IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NOS.: SC08-1317; SC08-1318; SC08-1319

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION

DEPARTMENT OF ADMINISTRATIVE HEARINGS, ET AL.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION

v. BAYFRONT MEDICAL CENTER, INC.

MICHAEL KOCHER, ET AL.

v. BAYFRONT MEDICAL CENTER, INC.

_____/

ON DISCRETIONARY REVIEW
FROM THE SECOND DISTRICT COURT OF APPEAL
L.T. Case Nos. 2D02-1638; 2D02-5156

ANSWER BRIEF OF RESPONDENT ALL CHILDREN'S HOSPITAL, INC.

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STATEMENT OF THE CASE AND FACTS

I. Introduction

The certified question before this Court concerns the proper interpretation of the notice requirement in the Florida Birth-Related Neurological Injury Compensation Plan ("NICA Plan"), sections 766.301-766.316, Florida Statutes. The purpose and intent of the statutory scheme, in turn, is the guiding factor in this Court's interpretation of the notice provision. As this Court is aware, the NICA Plan was implemented by the Florida legislature in 1989 to alleviate the insurance crisis plaguing Florida's obstetricians by providing an alternative method of compensation on a no-fault basis for qualifying "birth-related neurological injuries." *See Fla. Stat.* § 766.301(1); 766.303(2). Obstetricians and physicians providing obstetrical services are permitted to participate in the plan in exchange for certain fees and assessments. All Florida hospitals are *required* to be plan participants.

In those cases in which an Administrative Law Judge ("ALJ") determines that a compensable birth-related neurological injury as defined in the statute exists, the compensation provided by the NICA Plan becomes the claimant's exclusive remedy, with obstetricians, hospitals, and neonatal healthcare service providers immunized from liability as a result. Because compensation under the NICA Plan is a claimant's exclusive remedy in such cases, the Florida legislature included a

"notice" provision in the statute advising the patient of her obstetrician's participation in the plan. *See Fla. Stat.* § 766.316; *see also Galen of Florida, Inc. v. Braniff*, 696 So. 2d 308, 309-10 (Fla. 1997) (because not all obstetricians are required to participate in the NICA Plan, a patient is entitled to notice that she has limited her common law remedies by choosing a participating provider and an opportunity to choose a non-participating physician).

Although the intent of the NICA Plan was to reduce costly malpractice litigation, the statutory notice provision has *created* considerable litigation in Florida by claimants citing inadequate notice as an escape hatch from NICA's exclusive remedies.[1] This litigation came in the wake of this Court's determination in *Galen* that before an obstetrical patient's remedy can be limited by the NICA Plan, the patient must be given pre-delivery notice of her physician's participation in the plan. *Galen*, 696 So. 2d at 309. A key issue arising from that litigation is

[1] *See, e.g., Bayfront Medical Center, Inc. v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 982 So. 2d 704 (Fla. 2d DCA 2008); *All Children's Hospital, Inc. v. Dep't of Admin. Hrgs,* 989 So. 2d 2 (Fla. 2d DCA 2008); *Dianderas v. Florida Birth-Related Neurological*, 973 So. 2d 523 (Fla. 5th DCA 2007); *Florida Health Sciences Center, Inc. v. Div. of Admin. Hrgs*, 974 So. 2d 1096 (Fla. 2d DCA 2007); *Weeks v. Florida Birth-Related Neurological*, 977 So. 2d 616 (Fla. 5th DCA 2008); *Jackson v. Florida Birth-Related Neurological*, 932 So. 2d 1125 (Fla. 5th DCA 2006); *Sunlife Ob/Gyn Services of Broward County v. Million*, 907 So. 2d 624 (Fla. 4th DCA 2005); *University of Miami v. Ruiz*, 916 So. 2d 865 (Fla. 3d DCA 2005); *Schur v. Florida Birth-Related Neurological*, 832 So. 2d 188 (Fla. 1st DCA 2002); *Board of Regents v. Athey*, 694 So. 2d 46 (Fla. 1st DCA 1997), *approved*, 699 So. 2d 1350 (Fla. 1997).

whether a patient's receipt of notice of her obstetrician's participation in the NICA Plan satisfies the notice requirements of section 766.316, where the hospital has not provided the patient with duplicate NICA notice.

A desire for finality on that issue prompted the Second District Court of Appeal to certify the following question as one of great importance in the consolidated cases before this Court:

> 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?

