In the
SUPREME COURT OF THE STATE 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.

APPELLANTS', MIKE AND LYNN KOCHER'S, INITIAL BRIEF ON THE MERITS

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INTRODUCTION

The Appellants, MIKE AND LYNN KOCHER, as parents and natural guardians of CHRISTOPHER KOCHER, a minor, were the Appellees in the District Court of Appeal, Second District, along with the FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION. The Appellee herein, BAYFRONT MEDICAL CENTER, INC., was the Appellant below. The parties herein shall be referred to as "Kochers"; "NICA"; and, "Bayfront". References to the Record on Appeal shall be indicated by (R-).

STATEMENT OF THE CASE AND OF THE FACTS

This action arises from the medical negligence at and by Bayfront during the labor and delivery of Kocher's twin sons on June 15, 1996, with such negligence causing the death of one of their sons (Christopher) just three days after birth.

It is undisputed and has been stipulated to by all parties herein that Kocher's obstetrician, who was not employed by Bayfront, provided her with notice that he was a participating NICA healthcare provider before her delivery.(R-105)

It is also undisputed that Bayfront, the hospital at which the labor and delivery took place, **did not** provide Kocher with any NICA notice before her delivery. (R-105)

On February 12, 1999, the Kochers filed a medical malpractice action solely against Bayfront in the Sixth Judicial Court for Pinellas County, Florida, bearing Case No. 99-1084-CI-11, in light of Bayfront's failure to provide its separate and independent statutorily required NICA notice. (R-05)

On September 13, 2000, at the urging of Bayfront, the trial judge abated the medical malpractice action until the applicability of NICA to the Kochers' claims were resolved, to wit: whether or not the injuries sustained qualified under NICA, and whether or not the healthcare providers (the participating physician and the hospital) failed to comply with the required notice provisions of NICA. (R-05-013)

In the NICA administrative action the Kochers agreed that the injuries were compensable under NICA, but contested compensability under NICA and the ensuing application of the immunity provisions of NICA as to Bayfront in light of Bayfront's undisputed failure to provide separate and independent notice of its participation in NICA.(R-001-004; 018)

The Administrative Law Judge ("ALJ") determined that the injuries incurred by the infant, Christopher, during delivery were compensable under NICA; that the

delivering physician was a NICA participant, and that he provided proper notice to the Kochers of his participation in NICA. (R-109-136)

However, the ALJ further determined that Bayfront failed to provide the Kochers with the requisite notice of its participation in NICA. Consequently, the ALJ determined that the immunity provisions of NICA did not apply to Bayfront and the Kochers had the option of either accepting benefits pursuant to NICA, or pursuing their medical malpractice claim against Bayfront. (R-109-136)

The protracted appellate proceedings that followed scrutinized the extent of the ALJ's jurisdiction, including whether the ALJ had jurisdiction to determine issues related to the required notice to be given to a patient by a NICA healthcare participant prior to providing any services, and the effects of any such failure to provide such notice. See, Bayfront Medical Center, Inc. v. Div. of Admin. Hearings, 841 So. 2d 626(Fla. 2d DCA 2003); Bayfront Medical Center, Inc. v. Florida Birth-Related Neurological Injury Compensation Ass'n, 893 So. 2d 636(Fla. 2005); and NICA v. Bayfront, 955 So. 2d 531(Fla. 2007).

In NICA v. DOAH, 948 So. 2d 705, this Court answered the question in the affirmative, holding that "an ALJ has jurisdiction to make findings regarding whether a healthcare provider has satisfied the notice requirements of section 766.316, Florida Statutes." 948 So. 2d at 716-717.

Thereafter, this Court in NICA v. Bayfront, supra, quashed the decision in Bayfront Medical Center, Inc. v. Florida Birth-Related Neurological Injury Compensation Ass'n, 893 So. 2d 636 (Fla. 2DCA 2005), and remanded the case back to the Second District Court of Appeal for reconsideration upon application of this Court's decision in NICA v. DOAH.

On January 16, 2008, the Second District Court of Appeals, on remand, entered the decision at issue herein (See, Attachment B of the Index to NICA's Initial Brief on the Merits.), which was rendered final by the denial of the Kocher's and NICA"s motions for clarification and rehearing, on June 3, 2008.

