IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. SC08-1317
Lower Case No. 2D02-1638

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION	vs.	DEPARTMENT OF ADMINISTRATIVE HEARINGS, *et al.*

Case No. SC08-1318
Lower Case No. 2D03-5156

FLORIDA BIRTH-RELATED NEIROLOGICAL INJURY COMPENSATION ASSOCIATION	vs.	BAYFRONT MEDICAL CENTER, INC., *et al.*

Case. No. SC08-1319
Lower Case No. 2D03-5156

MIKE KOCHER, et al.,	vs.	BAYFRONT MEDICAL CENTER, INC.

RESPONDENT BAYFRONT MEDICAL CENTER, INC.'s ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

As used herein, Petitioner FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION is referred to as "NICA" and its "Initial Brief on the Merits" dated February 24, 2009, is referred to as "NICA's Initial Brief." As used herein, "NICA Plan" or "the Plan" refer to the program described in §§ 766.301-316, Fla. Stat.

As used herein, Petitioners MIKE KOCHER and LYNN KOCHER are referred to as "THE KOCHERS" and their "Initial Brief on the Merits" dated March 12, 2009, is referred to as "THE KOCHERS' Initial Brief." References to "FJA" are to proposed amicus, the "Florida Justice Association." The "Amicus Brief of Florida Justice Association in Support of Plaintiffs/Petitioners Kocher and Plaintiffs/Respondents Glenn" dated March 17, 2009, is referred to as "FJA's Amicus Brief."

Respondent BAYFRONT MEDICAL CENTER, INC. is referred to as "BAYFRONT." The decision of the Second District Court of Appeal that serves as the basis for this proceeding, Bayfront Medical Center, Inc. v. Florida Birth-Related Neurological Injury Compensation Association, et al, 982 So. 2d 704 (Fla. 2nd DCA 2008), is referred to as "Bayfront III." The decision relates to and references the "Final Order" entered in the case styled

Mike Kocher, et al. v. Florida Birth-Related Neurological Injury Compensation Association, Case No. 00-4567N, formerly pending to the State of Florida Division of Administrative Hearing, and will be referred to as "the DOAH case." That "Final Order" was entered on May 14, 2001, by Administrative Law Judge William J. Kendrick, who will be referred to as the "ALJ."

The record citations will be to the Second District Court of Appeal's record in Bayfront III and will be referred to with an "R" followed by the referenced page number(s). In the case of appendices, additional reference will be made to the specific contents thereof (i.e. "Lynn Kocher Deposition Transcript") with the specific page number and/or deposition exhibit number also identified.

STATEMENT OF THE CASE AND FACTS

The pertinent procedural history and underlying facts are set forth in Bayfront Medical Center, Inc. v. Division of Administrative Hearings, 841 So. 2d 626 (Fla. 2nd DCA 2003)("Bayfront I"), Bayfront Medical Center, Inc. v. Florida Birth-Related Neurological Injury Compensation Association, 893 So. 2d 636 (Fla. 2nd DCA 2005)("Bayfront II") and, of course, Bayfront III. They are also summarized in NICA's Initial Brief.

In Bayfront III, the Second District Court of Appeal finally answered the substantive question that had been pending since Bayfront I, to wit, "Does an obstetrician's pre-delivery notice of his participation in the NICA Plan alone, without further, redundant notice from the hospital, satisfy the legislative intent of § 766.316."? In Bayfront III, the Second District Court of Appeal answered this question with an emphatic and reasoned "yes," and reversed the Final Order of the ALJ that had held to the contrary.

In Bayfront III, the Second District Court of Appeal certified the following question as one of great public importance:

> IN LIGHT OF THE FLORIDA SUPREME COURT'S DECISION IN GALEN OF FLORIDA v. BRANIFF, 696 So. 2d 308 (Fla. 1997), DOES A PHYSICIAN'S PREDELIVERY NOTICE TO HIS OR HER PATIENT OF THE PLAN AND HIS OR HER PARTICIPATION IN THE PLAN SATISFY THE NOTICE REQUIREMENTS OF SECTION 766.316, FLORIDA STATUTES (1997), IF THE HOSPITAL WHERE

THE DELIVERY TAKES PLACE FAILS TO PROVIDE NOTICE OF ANY KIND?

Notably, the Second District Court of Appeal in Bayfront III did not certify conflict with Board of Regents v. Athey, 694 So. 2d 46 (Fla. 1st DCA 1997). Instead, the Athey decision was distinguished on its facts. Bayfront III, 982 So. 2d at 709.

SUMMARY OF ARGUMENT

NICA, in NICA's Initial Brief, gets it right. Under the facts of the cases under review, the purpose of § 766.316 was met and the requirements of Galen of Florida, Inc. Braniff, 696 So. 2d 308 (Fla. 1997) were unquestionably satisfied. (NICA's Initial Brief at 19).

To the same degree that the NICA gets its right, THE KOCHERS get in wrong. Contrary to THE KOCHERS initial argument, the Second District Court of Appeal's decision in Bayfront III does not conflict "with decisions of **every other** Florida District Court of Appeals on the same point of law."

