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 NEUROLOGICAL 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.

AMICUS CURIAE BRIEF OF THE FLORIDA HOSPITAL ASSOCIATION AND FLORIDA DEFENSE LAWYER'S ASSOCIATION

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INTRODUCTION AND IDENTITY OF THE AMICUS

The Florida Hospital Association, Inc. ("FHA") is a Florida non-profit trade association that represents about 200 hospitals and health systems in the State of Florida. The FHA represents member hospitals and health systems on matters of common interests before all three branches of government, particularly with respect to regulations that impact the members. The FHA regularly appears as amicus curiae before Florida courts to address issues that apply to its members and that relate to the complex regulatory structure governing its members' provision of health services in Florida. The issue involves whether a delivering physician's provision of his participation in Florida Birth Related Neurological Injury Compensation Association ("NICA") satisfies the statutory requirements of NICA if the hospital where the delivery took place fails to provide duplicate notice. It has the potential to significantly impact the provision of obstetric services by the members of the FHA.

The Florida Defense Lawyer's Association ("FDLA") is a statewide organization of tort and insurance defense attorneys with over 1,000 members. The FDLA regularly provides amicus briefs to courts throughout the State of Florida in cases presenting significant issues of tort law and trial or pre-trial practice.

Since the enactment of NICA, the FDLA's members have been actively involved in the development of the issues surrounding its interpretation and, specifically, the application of the notice provisions of the statute with respect to invoking the exclusive remedy available to patients under the plan when the patient chooses to treat with a physician who participates. The FDLA is uniquely situated to provide this court with input, in particular, on the application of the notice provisions implicated by NICA and their impact on the FDLA members' clients.

CERTIFIED QUESTION ON REVIEW

> 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?

SUMMARY OF ARGUMENT

This court should answer the certified question by the Second District in the affirmative. Interpreting NICA to require duplicate, additional notice under the statute is contrary to the intent and purpose of the NICA statute, namely to reduce the cost of medical malpractice litigation by providing compensation without fault to children who suffer brain or spinal cord injury

during labor, delivery, or the immediate post delivery resuscitation process. Moreover, a requirement of additional, duplicate notice under the statute by hospitals, when the patient has received proper notice from their delivering physician, and chosen to remain as a patient of that participating physician, would not serve to further the patient's understanding of the NICA plan. Neither would it provide the patient any opportunity to choose a facility that does not participate in the plan, because no such facilities exist in the State of Florida.

The petitioner and amicus curiae on behalf of the petitioner, the Florida Justice Association ("FJA"), advance the erroneous argument that notice given to a patient by a hospital, after the patient has already been given notice under the plan by their delivering physician and chosen to stay with that physician, would allow that patient to seek treatment outside the State of Florida or outside of the United States of America. This argument fails in that it ignores the fact that patients who have chosen to remain under the care and treatment of physicians who are participants in the NICA plan have likewise chosen to have their children delivered at a hospital or clinic at which their participating physician has staff privileges.

Since hospitals in the State of Florida are not given an option whether to "participate" in NICA, each patient who chooses to remain under the care

and treatment of a participating physician, also chooses to have their child at a hospital or facility that "participates" in NICA.

Notice of Plan Participation by the *physician* is the linchpin of the NICA notice requirement, and the patient's choice to accept the limitations and exclusive remedies of NICA hinges on the patient's choice of physician. Once a patient has been notified of the limitations of their potential remedies if they remain under the care and treatment of a participating physician, the goals of the NICA plan have been satisfied.

In cases, such as the matter at bar where a patient has knowingly and voluntarily remained under the care of a participating physician, only the most strained hypothetical can create a scenario where receiving a duplicate identical notice would serve any purpose. However, a practical reading and application of the legislative intent reveals that in cases where notice is received by a patient from their physician, the purpose and objective of the notice requirement is met in that the patient has the right to determine whether they will be covered by NICA or transfer their care and treatment to a non-participating physician. Once the objective of the notice requirement is met, the hospital at which the participating physician delivers the patient's child, should also enjoy the protections and exclusive remedy provided by

NICA if a neurological injury occurs during labor, delivery or the immediate post delivery resuscitation process.