Bayfront, 982 So. 2d at 710; *All Children's Hospital*, 989 So. 2d at 4.

Bayfront (where both deliveries occurred) and All Children's Hospital (a pediatric institution that provided immediate post-delivery resuscitation measures to one of the minors through its advanced neonatal nurses) argued that the statute was satisfied by the physicians' notice of their participation in the NICA Plan and, therefore, that all of the healthcare providers were entitled to invoke NICA's exclusive remedies. All Children's Hospital separately argued that it was entitled to invoke NICA's remedies because it is a pediatric institution with no "participating" obstetricians on staff and, therefore, is not subject to the statute's notice requirement. *See Fla. Stat.* § 766.316. The Second District agreed that a "physician's predelivery notice of his participation in the Plan satisfies the

statutory notice requirement as defined by [this Court] in *Galen*" and that the statute "does not mandate that both the hospital and physician must give notice." *Bayfront*, 982 So. 2d at 708; *All Children's Hospital*, 989 So. 2d at 3. The court then certified the aforementioned question to this Court for final resolution. *Id.*

All Children's Hospital respectfully submits that where a patient receives timely notice of her obstetrician's participation in the NICA Plan, the statutory notice requirement is met and additional notice from the hospital is not necessary. *See Fla. Stat.* § 766.316. All Children's Hospital further submits that healthcare providers that are not required to provide notice but are nevertheless entitled to invoke the statute's exclusive remedies – such as All Children's Hospital – are entitled to NICA protection, without regard to the delivering hospital's failure to provide the patient with additional notice of the NICA Plan. All Children's Hospital respectfully requests, therefore, that this Court (i) answer the certified question in the affirmative, and (ii) clarify All Children's Hospital's independent right to invoke NICA's exclusive remedies as a healthcare provider exempt from the statute's notice provision.

II. Factual Background[2]

This case arises out of the birth of Courtney Lynn Glenn at Bayfront Medical Center ("Bayfront") in St. Petersburg, Florida on September 30, 1997. On September 29, 1997, an amniocentesis procedure was performed on Anna Lentini, the birth mother, to determine fetal lung maturity. (R.179; T. 25-26.) After performing the procedure and conducting further tests, Ms. Lentini's obstetrician, Dr. David Moreland, sent her to Bayfront and ordered the administration of pitocin to induce labor. (R.180; T. 27.) When signs of hypoxia and fetal distress became apparent around midnight that evening, Dr. Moreland determined that a caesarean section should be performed. (R.182; T. 28.) The minor was born at 2:46 a.m. on September 30, and was immediately handed over to All Children's Hospital Advanced Neonatal Nurse Practitioner, Melody Couch. (R.182; T. 28-29.) Ms. Couch resuscitated the child, intubated her for respiratory distress, and then transferred her to All Children's Hospital. (R.183.)

It is undisputed that the minor suffered a birth-related neurological injury as defined in section 766.302(2), Florida Statutes. (R.2; T. 4-5.) It is also undisputed that Dr. Moreland was a "participating physician" in the NICA Plan at the time of

[2] This brief will focus on the relevant facts surrounding the birth and delivery of the minor Courtney Lynn Glenn. The facts pertaining to the birth of the minor Christopher Kocher are set forth in the Initial Briefs on the Merits of Petitioners Florida Birth-Related Neurological Injury Compensation Association and Mike and Lynn Kocher.

the minor's birth; that he gave Ms. Lentini timely notice of his participation in the plan; that Ms. Lentini acknowledged receipt of the notice; that Bayfront did not provide Ms. Lentini with additional notice of the plan; and that All Children's Hospital – a pediatric institution that does not offer obstetrical services and has no "participating physicians" on its staff – was not subject to the statutory notice requirement. (R.226-228; R.237 n.3.)

III. Case History

The minor's parents (collectively, the "Glenns"), brought a medical malpractice action against Dr. Moreland, his professional association and Bayfront on June 30, 1998, alleging medical malpractice associated with Ms. Lentini's prenatal care (*i.e.*, performance of the amniocentesis), as well as during her labor and delivery. (R.221; R. Interven. Ex. 1.) The initial complaint alleged that Dr. Moreland's negligence in managing the child's labor and delivery, along with that of Bayfront, resulted in permanent brain damage from oxygen deprivation as a result of the amniocentesis, labor and delivery. (*Id.*) An amended complaint was filed against the same parties in October 1998, reiterating the same allegations. (*Id.*)

The Glenns settled their case with Dr. Moreland and his employer for $1 million (Dr. Moreland's policy limits), and then filed a Second Amended Complaint against Bayfront and, for the first time, against All Children's Hospital.