In addition, THE KOCHERS and the FJA get it wrong and, under the facts of the cases under review, miss the point that the only obligation imposed by this Court's decision in Galen is to ensure that the patient has an opportunity to make an informed choice between using a physician participating in the NICA Plan or using a physician who is not a participant and thereby preserving her civil remedies. Under the facts of the instant case, that goal was unquestionably achieved when Mrs. Kocher not only received a copy of the NICA-mandated and approved brochure, but was also provided additional information by her obstetrician.

THE KOCHERS and the FJA further get it wrong when they overlook the fact that the only obligation arguably imposed on hospitals like Bayfront

by § 766.316 was to provide patients with a copy of a NICA-mandated and approved brochure which Mrs. Kocher already had in her possession. That brochure does not contain the information that THE KOCHERS and FJA claim was so vital to the choices they claim pregnant patients need to make. Instead, the language of the brochure itself contains the very "clear and concise explanation of the patient's rights and limitations under the plan" that § 766.316 requires. That language emphasizes the fact that coverage under the Plan is contingent on the status of the pregnant woman's delivering physician as a "participating physician" and not on the status (i.e. participating or non-participating) of the hospital where the baby will be delivered, the "anesthetist providing obstetrical services" or of some other physician or healthcare provider who may or may not be involved in the delivery.

Finally, THE KOCHERS and FJA ignore the fact that the Second District's decision in Bayfront III is in complete accord with Galen and is true to the fundamental rules of statutory construction employed by this Court for years. Bayfront III gives effect to all of the words contained in § 766.316, recognizes the fundamental purpose of that section, and acknowledges that the interpretation previously advanced by THE KOCHERS, accepted by the ALJ, and again being advanced by THE

KOCHERS and the FJA in the instant proceeding, creates an absurd result. Bayfront III is also consistent with the subsequent legislative amendment that was intended to clarify § 766.316. For all of these reasons, this Court should answer the certified question in the affirmative and approve the Second District's decision in Bayfront III.

ARGUMENT

NICA**,** THE KOCHERS and FJA all precede their arguments by accurately recognizing that the question presented involves the interpretation of a statutory provision and, thus, that the standard of review is de novo. From there, however, THE KOCHERS and FJA, both independently and collectively, go astray.

I. BAYFRONT III DOES NOT CONFLICT WITH DECISIONS FROM OTHER DISTRICT COURTS OF APPEALS

THE KOCHERS begin their "Legal Argument" by referencing "Conflict Jurisdiction" and then assert that Bayfront III "conflicts with decisions of **every other** Florida District Court of Appeals on the same point of law." (THE KOCHERS' Initial Brief at page 11). To that end, The KOCHERS point to Board of Regents v. Athey, 694 So. 2d 46 (Fla. 1st DCA 1997), University of Miami v. Ruiz, 916 So. 2d 865 (Fla. 3rd DCA 2005), Northwest Medical Center, Inc. v. Ortiz, 920 So. 2d 781 (Fla. 4th DCA 2006) and Weeks v. Florida Birth-Related Neurological, 977 So. 2d 616 (Fla. 5th DCA 2008) as cases in supposed conflict with Bayfront III. A closer look at the factual and legal underpinnings each of these cited cases, however, demonstrates the error of THE KOCHERS' first "Legal Argument."

In each of the cited decisions, the issue presented was not (as it is here) whether a physician's timely and proper pre-delivery notice of his or her participation in the NICA Plan and delivery of the NICA-created and court-approved NICA brochure was sufficient to satisfy the requirements of § 766.316 without redundant receipt of a second copy of the very same NICA brochure by the hospital. Rather, the issue in all of the cited decisions was whether the physician's failure to provide any notice at all could be excused. In fact, in Athey and Ortiz neither the delivering physician nor the hospital provided notice.[1] In Ruiz and Weeks, the hospital did give notice, but the delivering physician did not. In all of these cases, the absence of notice by the delivering physician of his or her participation in the NICA Plan was deemed to be controlling.[2] These significant factual and legal

[1] As acknowledged by THE KOCHERS, the Athey court specifically identified the circumstances under which a hospital such as BAYFRONT is required to provide NICA notice. (THE KOCHERS Initial Brief at 16)("The First District Court of Appeals in Athey stated 'if a hospital has a participating physician on its staff, to avail itself of NICA exclusivity the hospital is required to give pre-delivery notice to its obstetrical patients."). This holding not only does not conflict with Bayfront III, it is absolutely consistent with Bayfront III. 982 So. 2d at 708 ("Hospitals with participating physicians on staff are simply required to provide obstetrical patients with the NICA-prepared 'Peace of Mind' brochure.").