STANDARD OF REVIEW

The issue of whether a delivering physician's provision of his participation in NICA satisfies the statutory requirements of NICA if the delivering hospital does not provide identical duplicate notice presents a question of statutory construction which, like other questions of law, is subject to *de novo* appellate review. *See State v. Burress*, 875 So.2d 408, 410 (Fla. 2004).

ARGUMENT

I. The language, purpose and intent of NICA support the Second District's holding that hospitals that do not give notice to patients regarding NICA, can still avail themselves to the protections of the plan, when the patient received notice from their participating physician.

A. The Purpose of the Florida Birth Related Neurological Injury Compensation Plan

The Florida legislature established the Florida Birth Related Neurological Injury Compensation Plan for two equally important purposes. (1) To provide compensation on a no fault basis for a limited class of

catastrophic neurological injuries to newborns and (2) To stabilize and reduce malpractice insurance premiums for providers of obstetric services in Florida by limiting health care providers' exposure to civil liability. *See §766.301(1)(d), Fla.Stat.; Florida Birth Related Neurological Injury Comp. Ass'n. v. Florida Div. of Admin. Hearings*, 686 So.2d 1343 (Fla. 1997); *Fluet v. Florida Birth Related Neurological Injury Comp. Ass'n.*, 788 So.2d 1010 (Fla. 2nd DCA 2001). In establishing the plan, the legislature specifically recognized that physicians practicing obstetrics are in a high risk medical specialty for which malpractice insurance premiums are very costly.

To accomplish these goals, the plan allows a parent of a child who has suffered a neurological injury during the labor, delivery and/or the post delivery resuscitation process to file a claim with an administrative law judge associated with the plan. *See §766.302(3); 766.303(2); 766.305(1); and 766.313, Fla. Stat.* If NICA determines that the injury is a compensable birth related neurological injury, it may award compensation to the parents of the injured newborn provided the administrative law judge approves the award set forth by NICA. See §766.305(6), Fla. Stat. The compensation and award provided to parents under the plan is provided without consideration of fault. However, once the administrative law judge approves the award, the plan benefits become the exclusive remedy to claimants, and

foreclose any medical malpractice claim against any health care providers involved in the labor, delivery or immediate post delivery resuscitation process. *See §766.303, Fla. Stat.*

The plan provides compensation to the parents of neurologically injured newborns to assist the family of the newborn with the high costs associated with caring for a neurologically injured child. The no-fault posture of the process provides additional protections to these families by shielding them from the uncertainty of litigation and the prospect of unsuccessfully pursuing a tort claim against their health care providers and then being left without the ability to receive any compensation. Although the benefit paid under the plan is more restricted than the unlimited remedies provided by tort law, the plan does not require the claimant to prove malpractice, eliminates the risk that a judgment will remain unpaid, and provides a streamlined administrative hearing to resolve the claim. *See Florida Birth Related Neurological Injury Compensation Ass'n. v. McKaughan*, 668 So.2d 974, 977 (Fla. 1996).

The legislature understood that any birth other than a normal birth frequently led to a claim against the attending physician and as a consequence the physicians practicing obstetrics were among those most severely affected by the medical malpractice problems. *See §766.301(1)(b),*

Fla. Stat. Therefore, the Plain shields providers of obstetric services from the uncertainty of litigation and the possibility of tort claims involving neurologically impaired children that can sometimes result in unpredictably large jury awards. *See* 766.301(d), *Fla. Stat.* Limiting a participating physician's exposure to civil liability creates a more predictable environment that can help stabilize and reduce malpractice insurance premiums for obstetric providers, which in turn will encourage more physicians to provide such services in the State of Florida. *See* §766.301(1)(a), *Fla.Stat. See Fluet,* 788. So.2d at 1011 (holding that the legislature created this plan to protect physicians from the skyrocketing malpractice insurance premiums paid by obstetricians and to assure that Floridians would have an adequate supply of these essential health services).

