SUPREME COURT OF FLORIDA

CASE NO: SC08-1317
Lower Tribunal No: 2D02-1638

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION	vs.	DEPARTMENT OF ADMINISTRATIVE HEARINGS, ET AL.

CASE NO: SC08-1318
Lower Tribunal No: 2D03-5156

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION,	vs.	BAYFRONT MEDICAL CENTER, INC.

CASE NO: SC08-1319
Lower Tribunal No: 2D03-5156

MICHAEL KOCHER, ET AL.,	vs.	BAYFRONT MEDICAL CENTER, INC.

AMICUS CURIAE BRIEF OF FLORIDA JUSTICE ASSOCIATION IN SUPPORT OF POSITION OF PLAINTIFFS/PETITIONERS KOCHER AND PLAINTIFFS/RESPONDENTS GLENN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I.
INTRODUCTION AND SUMMARY OF ARGUMENT

The Florida Justice Association, formerly the Academy of Florida Trial Lawyers, is a statewide organization committed to the rights of consumers in general, and to the right of access to courts in particular. The FJA was deeply involved in the legislative process that resulted in the NICA Statute,[1] and also in numerous cases involving its interpretation and validity. We offer the following Argument in support of the Plaintiffs' position.

In the apparent xenophobic belief that all of the medical care in the United States--indeed, in the world--ends at the border of Florida, NICA has advanced the position--endorsed by Respondents Bayfront Medical Center ("Bayfront") and All Children's Hospital ("All Children's"), and accepted by the Second District Court--that because all hospitals in Florida that employ participating NICA physicians are required to be Plan participants, *see* §766.314, Fla. Stat., the Statute's notice requirement is meaningless as to hospitals (and thus is pure surplusage), and therefore, notwithstanding what the Statute says, no notice by a hospital should ever be required. This broad rationale would exempt every Florida hospital from the Statute's plain language, whether the patient's obstetrician himself had

[1]Florida Birth-Related Neurological Compensation Act, §§766.301-316, Fla. Stat. (2007) ("NICA").

provided notice or not.

However, given that every patient has the option to seek treatment at a hospital in another state or even another country, the argument is indefensible. The Florida Legislature and this Court both have declared that notice is required to preserve a patient's right to choose--in other words, that the choice protected by the Statute is a meaningful choice. *See Galen of Florida, Inc. v. Braniff*, 696 So. 2d 308, 309-10 (Fla. 1997) (quoted *infra*). Both already have determined that the statutory requirement of notice by a hospital protects a significant public interest. It is not for NICA or the hospitals to question that determination.

NICA also has advanced a more limited argument, also endorsed by the hospitals and the Second District Court, that the statutory requirement of notice by the hospital should not be enforced when the treating obstetrician already has given notice to the patient, because no purpose would be served by enforcing the Statute against a hospital in that context. However, the requirement of notice by the hospital is not redundant in this context. As NICA itself has acknowledged (Brief at 16), that requirement is not based on the hospital's mandatory participation in the NICA program, but rather on the fact that the hospital has "a participating physician on its staff . . . ." §766.316.[2] This requirement reflects the importance

[2]*See* NICA's Brief at 16: "[T]he reason the hospital must give notice is *not* because

not only that the patient receive notice of her *treating physician's* NICA status, but also of the status of *any other* staff doctor at the hospital--for example, an anesthetist providing obstetrical services; or a substitute obstetrician, if the mother's primary obstetrician is unavailable; or an assisting obstetrician, who might *also* be treating her. Regardless of the primary obstetrician's status, such notice gives the patient the option to seek treatment in a hospital in which the other doctors who might be treating her have opted out of the Plan, or a hospital outside of Florida. And if her primary obstetrician does not have privileges at such a hospital, then the patient has a choice to make--precisely the choice the Statute gives her. Whether or not the patient is *likely* to choose that alternative--a point stressed by NICA--is besides the point. The point--made clearly by this Court in *Galen*--is that the Legislature has given that choice *to the patient.*

It did so in clear, unambiguous language. The Statute says without qualification that in *addition* to the treating physician, "[e]ach hospital with a participating physician on its staff . . . shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries." §766.316, Fla. Stat. Although NICA and the hospitals have acknowledged this unambiguous language, the Second District Court concluded in *Bayfront Medical*

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the hospital 'participates' in the Plan, but because it has one or more physicians on

Center [3] that the Statute's language supported its interpretation: "[A] plain reading of the Statute does not require notice from [the hospital]," because only hospitals with participating physicians have to give notice under the Statute, and "a plain reading of this language suggests that a hospital is required to provide such notice . . . 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.