[2] This fact was also central to the Second District Court of Appeals' decision in Florida Health Sciences Center, Inc. v. Division of Administrative Hearings, 974 So. 2d 1096 (Fla. 2nd 2007), rev. denied, 2008 WL 2262438 (Fla., May 23, 2008).

differences quite simply undermine THE KOCHERS' presumed claim that this Court can and should exercise its jurisdiction under Article V, Section 3(b)(3), of the Florida Constitution. See Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962)("We have said that conflict must be such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter. . . . If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise.")(citations omitted).

II. THE COURT IN BAYFRONT III CORRECTLY DETERMINED THAT THE PURPOSE OF § 766.316, AS DISCUSSED IN GALEN, IS SATISFIED WHEN THE OBSTETRICAL PATIENT IS ADVISED OF HER PHYSICIAN'S PARTICIPATION IN THE NICA PLAN AND IS PROVIDED A COPY OF THE NICA BROCHURE

A. The purpose of NICA notice

The determination of the certified question necessarily involves an interpretation of § 766.316, Fla. Stat. The version of that section in effect in 1996 and 1997, when Mrs. Kocher was an obstetrical patient, provided 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 thereof as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be furnished on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan.

In interpreting § 766.316, as with the interpretation of all statutes, certain considerations apply. As this Court held in Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 686 So. 2d 1349, 1354 (Fla. 1997), and in connection with the interpretation of the statutes defining the NICA Plan:

> Where, as here, the legislature has not defined the words used in a phrase, the language should usually be given its plain meaning. Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984). Nevertheless, consideration must be accorded not only to the literal and usual meaning of the words, but also to the meaning and effect on the objectives and purposes of the statute's enactment. See, Florida State Racing Commission v. McLaughlin, 102 So. 2d 574 (Fla. 1958). Indeed, "[i]t is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided [in construing enactments of the legislature]." State v. Webb, 398 So. 2d 820, 824 (Fla. 1981).

In Galen, this Court addressed the legislative intent and purpose behind § 766.316 in the context of certified question that related to the timing of NICA notice. In particular, the issue presented in Galen was whether pre-delivery notice of participation in the NICA Plan was a precondition to the invocation of NICA's immunity. In the underlying case

in Galen, the pregnant mother claimed that she had not received the requisite notice from any of the healthcare providers while the health care providers claimed that she had been provided notice (albeit after delivery) or, in the alternative, pre-delivery notice was not required.

In addressing the certified question in Galen, this Court examined the legislative history behind the NICA Plan and its genesis in the 1987 Academic Task Force for Review of the Insurance and Tort Systems. 696 So. 2d at 310. This Court further acknowledged that Florida's NICA Plan was modeled after similar, recently-enacted legislation in Virginia. This Court then went on to say that the whole idea of notice was borne of the Task Force's concern that following the Virginia model, which contained no notice requirement, would open NICA up to legal attack. Notice, it was felt, "was necessary to ensure that the plan was fair to obstetrical patients and to shield the plan from constitutional challenge." Id.[3] "The Task Force

[3] From its inception until 2003, the statutes governing the Virginia Birth-Related Neurological Injury Compensation Plan ("BIP") did not require any health care provider to provide any notice of any kind to the obstetrical patient. See Va. Code 38.2-5004.1 (2002). In 2003, the Virginia General Assembly amended the BIP to require participating physicians and participating hospitals to provide notice of their participation in the BIP "at such time or times and in such detail as the board of directors of the Program shall determine to be appropriate." See Va. Code 38-2.5004.1(A) (2003). To implement this statute, the BIP's board of directors has developed a form and an informational brochure that borrow heavily from the "Peace of Mind" brochure developed by NICA. See, www.vabirthinjury.com. But that form

obviously believed that because not all health care providers are required to participate in the NICA plan, fairness requires that the patient be made aware that she has limited her common law remedies by choosing a participating provider." Id. at fn. 1. Acknowledging that pre-delivery notice will not always be required, this Court went on to hold:

> Under our reading of the statute, in order to preserve their immunity status, NICA participants who are in a position to notify their patients of their participation a reasonable time before delivery simply need to give the notice in a timely manner. In those cases where it is not practicable to notify the patient prior to delivery, pre-delivery notice will not be required.

Id. at 311. This Court then remanded the case for a determination of whether notice was given or, under the circumstances, was not required. Id.

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and brochure do not have to be given until after the baby is delivered. See Va. Code 38-2-5004.1(B) (2003). Regardless, and while the constitutionality of the BIP has been challenged on other grounds, See King v. Virginia Birth-Related Neurological Injury Compensation Program, 410 S.E. 2d 656 (Va. 1991), there are no reported decisions that the undersigned was able to locate that reference a constitutional challenge of the type that this Court in Galen said the Task Force feared when proposing the NICA Plan. Nor are there any reported cases from Virginia from before or after 2003 in which medical malpractice claimants sought to avoid the BIP's exclusive remedy provisions by alleging that they were not given sufficient pre-delivery notice of their providers' participation in the plan. Instead (and ironically), the "escape hatch for lawyers" that has been and is the ongoing litigation over NICA's notice provisions, is unique to Florida. Siegal, et al., Adjudicating Severe Birth Injury Claims in Florida and Virginia: The Experience of a Landmark Experiment in Personal Injury Compensation, 34 Am. J.L. & Med, 493, 513 (2008).