In the instant decision on appeal, the Second District Court of Appeals determined that Bayfront was not statutorily required to provide the Kochers with separate and independent notice of its participation in NICA; reversed the ALJ's finding that the Kochers have the right to reject the NICA benefits and proceed with their medical malpractice action against Bayfront; and, remanded for compliance with the NICA payment provisions.

Recognizing and acknowledging that their conclusion is in conflict with the First District Court of Appeals' decision in Board of Regents v. Athey, 694 So. 2d 46 (Fla. 1st DCA 1997); decision approved 699 So. 2d 1350 (Fla. 1997); the Second District Court of Appeals certified, as one of great public importance, the question of **whether a delivering physician's provision of his participation in**

NICA satisfies the statutory notice requirements of NICA if the delivering hospital fails to provide notice of any kind.

On or about January 30, 2009, this Court accepted jurisdiction of these consolidated cases.

SUMMARY OF ARGUMENTS

THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE ALJ'S FINDING THAT THE KOCHERS HAVE THE RIGHT TO REJECT NICA BENEFITS AND PURSUE A MEDICAL MALPRACTICE CLAIM AGAINST BAYFRONT BY DECIDING THAT THE DELIVERING PHYSICIAN'S PROVISION OF HIS PARTICIPATION IN NICA SATISFIED BAYFRONT'S SEPARATE AND INDEPENDENT NOTICE OF ITS PARTICIPATION IN NICA.

THE CLEAR LANGUAGE OF THE STATUTE REQUIRED BAYFRONT TO PROVIDE SEPARATE AND INDEPENDENT NOTICE TO THE KOCHERS OF ITS NICA PARTICIPATION.

THE DISTRICT COURT'S RULING DEPRIVES THE KOCHERS OF THEIR COMMON LAW REMEDIES AGAINST BAYFRONT IN DEROGATION OF CONSTITUTIONAL DUE PROCESS.

STANDARD OF REVIEW

The interpretation of the NICA Statute as to whether the physician's notice of his participation in NICA relieved Bayfront of its separate and independent statutory responsibility to provide notice is an issue of law subject to *de novo* appellate review. 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).

LEGAL ARGUMENT

CONFLICT JURISDICTION

Pursuant to the pertinent provisions of article V, section 3(b) (3) of the Florida Constitution, this Court has subject matter jurisdiction over the Second District Court of Appeals' erroneous decision. See also, Florida Rules of Appellate Procedure, Rule 9.030(a) (2) (A) (iv, v, vi).

The Kochers also respectfully submit that the decision of the Second District Court of Appeals herein conflicts with decisions of **every other** Florida District Court of Appeals on the same point of law. See, Board of Regents v. Athey, supra.; 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. Fla. Birth-Related Neurological, 2008 WL 268704(Fla. 5th DCA 2008).

SECTION 766.316- NOTICE AS CONDITION PRECEDENT

Under the Florida Birth-Related Neurological Injury Compensation Plan, participating healthcare providers are required to comply with the notice requirements as a condition precedent to their invoking NICA immunity. Section

766.316, Florida Statutes; see also, Galen of Florida, Inc. v. Braniff, 696 So.2d 308 (Fla. 1997).

Furthermore, should the healthcare provider fail to give the required notice, the exclusivity provision of the Plan does not apply. Id. That is, the claimant has the option to either accept the benefits of the Plan or to pursue a civil claim. See, Bayfront, 982 So. 2d 704, at 707.

Section 766.316 provides in pertinent part that:

> "Each **hospital** with a participating physician on its staff **and** each **participating physician**…under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injuries. Such notice…shall include a clear and concise explanation of a patient's rights and limitations under the plan." (Emphasis added.)

This language could not be clearer. As this Honorable Court reasoned in Galen, this language makes clear that the purpose of the notice is to give an obstetrical patient an opportunity to make an informed choice between using health care providers participating in the NICA Plan or using providers who are not participants and thereby preserving their civil remedies.

However, the Second District Court herein has determined that the plain language of the Statute is nonsensical, because all Florida hospitals are NICA

participants. It further opined 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 as the statute does not provide any hospital with the option of participating or declining to participate in the Plan.

Respectfully, the unambiguous language of the Statute does make sense, and does fulfill the mandate of Galen.

This is true for at least two reasons. First, there are medical services outside Florida. Expectant parents might decide to use facilities that have not insulated themselves from liability. The legislature has already decided that this is a meaningful decision, by requiring that **the patient** be given the choice in the first place. It has ratified the importance of the patient's choice not to use doctors or a facility they know that are insulated from potential liability.