Given that the Statute abrogates a pre-existing common-law right of action, of course it must be interpreted to do the least offense to that right--that is, to apply to doctors with staff privileges at a given hospital as well as that hospital's employees. Moreover, the district court in *Bayfront* did not offer any explanation for such a distinction. If anything, one would think that when the treating physician is an actual employee of the hospital, there might be a better argument that notification by the doctor should excuse the hospital. And in any event, even if the Statute's use of the phrase "participating physician on its staff" did refer only to doctors who are employees of the hospital, as opposed to doctors with staff privileges, the *Bayfront* court's reasoning still was misplaced, in assuming that the

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its staff who participate in the Plan."

[3]*Bayfront Medical Center, Inc. v. Florida Birth-Related Neurological Injury Compensation Ass'n*, 982 So. 2d 704 (Fla. 2d DCA 2008).

statutory language in question applies only to the "delivering physician." As noted, the Statute says that the hospital has to give notice whenever it has a "participating physician on staff"--*not* necessarily the "delivering physician," but *any* physician "on staff" who has opted into the NICA program. As this Court said in *Galen*, the patient is entitled to notice to the fullest extent possible. In light of that mandate, the clear meaning of the Statute is that the patient must be informed if *any* hospital physicians are in the NICA system.

Thus, a hospital's notice has significance apart from any notice given by or for the treating physician. The Statute's language is not meaningless. It is not surplusage. Bayfront and All Children's were required to follow it.

II.
ISSUE ON APPEAL

WHETHER THE HOSPITALS WERE REQUIRED TO PROVIDE NOTICE UNDER THE NICA STATUTE.

III.
STANDARD OF REVIEW

The interpretation of the NICA Statute presents an issue of law reviewable *de novo*. *See University of Miami v. Ruiz*, 916 So. 2d 865, 868 (Fla. 3d DCA 2005), *review dismissed*, 948 So. 2d 723 (Fla. 2007); *Schur v. Florida Birth-Related Neurological*, 832 So. 2d 188, 190 (Fla. 1st DCA 2002); *Nagy v. Florida*

Birth-Related Neurological Injury Compensation Ass'n, 813 So. 2d 155, 159 (Fla. 4th DCA 2002).

IV.
SUMMARY OF THE ARGUMENT

We have summarized the Argument in the Introduction.

V.
ARGUMENT

THE HOSPITALS WERE REQUIRED TO PROVIDE NOTICE UNDER THE NICA STATUTE.

1. NICA's Argument. The Statute says clearly that "[e]ach hospital with a participating physician on its staff *and* each participating physician . . . shall provide notice . . ." (emphasis added). As the First, Third, Fourth and Fifth District Courts have all indicated (*see* Kochers' Brief at 10), this language could not be more clear. It is inconsistent with any contention that either 1) a hospital should be excused from the clear statutory requirement, because all Florida hospitals have to be NICA participants; or 2) at least the hospital should be excused when notice was given by the treating physician, notwithstanding that the Statute clearly requires the hospital to provide notice as well.