Although the issue in Galen was the timing of the notice, this Court's discussion is also germane to the issue of the sufficiency of the notice. Florida Health Sciences Center, supra at 1100. As this Court and others have held, sufficient notice is that which allows an obstetrical patient the option of engaging the services of a participating physician and thereby forgoing her right to bring a lawsuit or of engaging the services of a nonparticipating physician and thus preserving her rights to institute a malpractice action in the event her baby suffers a birth-related neurological injury. Galen, 696 So. 2d at 309-10; Florida Health Sciences Center, 974 at 1100; Schur v. Florida Birth-Related Neurological, 832 So. 2d 188, 192 (Fla. 1st DCA 2002)(the "purpose of the [NICA] notice is to give the obstetrical patient an opportunity to make an informed choice between using a participating physician or using one who is not a participant in the NICA plan, thereby reserving her civil remedies."). As discussed below, that purpose was unquestionably achieved in the case under review.

B. "Participating healthcare providers"

Citing Galen for support, THE KOCHERS begin their substantive argument by asserting that, under the NICA Plan, "participating healthcare providers are required to comply with the notice requirements as a condition precedent to their invoking NICA immunity." (THE KOCHERS' Initial

Brief at 11). But in doing so, THE KOCHERS really beg the question: "Who or what are 'participating health care providers'"?

By its very terms, the NICA Plan was enacted to ensure the continued availability of obstetricians in Florida. See § 766.301. In doing so, the legislature made clear that the decision of whether to participate in the NICA Plan (and, thus, become a "participating health care provider") is one exclusive to physicians practicing obstetrics. Just as clearly, the legislature detailed the requirements for participation and did so only in connection with physicians. Indeed, the word "participating" is only ever used to as a modifier to the word "physician" and together the phrase "participating physician" is used no less than eleven times in the statutes establishing the NICA Plan, including in the definitions found in § 766.302. Section 766.302(7) defines "participating physician" as:

> [A] physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full or part time and who has paid or was exempted from payment at the time of the injury the assessment required for participation in the birth-related neurological injury compensation plan for the year in which the injury occurred. Such term shall not apply to any physician who practices medicine as an officer, employee, or agent of the Federal Government.

Nowhere in either the statute or in this Court's holding in Galen is there a requirement that any hospital give notice of its "participation" or

"lack of participation" in the NICA Plan. That is because hospitals in Florida do not have the option of participating or declining to participate in the Plan. See § 766.314 (4)(a) and (5)(a). Instead, all hospitals in Florida providing obstetrical care and services are assessed equally. Id.[4]

Just as obvious as the absence of the phrase "participating hospital" from the relevant statutes, is the absence of any such phrase from the NICA brochure itself. In fact, the pertinent NICA-generated brochure, titled "Peace of Mind for An Unexpected Problem," stated as follows:

> The birth of a baby is an exciting and happy time. You have very reason to expect that the birth will be normal and that both mother and child will go home healthy and happy.
>
> Unfortunately, despite the skill and dedication of doctors and hospitals, complications during birth sometimes occur. Perhaps the worst complication is one which results in damage to the newborn's nervous system – called a "neurological injury." Such an injury may be catastrophic, physically, financially and emotionally.

[4] This fact further distinguishes NICA from the Virginia plan after which it was modeled. Under the Virginia plan, hospitals have the option of participating or not participating. To participate, a Virginia hospital has to enter into a formal written agreement that obligates it to do more than just pay an assessment for every live birth. See Virginia Code § 38.2-5001. For that reason, it is estimated that as many as half of all Virginia hospitals providing obstetrical care and services do not participate in the BIP, Siegal, supra, 34 Am. J.L. & Med. at 514, and some hospitals that participate during a particular year may (and often do) elect not to participate in successive years. See www.vabirthinjury.com/hospital (identifying "participating hospitals" by year, 2004-2008).

In an effort to deal with this serious problem, the Florida Legislature, in 1988, passed a law which creates a Plan that offers an alternative to lengthy malpractice litigation processes brought about when a child suffers a qualifying neurological injury at birth. The law created the Florida Birth-Related Neurological Injury Compensation Association.

EXCLUSIVE REMEDY

The law provides that awards under the Plan are exclusive. This means that if any injury is covered by the Plan, the child and its family are not entitled to compensation through malpractice lawsuits.

CRITERIA AND COVERAGE

Birth-related neurological injuries have been defined as an injury to the spinal cord or brain of a live-born infant weighing at least 2500 grams at birth. The injury must have been caused by oxygen deprivation or mechanical injury, and must have occurred in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital. Only hospital births are covered.

The injury must have rendered the infant permanently and substantially mentally and physically impaired. The legislation does not apply to genetic or congenital abnormalities. Only injuries to infants delivered by participating physicians are covered by the Plan.

