, has no obligation to provide NICA notice. Further, not only would the University have no reason to take measures to provide notice for physicians working for another employer at the time, the University has no control over the activities at the Trust's facilities and, in particular, the protocols and policies of a particular Trust facility relating to the provision of notice.

In any event, the only determination that must be made under Section 766.316 is whether ***Dr. Norris and Dr. Barker*,** and not the physicians' allegedly vicariously liable employers, gave the required notice or were excused from doing

so under their individual circumstances.[5] Since it was Dr. Norris and Dr. Barker's burden to provide the requisite notice, the obligation to give notice should not have arisen until such physicians interacted with Ms. Ruiz and knew that they would be involved in her labor and delivery. While the University or the Trust could have conceivably endeavored to provide exhaustive notice on the physicians' behalf to all patients at Jackson North (including Ms. Ruiz), nothing in Section 766.316 required either entity to do so. Nor did the physicians have any independent obligation to coordinate with Jackson North to advise ***every*** patient appearing at ***any*** of the hospital's pre-registrations that they participated in the NICA Plan, regardless of whether they would be rendering care to them. The Third District's suggestion that the physicians, the University, and the Trust must take such measures is inherently problematic. As the physicians cannot be physically present at every pre-registration, they would be forced to place their immunity and protection under the NICA Plan (to which substantial contributions have been made on their behalf in exchange for no-fault compensation for certain injuries[6]) in the

[5] The fact that Dr. Norris, who is not an attorney and who does not profess to have any legal knowledge, may have been unaware of his independent obligation to provide notice of his participation in the NICA Plan is immaterial and cannot serve to preclude the application of the exceptions contained in Section 766.316 where such exceptions are otherwise met under the circumstances of the case.

[6] Respondents disingenuously suggest in their Answer Brief that the Ruiz family would only receive a NICA recovery of $100,190.65 should NICA benefits be deemed their exclusive remedy, and that the child does not recover anything under the NICA Plan. *See Answer Brief at p 23.* Respondents neglect to mention that this amount reflects only that part of the award granting the statutory maximum of

hands of Jackson North and trust that the hospital fulfilled their expectations that it would provide notice on their behalf. This could potentially result in litigation should the hospital neglect to provide the physician's notice to a patient on a particular occasion and the physician subsequently loses his or her right to rely on NICA's exclusivity provisions. *See, e.g., Florida Birth-Related Neurological Injury Compensation Ass'n v. Feld*, 793 So. 2d 1070 (Fla. 4th DCA 2001) (affirming judgment in favor of a physician in action against NICA for negligence and breach of contract where NICA's failure to provide notice forms to the physician resulted in the physician not furnishing notice to his patients and causing him to not receive statutory immunity from a medical malpractice lawsuit). The bright-line rule proposed by the University would serve to avoid such problems and guarantee that the physicians maintain complete control over whether they have satisfied their separate and independent notice obligation.

A bright-line rule would also clarify for health care providers when their obligation to provide notice is triggered and would create much-needed certainty for both health care providers and patients as to how the ALJ will rule in a particular

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non-economic damages and the actual expenses already incurred by the Ruiz family. Pursuant to Section 766.31(1)(a), Florida Statutes, the ALJ ***also*** awarded the Ruiz family the right to receive reimbursement of actual expenses for all medically necessary and reasonable medical and hospital, habilitative and training, family residential or custodial care, professional residential, and custodial care and service, for medically necessary drugs, special equipment, and facilities, and for related travel. The award to Respondents' counsel for the reasonable expenses incurred in connection with the filing of the claim, including attorney's fees, was limited to $10,580.33.

case. The ALJ and appellate courts would be constrained to apply an objective test in making a determination as to whether a health care provider was excused from giving notice and subjective determinations as to the existence of a "reasonable opportunity" like that made by the Third District below would be eliminated. Indeed, rather than focusing on any legitimate opportunity that Dr. Norris and Dr. Barker may have had to provide notice to Ms. Ruiz, the Third District appeared to be more concerned with a perceived difference in treatment of patients based on financial status, as evidenced by comments by the panel at Oral Argument[7] as well as the first sentence of the written opinion, which states that "Juanita and Miguel Ruiz were expectant parents ***who could not afford private medical care***." *Ruiz*, 916 So. 2d at 867 (emphasis added). No doubt influenced by a misguided (but understandable) concern for the rights of indigent patients, the Third District somehow reached the conclusion that the physicians had a "reasonable opportunity" to furnish notice at pre-registration or during the weeks after pre-

[7] In response to the University's argument that Dr. Norris and Dr. Barker did not have a prior relationship with Ms. Ruiz that would have created an opportunity to give notice prior to her presentation for delivery, Judge Ramirez stated that the reason that no such relationship existed was "because she is a poor indigent client that doesn't have the benefit of a private patient/doctor relationship. She is going there as a public patient, and she doesn't know who her doctor is going to be." *Respondents' Appendix, Tab A, pp. 7-8*. Not only is the financial status of a patient wholly irrelevant to a determination under Section 766.316, there is no evidence in the record to support Judge Ramirez's suggestion that "public patients" never receive prenatal care from the physicians who work at Jackson North or that only "public patients" lack a prior relationship with the physicians who are ultimately involved with their delivery at the hospital.

registration notwithstanding the fact that (1) neither Dr. Norris nor Dr. Barker ever provided any care to Ms. Ruiz prior to her presentation for delivery; (2) neither Dr. Norris nor Dr. Barker was present at pre-registration; (3) neither Dr. Norris nor Dr. Barker knew at the time of Ms. Ruiz's pre-registration (or at any time prior to Ms. Ruiz's presentation to the hospital for delivery) that they in particular would be providing obstetrical services to Ms. Ruiz; and (4) Ms. 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.

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,

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June Galkoski Hoffman
Fla. Bar No. 050120
Marc J. Schleier
Florida Bar No. 0389064
FOWLER WHITE BURNETT P.A.
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 SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this ____ day of May, 2006, to **Lincoln J. Connolly, Esq.** and **Manuel A. Reboso, Esq.**,Rossman Baumberger & Reboso, P.A., 23rd Floor, Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130; **Wilbur E. Brewton, Esq.**, Roetzel & Andress, L.P.A., 225 South Adams Street, Suite 250,

Tallahassee, Florida 32301; and **Stephen A. Stieglitz, Esq.**, Assistant County Attorney, Miami-Dade County Attorney's Office, Suite 2810, Stephen P. Clark Center, 111 N.W. 1st Street, Miami, Florida 33128-1993.

June Galkoski Hoffman

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