The Plan implemented by the Legislature has provided a successful compensation system to the patients it serves. Studies showed that in just its first decade of operation, NICA distributed compensation relatively efficiently, equitably and generously to nearly 100 infants living with limitations due to severe neurological injury. *See Bovbjerg R.R., F.A. Sloan and P.J. Rankin. 1997.* Administrative performance of no fault compensation for medical injury. *Law and Contemporary Problems 60 (1-2): 71-113.*

B. NICA's notice requirement and "participating health care providers"

Participation in Florida's plan is voluntary for obstetricians. Under the plan, a "participating physician" is any physician who practices obstetrics or provides obstetrician services, either full time 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. *See §766.302(7), Fla. Stat.*

All Florida licensed physicians are obligated to pay a $250 annual assessment. Florida licensed obstetricians can elect to pay a $5,000 assessment, in lieu of the $250 assessment, to participate in the plan as a "participating physician." "Participating physicians" must give notice to their obstetrician patients in order to avail themselves of the limited no fault alternative for birth related neurological injuries. *See §766.316, Fla.Stat.*

Conversely, hospitals that provide facilities for the provision of obstetric services are not given the option whether or not to participate in the plan. *See 766.314, Fla.Stat.* As a result, §766.316, Fla. Stat. does not require a hospital to give notice based on its "participation." Under that section, hospitals are only required to provide notice to their patients of the

existence of the exclusive remedies of NICA if the facility has one or more physicians on their staff who participates in the plan. Said another way, the obligation of a hospital to provide notice is only triggered by the involvement of a participating physician in the patient's care. If the patient is having their child delivered by a non-participating physician, any notice given by the hospital is a nullity because the limitations of NICA only apply when a participating physician is involved in the delivery of an injured child. This is an *extremely vital* distinction because it highlights the fact that the patient's choice whether to voluntarily accept the limitations and exclusive remedies of NICA flow directly from the patient's choice of whether to submit to the care and treatment of a participating physician.

As the Second DCA held, while the notice requirement applies to all participating physicians, it applies to hospitals *only* if the delivering physician is a participating physician *and* is an employee of the hospital – as opposed to an independent contractor physician who merely enjoys staff privileges at the hospital:

> The statute does not mandate that both the hospital and the 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 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.

C. Requiring identical duplicate notice to a patient is contrary to the purpose and intent of the NICA statute and frustrates the purpose of the Plan in favor of the substance of the statute.

Requiring a hospital to give identical duplicate notice of an obstetrician's participation in NICA, when that same obstetrician has already provided notice to his or her patient, fails to further any purpose of the NICA plan or the purpose of the notice requirement. As this Court stated in *Galen, 696 So.2d at 309-10*, "the purpose of the notice requirement is to give an obstetrical patient an opportunity to make an informed choice between using a health care provider participating in the NICA plan or using a provider who is not a participant." Once a patient chooses to remain under the care and treatment of a participating physician, after being given proper statutory notice of that physicians' participation under the plan, the purpose of the notice requirement has been met. Even if patients were provided identical duplicate notice at the hospital's steps, there would be no opportunity to choose a facility that is not covered by the plan because facilities within the State of Florida do not have the option of whether to participate in NICA. As the Second District Court aptly noted in *Bayfront, 985 So.2d at 708-09*,

"any additional notice provided by [the hospital] would not have enhanced [the patient's] understanding of her options."

Indeed, the patient's options to make a choice between using a health care provider participating in the NICA plan or using a provider who is not a participant begins and ends with the physician. Notice by a participating physician is the linchpin of the notice requirement under NICA. A patient's decision as to whether to accept the limitations and exclusive remedies of NICA rests solely in the patient's choice of whether to remain under the care of a participating physician.

The petitioner and the amicus curiae on behalf of the petitioner, urge the court to hold that both the hospital and the participating physician must give identical notice to the patient in order for the hospital to enjoy the protections of NICA. However, the statute itself provides that only hospitals with "a participating physician on staff" must give notice. The intent of the notice provision is to provide adequate notice to patients when the deliverying physician is a participant under the plan. The notice provision does not require that a patient be given two identical copies of the same brochure explaining that their physician is a participant in a plan which limits their options to pursue a civil lawsuit against their doctor.