COMPENSATION

Compensation may be provided for the following:

- Actual expenses for necessary and reasonable care, services, drugs, equipment, facilities and travel, excluding expenses that can be compensated by state or federal government or by private insurers.

- In addition, an award, not to exceed $100,000 to the infant's parents or guardians.

- Reasonable expenses for filing the claim, including reasonable attorney's fees

The Association is one of only (2) such programs in the nation, and is devoted to managing a fund that provides compensation to parents whose child may suffer a qualifying birth-related injury. The Plan takes the "No-Fault" approach for all parties involved. This means that no costly litigation is permitted, and the parents of a child qualifying under the law who file a claim with the Division of Administrative Hearings may have all actual expenses for medical and hospital care paid by the Association.

You are eligible for this protection if your doctor is a participating physician in the Association. Membership means that your doctor has purchased this benefit for you in the event that your child should suffer a birth-related neurological injury, which qualifies under the law.

If you would like more information or would like to receive a copy of Florida Statute 766.301 which details the provision of the Neurological Compensation Act, please call or write:

Florida Birth-Related
Neurological Injury
Compensation Association
Post Office Box 14567
Tallahassee, Florida 32317-4567
Attn: Lynn Larson
Executive Director
Telephone (850) 488-8191
Toll Free: 1-800-398-2129

(R. 104; R. Appendix I, Intervenor BAYFRONT's Exhibit 5). The NICA brochure, which serves as the "form[] from the association" to which the

statute makes reference, is the only legally-approved method of providing the explanation of the Plan that § 766.316 contemplates. Dianderas v. Florida Birth-Related Neurological, 973 So. 2d 523, 527 (Fla. 5th DCA 2007)("[W]e conclude the NICA 'Peace of Mind" brochure satisfies the legislative mandate of providing a 'clear and concise explanation of the patient's rights ('Criteria and Coverage') and limitations ('Exclusive Remedy') under the plan.'"). There is but one brochure, not one designed for physicians to hand out and another designed for hospitals to distribute. There is but one message – NICA will apply if the patient's delivering physician is a "participating physician" and the delivery takes place in a "hospital."

C. Mrs. Kocher was provided with all of the information in a way and at a time that enabled her to make the informed decision both § 766.316 and Galen require.

While the certified question is more general, the way in which it arose and the practical implications of this Court's answer can only be appreciated by looking at the factual context considered by the Second District in Bayfront III. In the instant case, it is established that Mrs. Kocher received the NICA brochure during her very first prenatal visit on December 5, 1995. (R. 104). She was advised that the NICA Plan was part of her obstetrician's "insurance." (R. Appendix I, Intervenor BAYFRONT's

Exhibit 1, Beth Benson, M.D. Deposition Transcript at p. 24; R. Appendix I, Hearing Transcript at p. 28) She was encouraged to read it and to ask any questions either then or later. (R. Appendix I, Intervenor BAYFRONT's Exhibit 1, Beth Benson, M.D. Deposition Transcript at p. 24-25). She was told that all of the obstetricians in that practice were NICA participants and that if there was a neurological injury to her babies NICA would make payment and a malpractice claim would be foreclosed. (R. 104; R. Appendix I, Intervenor BAYFRONT's Exhibit 1, Beth Benson, M.D. Deposition Transcript at p. 24-25). She was told that if she was unwilling to be bound by NICA's limitations she could seek obstetrical care elsewhere. (R. Appendix I, Intervenor BAYFRONT's Exhibit 1, Beth Benson, M.D. Deposition Transcript at p. 25). She admittedly signed a form acknowledging receipt of the NICA brochure and of an explanation of the Plan the same day. (R. 104-05; Appendix I, Hearing Transcript at p. 26; R. Appendix I, Intervenor's Exhibit 4).

After receiving the brochure and discussing the NICA Plan with her obstetrician, she never one contacted her obstetricians' office and never once called NICA as both the brochure and the acknowledgement form indicated she could. (R. Appendix I, Hearing Transcript at p. 39). She never had doubts or concerns about her obstetricians and never gave any thought to

switching her care to obstetricians who were not NICA participants. (R. Appendix I, Hearing Transcript at p. 39-40; 45-46). She never had questions or concerns about the fact that she would deliver her twins at Bayfront Medical Center. (R. Appendix I, Hearing Transcript at p. 40).

In this case, the uncontroverted evidence established that Mrs. Kocher did have an opportunity to change physicians and protect THE KOCHERS' constitutional right to pursue their civil remedies against anyone and everyone involved in the delivery process.[5] As such, and as the Second

[5] THE KOCHERS have never challenged the fact that, by accepting continuing care from their chosen obstetricians after timely and sufficient NICA notice was provided, their claimed constitutional right to pursue their civil remedies against the delivering physician was waived. In fact, the delivering physician was never named in the underlying litigation, was never made part of the administrative proceeding, and has never participated in any of the appellate proceedings.

