

SUPREME COURT OF FLORIDA

CASE NO.: SC08-1317

Lower Tribunal No(s): 2D02-1638

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY
COMPENSATION ASSOCIATION

vs. DEPARTMENT OF
ADMINISTRATIVE
HEARINGS, ET AL.,

CASE NO.: SC08-1318

Lower Tribunal No(s): 2D03-5156

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY
COMPENSATION ASSOCIATION,

vs. BAYFRONT MEDICAL CENTER,
INC.

CASE NO.: SC08-1319

Lower Tribunal No(s): 2D03-5156

MIKE KOCHER, ET AL.

vs. BAYFRONT MEDICAL CENTER,
INC.

REPLY BRIEF OF
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY
COMPENSATION ASSOCIATION

On Appeal from Questions of Great Public Importance
Certified by the Second District Court of Appeal in Opinions
dated January 16, 2008

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SUMMARY OF THE ARGUMENT

Answer Brief filed by Respondents, Courtney Lynn Glenn, a minor, by and through Gregory H. Fisher, as court appointed guardian of the property of Courtney Lynn Glenn and Anna Lentini, f/k/a Anna Glenn, and the Answer Brief filed by Christopher Glenn adopting the aforementioned Answer Brief in toto, contains issues not properly raised in this appeal. As such, Point III of the aforementioned Answer Brief should be stricken or at least not considered by this Court.

ARGUMENT

This is a consolidated appeal addressing the proper interpretation of Section 766.316, Florida Statutes, relative to the question certified by the Second District Court of Appeal in All Children’s Hospital, Inc. v. Dep’t of Admin. Hearings, 989 So. 2d 2 (Fla. 2d DCA 2008) and Bayfront Medical Center, Inc. v. Fla. Birth-Related Injury Comp. Ass’n, 982 So. 2d 704 (Fla. 2d DCA 2008). This Reply Brief is filed in response to the Answer Brief filed by Respondents, Courtney Lynn Glenn, a minor, by and through Gregory H. Fisher, as court appointed guardian of the property of Courtney Lynn Glenn and Anna Lentini, f/k/a Anna Glenn, and the Answer Brief filed by Christopher Glenn adopting the aforementioned Answer Brief in toto. Both Answer Briefs will be addressed collectively herein and collectively referred to as the “Glenns’ Answer Brief.”

Point III of the Glenns’ Answer Brief sets forth issues which are improperly raised here and which should not be addressed by this Court.¹ In Point III, the Glenns argue that All Children’s Hospital does not have NICA immunity because All Children’s Hospital was an agent/contractor with Bayfront such that Bayfront’s failure to give notice precludes All Children’s Hospital from claiming immunity

¹ All page references are to the Answer Brief filed by Respondents, Courtney Lynn Glenn, a minor, by and through Gregory H. Fisher, as court appointed guardian of the property of Courtney Lynn Glenn and Anna Lentini, f/k/a Anna Glenn.

under the Florida Birth-Related Neurological Injury Compensation Plan. See Glenns Answer Brief, pp. 15-8.

Resolution of this issue presented in Point III does not relate to the resolution of the certified question stated by the Second District Court of Appeal as:

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?

Instead, the issue presented in Point III requires this Court to make determinations regarding the contractual relationship between Bayfront and All Children's Hospital with respect to the particular healthcare providers involved in Courtney Glenn's delivery. This issue of the contractual relationship between the two hospitals was not raised or resolved below.

Further, resolution of the argument in Point III is not dispositive of the case. The issue of whether the claim filed by the Glenns is compensable under the Florida Birth-Related Neurological Injury Compensation Plan has not been determined by the Administrative Law Judge. Until such determination is made, it is not known whether any of the provisions in Sections 766.301 through 766.316, Florida Statutes, are applicable to give immunity from civil action to any

healthcare provider involved in the labor, delivery or post-resuscitative period for the delivery of Courtney Glenn.

This Court may exercise its discretion to decline to address an issue which is not related to the certified question and is not the basis of the discretionary review. See Chames v. DeMayo, 972 So. 2d 850, 853 n.2 (Fla. 2007); Major League Baseball v. Morsani, 790 So. 2d 1071, 1080 n.26 (Fla. 2001)(“We decline to address the other claim raised by Major League Baseball because it is outside the scope of the certified question and was not the basis of our discretionary review. As a rule, we eschew addressing a claim that was not first subjected to the crucible of the jurisdictional process set forth in article V, section 3, Florida Constitution.”); State v. Perry, 687 So. 2d 831, 832 (Fla. 1997)(“We decline to review the second cross-appeal issue raised by respondent because the issue is unrelated to the certified question upon which this Court’s jurisdiction is based.”). This Court should exercise its jurisdiction in this case and not address the argument raised in Point III of the Glenns’ Answer Brief which is outside the scope of the certified question.

Although once the Court accepts jurisdiction over a case, it may resolve other issues properly raised, these issues raised in Point III of the Glenns’ Answer Brief are not properly raised. See Boca Burger, Inc. v. Forum, 912 So. 2d 561, 563 (Fla. 2005)(citing Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982)). Review of

the issues in Point III requires resolution of factual and legal issues relative to the various parties' contracts and supervision which were not presented to the Administrative Law Judge in the NICA proceeding below or the appellate court.² The argument presented also cites to an Appendix containing several documents which are not part of the record on appeal. "It is elemental that appellate courts will not consider evidence that was not presented to the trial court for its consideration." See Supinski, M.D. v. Omni Healthcare, P.A., 853 So. 2d 526, 532 n.2 (Fla. 5th DCA 2003). The information included in the Appendix is information which was not presented to the Administrative Law Judge during the administrative proceeding and is not in the record before this Court. Thus, it is improper for this Court to consider such information. See Hughes v. Enterprise Leasing Co., 831 So. 2d 1240 (Fla. 1st DCA 2002)(stating because a specific document was merely attached to the appellee's brief but is not in the record on appeal, the court could not review the document on appeal).

For the forgoing reasons, the Court should strike the argument in Point III as being improper or, at a minimum, not consider the argument contained in Point III

² The Glens neither petitioned for review of the Second District Court of Appeal's decision nor filed a Notice of Cross-Appeal. As such, any additional issues raised by the Glens outside the scope of the Initial Briefs, should not be considered. See In re Estate of H.H. Herring v. Henderson, 670 So. 2d 145, 149 (Fla. 1st DCA 1996).

and the documents contained in the corresponding Appendix when resolving the instant appeal.³

³ On May 4, 2009, Respondent, All Children's Hospital, filed a Motion to Strike pages 15 -18 of the Answer Brief which is labeled as Point III of the Argument and the Appendix. As of the date of this Reply Brief, this Court has not ruled on that Motion.

CONCLUSION

WHEREFORE, Petitioner, Florida Birth-Related Neurological Injury Compensation Association, respectfully requests that Point III of the Glenns' Answer Brief and corresponding documents in the Appendix be stricken, or at least disregarded. Further, based on the specific facts of each case at issue in the instant appeal, NICA requests that the certified question can be answered in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATION OF FONT SIZE AND STYLE

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

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