Second, it is possible that there are Florida hospitals in which all staff physicians have opted out--or at least the Legislature apparently thought so. It could have concluded that proper notice would give the patient the option of seeking such a facility. This possibility does not render the statutory language superfluous.

Given that both reasons sustain the plain language of the Statute, they must prevail.

Additionally, the Second District's construction violates a cardinal principle of statutory construction that it "never be presumed that the legislature intended to enact purposeless and therefore useless, legislation." Sharer v. Hotel Corp. of Am., 144 So. 2d 813, 817 (Fla. 1962)

The Second District's conclusion ignores the mandatory language of the statute, requiring that **both the hospital with a participating physician on its staff and each participating physician shall provide notice to the obstetrical patient**, thus violating the statutory construction maxim that "all words in a statute…be construed so as to give them some effect, not so as to render them meaningless surplusage." Fla. Police Benev. Ass'n, Inc. v. Dep't of Agric. & Consumer Servs., 574 So. 2d 120,122 (Fla. 1991)

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", 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". 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, 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 is a **separate and distinct entity** with, *inter-alia*, 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 may do, and the patient has the right to make the choice. The statute is clear and unambiguous in mandating this requirement. There is no reasonable alternative interpretation consistent with the patient's right to be notified of its physician's **and its hospital's** participation in NICA.

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." Daniels v. Florida Department of Health, 898 Sop. 2d 61 (Fla. 2005) (quoting Nicoll v. Baker, 668 So. 2d 989, 990-91(Fla. 1996).

Additionally, because the NICA statute providing for immunity for healthcare providers who furnish the requisite notice is in abrogation of the common law right of patients receiving negligent care to sue both the delivering physician and the hospital, respectively, it must be strictly construed. See

generally, Sakis v. Allstate, 863 So. 2d 210 (Fla. 2003); and, Daniels v. Fla. Dept. of Health, supra.

Of particular interest to these proceedings, the court in Athey spoke to the independent obligation of **both** the delivering physician and the hospital to accord the patient notice of their respective participation in NICA, as mandated by Section 766.316, Florida Statutes.

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. **In addition**…a participating physician is required to give notice to the obstetrical patients to whom the physician provides services. Under section 766.316, therefore, **notice on behalf of the hospital will not by itself satisfy the notice requirement imposed on the participating physician(s) involved in the delivery**." 694 So. 2d at 49. (Emphasis added.)

This conclusion reached by the Athey court, approved by this Court, regarding the independent obligation of the physician and the hospital to provide notice of their respective participation in NICA cannot logically be any different in instances where the physician gives such statutorily required notice but the hospital does not.

Similarly in Ruiz, supra, the Third District Court of Appeals determined that the ALJ correctly found, in the underlying NICA proceedings, that a hospital's notice was inadequate to satisfy the physician's independent obligation to provide notice.

Again, the Kochers respectfully submit that logic would dictate that the converse would also be true, i.e. that a physician's provision of the statutory notice of its participation in NICA would not satisfy the hospital's independent obligation to provide notice of its participation therein.

In Ortiz, supra., the Fourth District Court of Appeal determined that a hospital's failure to give notice of its participation in NICA resulted in its losing the protection(exclusivity and immunity) afforded by NICA.

Additionally, in Weeks, supra., the Fifth District Court of Appeals determined that where the statutorily required notice was not furnished, neither the hospital, nor the participating physician could invoke the benefits of NICA.

Accordingly, as the statute clearly and unambiguously requires **both** the hospital and the delivering physician to provide obstetrical patients with notice of their separate and independent participation in NICA, the plain language of the statute controls and notice by one healthcare provider of their own individual participation cannot properly serve as notice of the other's participation so as to eliminate the patient's common law right to sue for malpractice and/or negligence

against the healthcare provider who fails to provide such statutorily required notice.

LEGISLATIVE HISTORY

Contrary to the assertions by the Second District, as well as NICA, that the that the plain language of the Statute is nonsensical and/or not consistent with the intent of the legislature , the plain and ordinary meaning of the statute regarding the hospital's separate and independent notice requirements of the NICA statute is actually supported by legislative history.

As discussed by this Honorable Court in Galen, supra, Florida's Birth-Related Neurological Injury Compensation Plan was proposed by the 1987 Academic Task Force for Review of the Insurance and Tort Systems.