Inasmuch as it is undisputed that Mrs. Kocher received the NICA brochure and was advised that all of her obstetricians were "participating physicians," and further inasmuch as the NICA brochure makes clear that NICA Plan provides an "exclusive" remedy and that "no costly litigation is permitted," it is unclear how THE KOCHERS can legitimately argue that their constitutional "due process" rights to pursue "their common law remedies against Bayfront" have somehow been deprived. Moreover, and setting aside the undeniable legal fact that THE KOCHERS never had any "common law remedies" for the unfortunate death of their son in the first place, Nissan Motor Co. v. Philger, 508 So. 2d 713 (Fla. 1987), the NICA statutes make abundantly clear that the exclusivity of the NICA Plan provides immunity for all health care providers involved in the delivery. It can only be an ignorance of the law by them and their attorneys that allows THE KOCHERS to argue that their waiver was limited only to their right to pursue a claim against the participating physician. But ignorance of the law

District in Bayfront III correctly held, the requirements of Galen were unquestionably satisfied.

D. Neither her "participating physician" nor Bayfront were obligated to provide Mrs. Kocher with notice that she could avoid NICA by delivering her babies in some other state or country.

The desperate argument made by THE KOCHERS and FJA to the effect that requiring hospitals to provide notice advances the statutory purpose by permitting patients to seek obstetrical care outside of Florida not only misses the point, it attempts to obfuscate it. By definition, Florida's NICA Plan only applies in Florida. Only obstetricians licensed in Florida can become "participating physicians." See § 766.302(7). Only hospitals licensed by the State of Florida are covered by NICA and only hospitals licensed in Florida are obligated to pay the NICA assessments. See § 766.302(6) and § 766.314 (4)(a). As the NICA brochure states, NICA is one of only two such programs in the nation and only covers hospital births. By simple deductive reasoning, that means that there are 48 other states, and innumerable other countries, where obstetrical patients can presumably go to secure obstetrical services if they so choose. But, as the record below

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is not an excuse, and is not a basis upon which THE KOCHERS can salvage their claim against BAYFRONT. See Ellis v. State, 762 So. 2d 912 (Fla. 2000)(recognizing that the publication in the Laws of Florida or the Florida Statutes gives all citizens constructive notice of the consequence of their actions).

clearly established, she did not and never even intimated that she would have. Instead, she knowingly and willing elected to receive obstetrical services from participating obstetrical physicians in the city where she lived, with whom she had a preexisting relationship and whom she knew (because she was told) would be delivering her babies at a hospital in St. Petersburg, Florida. Thus, even if the Legislature could have conceivably envisioned the hypothetical patient who, when given a NICA brochure, would elect to go to some other state or some other country to receive her obstetrical care, Mrs. Kocher was not that patient.

E. Even if there were hospitals at which there were no "participating physicians," any NICA notice that the hospital could provide would be meaningless.

The next argument, to the effect that "it is possible that there are Florida hospitals in which all staff physicians have opted out – or at least the Legislature apparently thought so," (THE KOCHERS' Initial Brief at 13), also misses the point. Even if there are such hospitals, it would not matter how much notice the hospital provided or how often the hospital provided it. NICA would not apply. NICA applies (and, thus, benefits are available and immunity attaches) only if the delivering physician is a "participating physician." That is what "the Legislature apparently thought" and that is what the statute passed by the Legislature states. See § 766.309. That is

also what the NICA brochure states and there can be no question that giving a patient multiple brochures would not change a thing. As such, THE KOCHERS' attempt to fashion an argument based on an illusory hypothetical does not withstand scrutiny.

III. IN ADDITION TO BEING CONSISTENT WITH GALEN, BAYFRONT III IS CONSISTENT WITH OTHER FUNDAMENTAL RULES OF STATUTORY CONSTRUCTION

In their Initial Brief, THE KOCHERS argue that "Florida law is well established that when statutory language is clear, courts have 'no occasion to resort to rules of construction – they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power.'" (THE KOCHERS' Initial Brief at 15, citing Daniels v. Florida Department of Health, 898 So. 2d 61 (Fla. 2005)). Section 766.316, THE KOCHERS claim, is clear and unambiguous. (THE KOCHERS' Initial Brief at 17).

The first flaw in THE KOCHERS' argument is apparent from this Court's holding in Galen. After all, if § 766.316 was so clear and unambiguous there would have been no need for this Court in Galen to have "resort[ed] to rules of construction" such as legislative history. Nor would it have been necessary for other courts to "resort to rules of construction" to define the contours of NICA notice. See e.g. Florida Health Sciences Center, 974 So. 2d at 1100 (holding that a physician's compliance with the

"literal wording of the notice statute is not sufficient to meet the statute's intent."). Thus, BAYFRONT respectfully submits, "resort to rules of construction" is not only appropriate in this case, it is required.