Legislative intent is the pole star that guides a court's statutory construction analysis. *State v. J.M.*, 824 So.2d 105, 109 (Fla. 2002). Although the petitioner urges this court to rely on the plain language of the statute alone, this approach is only appropriate when the statutory language is clear. *See State v. Burress*, 875 So.2d 408, 410 (Fla. 2004). However, when a statute is ambiguous, a court may resort to the rules of statutory construction. *BellSouth Telecomms. Inc. v. Meeks*, 863 So.2d 287, 289 (Fla. 2003). "Ambiguity" suggests that a reasonable person can find different meanings in the same language. *State v. Huggins*, 802 So.2d 276, 277 (Fla. 2001). The number of cases that have come before this Court, and the various district courts of appeal throughout the State of Florida since *Galen* was decided, suggest that the language is subject to multiple interpretations. Indeed, the fact that the Second District Court of Appeal has differed in its interpretation of the notice in these consolidated cases with the underlying Administrative Law Judge, and potentially with other District Courts of Appeal, is proof positive that reasonable persons find different meaning in the language of the notice provision. Thus, the legislative history of the statute's enactment and other extraneous matters are properly considered in order to arrive at the proper meaning of the statute. *See Donato v. Am. Tel. & Tel. Co.*, 767 So.2d 1146, 1153 (Fla. 2000); See also *Fajardo v. State*, 805

So.2d 961, 963-64 (Fla. 2nd DCA 2001) (explaining that the rules of statutory construction are reserved for cases in which a fair reading of the statute leaves a court in genuine doubt about the correct application of the statute).

It should not be overlooked that the legislature's intent in implementing NICA *was not* to draft a notice statute, but rather to provide compensation to patients, on a no fault basis for neurologic injuries, while shielding exposure to civil liability. *See Fluet,* 788 So.2d at 1010–11 (Fla. 2nd DCA 2001). The notice provision contained in the statute should not be elevated in substance, or be interpreted in a way that frustrates the intent and purpose of the very creation of the statute.

This court stated in *Galen*, 696 So.2d at 310, that the task force which analyzed the plan prior to its implementation "obviously believed" that fairness requires that the patient be made aware that she has limited her common law remedies by choosing a participating provider. However, once the patient has received fair warning, and has chosen to remain under the care and treatment of a participating provider, as Ms. Kocher and Mrs. Glenn did in the consolidated cases before this court, the true purpose and intent of the plan should be carried out.

To construe the notice requirement in a fashion that would require duplicate notice to a patient would serve no purpose other than to defeat the goals of the plan and allow the patient to pursue a civil action against a hospital even after she has voluntarily agreed to accept the exclusive remedies offered by NICA. This approach would be in error, because as this court noted in *Florida Birth Related Neurological Injury Comp. Ass'n v. Florida Div. of Admin. Hearings*, 686. So.2d 1349 (Fla. 1997), "the principles of statutory construction should be applied to uphold the policies underlying the plan..." In fact, by prohibiting a hospital from availing itself of the protections of NICA, despite the fact that the patient made a knowing and voluntary election to be treated by a participant of the plan, runs directly contrary to the plan's goal of stabilizing the medical malpractice insurance crisis facing the providers of obstetric services, by providing an exclusive remedy to patients. *See Galen* at 311. As this Court has said, "the purpose of the notice is to give an obstetrical patient an opportunity to make an informed choice between using a health care provider participating in the NICA plan or using a provider who is not a participant and thereby preserving her civil remedies. *Turner v. Hubrich*, 656 So.2d 970, 971 (Fla. 5th DCA 1995)." *Galen of Fla.*, 696 So.2d at 309-10. Once the patient

receives predelivery notice from the participating physician, the statute's purpose has been served. Notice from the hospital is a mere redundancy.