Invoking the principle that a statute should be interpreted consistent with its

underlying purposes (*see* Brief at 19), NICA argues first that the Statute makes no sense in requiring notice by hospitals, because all Florida hospitals are required to be NICA participants (*see* Brief at 14-16). As a back-up position, noting that the "purpose and import of a hospital providing the NICA notice varies under the facts and circumstances of the case" (Brief at 17), NICA contends that no purpose could be served by requiring a hospital to give notice when the treating physician has already done so (Brief at 16-17). It says that "[i]n many instances," notice by the hospital "operates as a duplicate notice," because the patient already has been informed of the doctor's participation in NICA, and has chosen to stay with the doctor" (Brief at 16); and that "by choosing an obstetrician, a patient is in almost all instances also choosing the hospital in which she will deliver her child" (Brief at 17). This is because "the obstetrical patient necessarily chose to deliver her child at a hospital where her NICA participating physician could provide such services" (*id.*). In such instances, "the failure of a hospital to provide the NICA notice would not impact the patient's prior choice regarding her obstetric provider" (Brief at 16).

In other words, NICA contends, the mandatory, unqualified statutory obligation imposed upon hospitals to give notice is really only a back up, to be enforced only when it turns out that the treating physician failed to give notice. Only then should the Statute actually mean what it says, requiring notice by the

hospital as a substitute for the treating physician's. (Of course, since a hospital has no idea whether the treating doctor in fact has given notice or not, the burden of NICA's argument is that the hospital *always* should provide such back-up notice, but that if it fails to do so, the hospital should be forgiven if it turns out in retrospect that the treating physician did notify the patient of the doctor's participation in the Plan).

The District Court in *Bayfront* echoed this reasoning. After quoting this Court's statement in *Galen,* 696 So. 2d at 309-10, that "the purpose of the notice requirement is to give an obstetrical patient an opportunity to make an informed choice between using a healthcare provider participating in the NICA Plan or using a provider who is not a participant . . . ", the court in *Bayfront* first decided that "healthcare provider" means the treating physician and no one else. On the assumption that the hospital's duty to provide notice is thus entirely duplicative of the doctor's, and given that the doctor in *Bayfront* did notify the patient, the court then held that "any notice given by Bayfront would have been meaningless." 985 So. 2d at 708. It said, *id*. at 708-09:

> First, the notice provided to Mrs. Kocher by her physician put her on notice of her option to either continue in his care and be covered by the Plan or seek care from a nonparticipating physician. The purpose of the notice statute, as determined by the Florida Supreme Court in *Galen,* was satisfied. Any additional notice provided by

Bayfront would not have enhanced Mrs. Kocher's understanding of her options.

Additionally, unlike the option Mrs. Kocher enjoyed with regard to the selection of a nonparticipating physician, she could not have chosen to seek services at a hospital that was not covered by the Plan. The statute does not provide any hospital with the option of participating or declining to participate in the Plan; rather, all hospitals are assessed equally. *See* §766.314(4)(a), (5)(a). Further, nothing in the statute or case law suggests that it is a hospital's duty to advise a patient that her physician is or is not a participating physician. Hospitals with participating physicians on staff are simply required to provide obstetrical patients with the NICA-prepared "Peace of Mind" brochure [which advises that the Hospital is a participant in the NICA Plan]. . . .

Accordingly, we conclude that a physician's pre-delivery notice of his participation the Plan satisfies the statutory notice requirement . . . . Therefore, in the instant case, the statute was satisfied by the notice provided to Mrs. Kocher by her physician. Moreover, we agree that a plain reading of the statute does not require notice from Bayfront. The statute does not mandate that both the hospital and physician must give notice; rather, the statute qualifies which hospitals must give notice. That is, the only hospitals that are statutorily required to give notice are those "with a participating physician on . . . staff." §766.316. Although the statute does not define this term, a plain reading of this language suggests that a hospital is required to provide such notice to an obstetrical patient if that patient's delivery 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. Nothing in the instant ALJ's [administrative law judge's] amended final order indicates that Bayfront is a hospital with a participating physician on staff or that

> Mrs. Kocher's physician is an employee of Bayfront. As such, we conclude that Bayfront was not statutorily required to provide Mrs. Kocher with additional notice.

2. The Plaintiffs' Response. Respectfully, NICA, the hospitals, and the Second District Court are incorrect. The language of the Statute is unambiguous, in providing that "[*e*]*ach* hospital with a participating physician on its staff *and* each participating physician . . . shall provide notice . . ." (emphasis added). This unambiguous language cannot be reconciled with either the sweeping argument that hospitals should never be required to give notice, because all Florida hospitals have to be NICA participants, or the more-limited argument that hospitals should be excused from giving notice if the treating obstetrician already has done so.