A. When interpreting § 766.316, significance and effect must be given to every word.

One rule of statutory construction overlooked by THE KOCHERS is that which recognizes the Court must give significance and effect to all of the words, phrases, sentences, as words in a statute should not be construed as mere surplusage. Hechtman v. Nations Title Ins. of New York, 840 So. 2d 993, 996 (Fla. 2003). In the instant case, THE KOCHERS overlook the fact that § 766.316 specifies which hospitals are obligated to provide notice. Indeed, only a hospital "with a participating physician on its staff" must give notice.

As the Second District recognized, while the statute does not define the phrase, "a plain reading of this language suggests that a hospital is required to provide such notice to an obstetrical patient if that patient's delivering physician is a Plan participant and is also an employee of the hospital, as opposed to a physician who merely enjoys staff privileges at the hospital." 982 So. 2d at 708-09 (emphasis in the original). The Second District's interpretation of this language is consistent with another rule of statutory construction used by courts in interpreting the language used in the

statutes establishing the NICA Plan. That rule provides that the plain and ordinary meaning of words "can be ascertained by reference to a dictionary." Dianderas, 973 So. 2d 527, quoting Seagrave v. State, 802 So. 2d 281, 286 (Fla. 2001). See also Orlando Regional Healthcare System, Inc. v. Florida Birth-Related Neurological, 997 So. 2d 426, 431 (Fla. 5th DCA 2008)(resorting to dictionary definitions to interpret provisions of the NICA Plan). The dictionary defines the operative term "staff" as "a group of persons, as employees, charged with carrying out the work of an establishment or executing some undertaking." Random House Webster's Unabridged Dictionary (2nd ed. 1999). As such, the fact that the court in Bayfront III defined "staff" as used in § 766.316 as referring to a physician who "is also an employee of the hospital" is neither surprising nor inappropriate. In fact, when a hospital employs a "participating physician" it can and should give notice and, when it does so and its employed "participating physician" is involved in the delivery, the purpose of the statute is fulfilled without any other notice being given. See Sunlife OB/GYN Services of Broward County, P.A. v. Million, 907 So. 2d 624 (Fla. 5th DCA 2005). But, as the Second District correctly recognized, Bayfront was not one of those hospitals and, most importantly, Mrs. Kocher's "participating physician" was not one of its employees.

B. A literal interpretation of § 766.316 is not required because such an interpretation would lead to an absurd or unreasonable result.

The rules of statutory construction that stand for the proposition that legislative intent in the polestar by which this Court must be guided also recognize an overarching desire to avoid absurd and unreasonable results. Patry v. Capps, 633 So. 2d 9 (Fla. 1994). In Patry, this Court was asked to address a certified question that dealt with the interpretation of § 768.57(2), Fla. Stat, the predecessor to § 766.106(2), Fla. Stat. Id. at 10. That statutory section required the presuit service of notice on a prospective medical malpractice defendant as a precondition to filing a medical malpractice lawsuit. Id. at 11. The statute, as written, mandates service by certified mail, return receipt requested. Id. In Patry the question was not whether the prospective defendant, Dr. Capps, got notice. He did, albeit by hand delivery. Id. at 10. The certified question addressed whether Dr. Capps' receipt of the notice by hand delivery was sufficient when, under a strict interpretation of the statute, service by certified mail was required.

In answering the certified question in the negative, this Court recognized that the service of the presuit notice as a precondition to filing a lawsuit for medical malpractice furthered the legislative intent "to facilitate

the amicable resolution of medical malpractice claims." Id. at 11. This Court further recognized, however, that service of the notice by certified mail, in a case where hand delivery receipt of the notice was acknowledged, was "in no way essential to this legislative goal." Id. at 12. This Court went on to hold:

> When considering other statutes that appear to mandate a specific mode of service, several Florida courts have held that actual notice by a mode other than that prescribed sufficient. See e.g., L&F Partners, LTD v. Micelli, 561 So. 2d 1227 (Fla. 2nd DCA 1990)(statute that provides for delivery of notice by certified or registered mail, return receipt requested, in worthless check action required only some type of personal delivery beyond regular mail); Bowen v. Merlo, 353 So. 2d 668 (Fla. 1st DCA 1978)(actual delivery of notice by regular mail was sufficient under Mechanic's Lien Law that provided for delivery of notice of claim by certified or registered mail). Most recently, in Phoenix Ins. Co. v. McCormick, 542 So. 2d 1030 (Fla. 2nd DCA 1989), the Second District Court of Appeal held actual notice by a mode other than that authorized in section 627.426(2)(a), Florida Statutes (1985), sufficient to preserve an insurer's right to assert a coverage defense. Under that statute a liability insurer is precluded from asserting a coverage defense, unless within thirty days of knowledge of the defense written notice is given to the insured by registered or certified mail, or by hand delivery. That Phoenix court recognized that the language providing for notice by certified mail, registered mail, or hand delivery eliminates the problems in proving timely service; but held that when the insured concedes actual notice, strict compliance is not required. Recognizing that the statute allows an insurer to deny coverage by certified letter sent to the insured's last known address, even if the insured never actually receives the notice, the Phoenix court refused to interpret the statute to permit a denial of coverage where notice is never received but to preclude denial

> when actual notice by regular mail is conceded. 542 So. 2d at 1032.
>
> A similar absurdity would result if we were to accept Dr. Capps' construction of section 768.57(2). It appears that notice of intent to initiate litigation sent certified mail, return receipt requested, would be sufficient to toll the statute of limitations, even if the notice was not actually received by the defendant. Zacker v. Croft, 609 So. 2d 140 (Fla. 4th DCA 1992), rev. denied, 620 So. 2d 760 (Fla. 1993). Whereas, under Dr. Capps' interpretation of the notice provision, the statute of limitations would not be tolled when service was by a mode other than that provided in the statute, even if the defendant concedes receipt of timely notice that caused no prejudice. We do not believe that the Legislature intended such an irrational result.