Justice Lewis eloquently stated in *Panama City Beach Community Redevelopment Agency v. State*, 831 So.2d 662, 664 (Fla. 2002), that "the law should not be at war with common sense." Respectfully, a common sense practical application of the notice provision requires only that the patient be given fair notice by someone that their physician is a participant under the plan. Requiring the hospital to provide a second copy of the NICA brochure to a patient who has already made their election to submit to NICA is an unnecessary legalistic hurdle that provides no further options, choices or protections to the patient. Duplicative notice appears only to thwart the goal of providing the option of a no fault system of compensation, while shielding the hospital from the uncertainty and unpredictability of a civil tort claim.

In an effort to provide a purpose for the requirement of a hospital to provide duplicate identical notice, the petitioner, and the amicus curiae in favor of the petitioner, suggests that the duplicate notice is required because there may be other doctors who are employees of the hospital who might be involved in treating the patient who are also members of NICA and/or because a patient may chose to seek treatment outside of the State of Florida

or the United States of America. *See Florida Justice Association Brief p. 10-11.*

However, FHA and FDLA respectfully submit that these strained hypotheticals do not provide realistic examples of situations in which a patient may find themselves. Once notice is given by a participating physician, the patient makes the decision whether to submit to the care of that *participating physician.* If the patient opts to seek out a physician who is not a participant in NICA, then the hospital will be unable to avail itself to the protections of NICA should the non-participating physician be accused of negligence. Likewise, if the patient is not given notice, by the physician *or* the hospital, that a physician is a participant, then both the hospital and the physician are precluded from invoking the protections of NICA. *See Galen,* 696 So.2d 308 (Fla. 1997). It is therefore evident, that singular notice by the participating physician, or the facility that brings a patient in contact with the participating physician, is sufficient to address the concerns in the FJA's hypothetical regarding previously unknown physicians who may come into contact with the patient. It is also important to remember that unknown participating physicians are *not* the subject of the consolidated appeals in front of this court. The only participating physicians, who were involved in the care and treatment of the patients at issue in these cases gave

notice, and the patients agreed to remain under their care and treatment despite knowing of the limited exclusive remedies of NICA.

Next, if a patient chose to seek care and treatment at a facility outside of the State of Florida, as is suggested by the FJA, then the *"Florida"* Birth Related Neurological injury Compensation Act would not apply. Even a physician who had given proper notice could not avail himself of the protection of a plan created specifically for births resulting in neurological injuries within the borders of our State. Moreover, it strains reason and common sense to entertain the notion that patients, like Mrs. Kocher and Mrs. Glenn, who knowingly decided to remain under the care of a participating physician, would be given a duplicate copy of the notice on the hospital steps, and would then make the decision to halt the delivery of the child and flee to another state or country to avoid the very plan that they accepted when notice was originally given by their doctor. This Court has noted that the interpretation of a statute must be done in a way that avoids absurd and unreasonable results. *See Patry v. Capps*, 633 So. 2d 9 (Fla. 1994). Respectfully, requiring identical duplicate notice by a hospital for the purpose of satisfying the hypotheticals proposed by the Petitioner and FJA would be reaching just such a result.

Florida hospitals often have little contact, and often provide no care or treatment, to a patient prior to the time their participating physician orders the patient to report to the hospital for the birth of their child. Allowing hospitals to rely on and adopt the notice given by the delivering physician, allows the law on this point to be in harmony with common sense, and supports a practical application of the purpose of the statute.

CONCLUSION

For the reasons set forth herein, the FHA and FDLA respectfully requests that this court answer the certified question in the affirmative and hold that a hospital is entitled to the protections of the plan when the notice requirements of §766.316 are satisfied by the participating physician, even when the hospital does not give identical duplicate notice.

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 identified on the attached Service List this 16 day of April, 2009.

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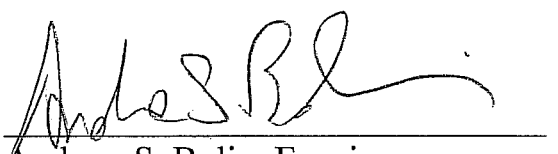
CERTIFICATION OF FONT SIZE AND STYLE

I HEREBY CERTIFY that this Petitioner's INITIAL 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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