Moreover, the unambiguous statutory language makes sense, because the patient's obstetrician is not the only doctor who might be treating her. There may be other doctors who are either employees of the hospital or have staff privileges, who also have opted into NICA; and because *they* also may be treating the patient, the patient also needs to know about *them.* For example, if the patient's primary obstetrician is unavailable, someone else may end up delivering her baby, or someone else may assist. As NICA points out (Brief at 15), this Court said in *Galen,* 696 So. 2d at 309-10, that NICA protects the patient's "informed choice

between" those "participating in the NICA plan or [instead] using a provider who is not a participant . . . ." That choice applies not just to the hospital as an institution, but just as much to all of its employees--and indeed, to all doctors who have hospital staff privileges.[4] Such notice gives the patient the option to seek a hospital in which other relevant doctors on staff have opted out of the Plan, or to seek treatment outside the State--a choice that the Florida Legislature and this Court have said is a meaningful one.[5]

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[4]Even NICA and the hospitals have not advanced the curious construction of the statutory language offered in *Bayfront Medical*, distinguishing between doctors who are hospital employees and doctors who merely have staff privileges. As we said, the *Bayfront* court gave no explanation for its conclusion that hospitals have to give notice only when the primary treating physician is actually their employee. If anything, that relationship provides the better argument for excusing the hospital, because the treating doctor is its agent. NICA has properly repudiated this rationale (*see* Brief at 17 n.6).

[5]This point debunks NICA's argument, and the *Bayfront* court's holding, 982 So. 2d at 708, that the plain language of the Statute is nonsensical, because all Florida hospitals are NICA participants. The court said in *Bayfront* that "unlike the option Mrs. Kocher enjoyed with regard to the selection of a non-participating physician, she could not have chosen to seek services at a hospital that was not covered by the Plan. The Statute does not provide any hospital with the option of participating or declining to participate in the Plan; rather, all hospitals are assessed equally." 982 So. 2d at 708, *citing* §766.314(4)(a), (5)(a). However, given that the Statute also covers employees of the hospital, or other doctors with staff privileges, who might or might not opt out of the program, the unambiguous language of the Statute does fulfill the mandate of *Galen* that such notice will "give an obstetrical patient an opportunity to make an informed choice between using a healthcare provider participating in the NICA plan or using a provider who is not a participant and thereby preserving her civil remedies." 696 So. 2d at 309-10.

The sanctity of the patient's choice is protected by the unambiguous statutory language. It is not dependent on the *probability*--or on NICA's *prediction*--that "in almost all instances" (Brief at 17), a patient properly notified of NICA participation by her obstetrician will choose to stay with that obstetrician, and thus to stay with the "hospital where her NICA participating physician could provide such services" (Brief at 17). This prediction misses the entire point--that the Legislature has given that choice *to the patient*. It has implicitly rejected NICA's presumption of the choice that a patient would likely make. As this Court held in *Galen*, 696 So. 2d at 309, the Statute requires that the *patient* be given the "opportunity" to make the choice.

Thus, the Statute properly mandates that both the hospital and physician must give notice, not to create a duplicative back-up, but because the hospital has its own set of participating physicians on staff, and the patient has the right to know about them. If the hospital has *any* physician on staff who is a NICA participant, then the patient's decision making is affected, regardless of what she will "probably" do (our quotations), and the patient has the right to make the choice. And this is true whether the treating physician is or is not an employee of the hospital. The Statute is clear and unambiguous in mandating this requirement. There is no alternative interpretation.

VI.

CONCLUSION

It is respectfully submitted that the decisions of the Second District Court

should be disapproved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail upon all counsel on the attached Service List on this ___ day of March, 2009.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this computer-generated Brief is in compliance with the font requirements of Rule 9.210(a)(2), Fla. R. App. P. as submitted in Times New Roman 14-point.

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