Id. at 13.

As the Second District correctly recognized in Bayfront III, the argument in favor of strict interpretation advanced by THE KOCHERS (and now embraced by the FJA), leads to an absurd and "untenable result." 982 So. 2d at 709. A "participating physician" who does everything to provide his or her patient of all of the information required by § 766.316 and Galen would be deprived of NICA immunity because the hospital did not provide duplicate notice. Moreover, a hospital, that under a certain circumstances would enjoy NICA immunity even if no notice is required (i.e. in the case of a "medical emergency" or when the giving of notice is "not otherwise practicable"), would be denied NICA immunity just because the patient who admittedly gets actual pre-delivery notice and the information required by

the statute to make an informed decision does not get duplicate notice. In other words, under the argument advanced by THE KOCHERS and the FJA, the NICA Plan would apply if no notice is given, but would not apply where, as here, receipt of notice is admitted. Form would be elevated over substance, litigation over notice would continue and the legislative purpose that undergirds the entire NICA Plan would be impermissibly subverted. See Williams v. State, 492 So. 2d 1051, 1054 (Fla. 1986), receded from on other grounds, Brown v. State, 719 So. 2d 882 (Fla. 1998)(the literal requirement of a statute that "exalts form over substance" and yields an "absurd result" will not be countenanced).

C. When interpreting § 766.316, the Court has the right and the duty to consider subsequent legislation.

The rules of statutory construction have long recognized that when "an amendment to a statute is made soon after controversies as to the original act arise, courts may consider the amendment as a legislative interpretation of the original law and not as a substantive change thereof." Lowry v. Parole and Probation Commission, 473 So. 2d 1248, 1250 (Fla. 1985). The applicability of this rule of statutory construction in connection with an interpretation of the NICA Plan has been recognized before, See Tabb v. Florida Birth-Related Neurological Injury Compensation

Association, 880 So. 2d 1253 (Fla. 1st DCA 2004), and BAYFRONT respectfully submits it is appropriate to do so again.

In 1998, and in response to this Court's decision in Galen and concerned that the notice provisions that were included in the NICA plan to reduce litigation were having the exact opposite effect, the Florida Legislature amended § 766.316 to include the following language:

> The hospital ***or*** the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. The signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the requirements of this section have been met.

Ch. 98-113, § 4, Laws of Florida. (emphasis added).

Once again, when faced with the opportunity to use the phrase "participating hospital," the Florida legislature did not. Instead, as set forth above, the Florida legislature clarified that the requirements of § 766.316 could be satisfied by the hospital or the "participating physician" and that proof of compliance by one would create a rebuttable presumption for both. See FL H.R. Journal, 1998 Reg. Sess., No. 25 (recognizing that the amendments were intended to "clarify[] legislative intent" and to "provid[e] hospitals and physicians with alternative means of providing notice to obstetrical patients relating to the no-fault alternative for birth-related neurological injuries."); See also FL Staff An., S.B. 1070, March 4, 1998

("in recent years, NICA has been the subject of litigation regarding the notice requirements to patients"; the amendment "authorizes the hospital or the participating physician to elect to give the patient the notice form and have the patient sign a form documenting receipt of the notice form": "This amendment is in response to the Florida Supreme Court decision in Galen of Florida, Inc. v. Braniff, explained above.").[6] The Florida legislature was less concerned about who actually provided the notice so long as the notice was provided. While not referencing this amendment and the thought behind it, Bayfront III is certainly consistent with it and the rules of statutory construction that permit it to be considered here. For this additional reason, the certified question should be answered in the affirmative and the Second District's decision is Bayfront III should be approved.

[6] Florida courts, including this Court, have looked to such legislative history and staff analyses to discern legislative intent. See e.g. American Home Assurance Co. v. Plaza Materials Corp., 908 So. 2d 360, 368-69 (Fla. 2005).

CONCLUSION

For all of the foregoing reasons, BAYFRONT respectfully requests that this Court answer the certified question in the affirmative and approve the decision of the Second District Court of Appeal in Bayfront III.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the individuals indentified on the attached Service List this ____ day of April, 2009:

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CERTIFICATE OF TYPE SIZE AND FONT

I HEREBY certify that the BAYFRONT's Answer Brief on the Merits has been printed in 14 point Times New Roman font.

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