In its November 6, 1987 report, the Task Force recommended adoption of a no-fault compensation plan for birth-related neurological injuries similar to the then newly enacted Virginia plan(1987 Va. Acts Ch. 540).

However, the Task Force was concerned that the Virginia legislation did not contain a notice requirement and it believed that such notice was necessary to ensure that the plan was fair to obstetrical patients and to shield the plan from constitutional challenge. See, Galen, at 310.

In its report, the Task Force therefore recommended that "health care **providers** who participate under this plan should be required to provide reasonable

notice to patients of their participation. **This notice requirement is justified on fairness grounds and arguably may be required in order to assure that the limited no-fault alternative is constitutional.**" See, Galen, at 310, quoting the Task Force Report at 34, with emphasis added.

Accordingly, because the NICA statute clearly requires **both** the hospital and the delivering physician to provide notice to its obstetrical patients of their respective participation in the Plan as a condition precedent to being afforded the Plan's immunity; because the statute abrogates obstetrical patients' common law rights to sue such negligent healthcare providers; and, because such separate and independent notice by both healthcare providers is in accordance with this constitutional due process mandate, the subject statutory notice requirements must be strictly construed.

In light of the mandate of such strict statutory construction, and due to its failure to provide any notice whatsoever of its participation in the NICA Plan, Bayfront cannot "piggy-back" on the delivering physician's notice so as to avail itself of the immunity afforded thereunder.

DUE PROCESS/CONSTITUTIONALITY

The Kochers further respectfully submit that if the hospital's separate and independent pre-delivery notice is not a condition precedent to its immunity under

the Plan; the Kochers will be deprived of their common law remedies against Bayfront without due process.

Florida law has long established that hospitals and independent physicians not actually employed by that hospital are separate and distinct entities, with each having separate and distinct rights and obligations, including the potential for each to be sued by patients receiving negligent and/or inadequate services, respectively**.** Insinga v. LaBella, 543 So. 2d 209 (Fla. 1989); Wilson v. Lee Memorial Hospital, 65 So. 2d 40 (Fla. 1953).

The substantial weight of authority supports the view that a private physician with hospital privileges is not considered the hospital's servant because the hospital had no right to control the acts of a physician who is an independent contractor, and, consequently, the hospital will not be liable for the independent physician's negligence, nor will it be a guarantor of the physician's competence. See, Insinga, at 213.

In Reed v. Good Samaritan Hospital, Ass'n., 453 So. 2d 229 (Fla. 4th DCA 1984) wherein a plaintiff asserted that the hospital was liable for tortious acts committed on its premises by a private physician with staff privileges, the court held that “the law is clear that if the doctor is “an independent contractor, that shield[s] the hospital from vicarious liability.” 453 So.2d at 230.

Accordingly, the Second District's holding in the instant case that the delivering physician's provision of notice **as to his participation in NICA,** satisfied Bayfront's **separate and independent notice requirement** departs from a strict construction of the plain language provided for in Section 766.316, Florida Statutes, and consequently denies the Kochers of their due process rights by depriving them of their common law remedy to sue Bayfront for its **separate and distinct negligence and/or medical malpractice**.

Consequently, the Kochers respectfully submit that the Second District's decision below should be reversed and the Kochers should be allowed, as they previously have, to reject NICA benefits and proceed with their medical malpractice action against Bayfront.

CONCLUSION

The instant decision of the Second District Court of Appeals that the provision by the delivering physician (who admittedly was not employed by Bayfront) of the statutorily required notice of his participation in NICA to the Kochers had satisfied the separate and independent statutorily required notice as to Bayfront (which undisputedly did not provide such notice of its participation in NICA.) so as to preclude the Kochers from pursuing their medical malpractice action against Bayfront clearly is clearly erroneous.

The Second District's interpretation of section 766.316, Florida Statutes violates the clear and plain wording of the statute , in contravention of the "strict construction" mandate of Florida law, and deprives the Kochers of their constitutional right to pursue their medical malpractice action in court against Bayfront by eliminating their common law right to sue the hospital and in limiting them to the exclusive remedy of NICA after Bayfront undisputedly failed to provide the statutorily required separate and independent notice of its participation in NICA.

Accordingly, the Kochers respectfully request this Honorable Court to reverse the Second District's decision below; determine that the immunity provisions of NICA do not apply to Bayfront and allow the Kochers the option to reject the limited payment pursuant to NICA and to pursue their medical malpractice claim against Bayfront.

Respectfully submitted,

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