(R.221; R. Interven. Ex.1; T.57.) The complaint alleged that Bayfront negligently handled the labor and delivery, and that All Children's Hospital negligently managed the child's post-delivery resuscitation and neonatal care. (R.221-22; R. Interven. Ex. 1.) The Glenns settled with Bayfront for $100,000, and then filed a Third Amended Complaint, this time naming All Children's Hospital as the sole defendant. (R.222; T.57; R. Interven. Ex. 1.) When All Children's Hospital raised the issue of NICA, the Glenns attempted to avoid its operation and exclusive remedies by pleading a new and contradictory theory: that All Children's Hospital's alleged negligence occurred *after* the child's immediate post-delivery resuscitation and, therefore, fell outside of the NICA Plan. (R.222; R. Interven. Ex. 1.)

The trial court abated the action on June 26, 2001, to allow the ALJ to determine whether the minor had sustained a birth-related neurological injury compensable under NICA. (R.223.) One month later, the Glenns filed a Petition with the Department of Administrative Hearings ("DOAH"), alleging that the injuries occurred *after* the minor's birth and the post-resuscitative efforts by All Children's Hospital and, therefore, were not "birth related" or compensable under the NICA Plan. (R.1-9.) Their obvious goal was to escape from the provisions of the plan in order to pursue their medical malpractice action against All Children's Hospital, as they had done against Dr. Moreland and Bayfront. (T.24.)

DOAH served NICA with a copy of the claim on September 4, 2001. (R.18.) NICA requested the entry of an order setting a hearing on the issue of compensability. (*Id.*) All Children's Hospital intervened in the proceeding on November 20, 2001. (R.26; 72.) A final hearing was held in St. Petersburg, Florida on February 12, 2002. (T.1-172.)

At the hearing, the ALJ received evidence and heard argument on the following issues: (1) whether the alleged injury was compensable under NICA; and (2) whether notice of the NICA Plan was provided to Ms. Lentini in compliance with section 766.316, Florida Statutes. (*Id.*) With regard to the notice issue, the parties stipulated that Dr. Moreland gave Ms. Lentini timely notice of his participation in the Plan as required by the statute, but that additional notice of the Plan was not provided by Bayfront. (R.227-28.) The ALJ recognized that All Children's Hospital was not subject to the statute's notice requirement. (R.237 n.3.)

On April 16, 2002, the ALJ entered an order determining that even though notice of Dr. Moreland's NICA participation had been timely given and received, the statute's notice provision was not satisfied because Bayfront did not provide Ms. Lentini with duplicate notice, with the result that All Children's Hospital was not entitled to invoke the exclusive remedies of the plan. (R.234-36.) Concluding that it was "unnecessary, at this time, to address the remaining issues," the ALJ

ordered the Glenns to elect, in writing, whether to waive notice and pursue a claim for plan benefits, or to pursue their civil remedies instead. (R.228; 236.) The Glenns filed notice of their election to pursue their civil remedies on April 24, 2002. (R.239-40.) All Children's Hospital appealed the ALJ's order to the Second District on April 30, 2002. (R.241.)

All Children's Hospital's appeal raised one discrete issue – whether the ALJ erred when he determined that duplicate notice by *both* the hospital *and* the participating physician was a condition precedent under section 766.316 to the right of *any* healthcare provider (including one not required to give notice) to invoke NICA's remedies. The Second District declined to reach that issue, concluding instead that the ALJ lacked subject matter jurisdiction to resolve the notice issue. *All Children's Hospital, Inc. v. Dep't of Admin. Hrgs*, 863 So. 2d 450, 454 (Fla. 2d DCA 2004), *quashed*, 948 So. 2d 705, 717 (Fla. 2007). The Second District certified conflict with decisions of other district courts of appeal addressing the ALJ's subject matter jurisdiction under NICA to determine whether proper statutory notice has been given. *All Children's Hospital*, 863 So. 2d at 457. This Court accepted jurisdiction, quashed the Second District's decision, and held: "[W]hen notice is raised as part of a claim filed under NICA, an ALJ has jurisdiction to make findings regarding whether a health care provider has satisfied the 'notice to obstetrical patients' requirement of section 766.316, Florida Statutes

(Supp. 1998)." *Florida Birth-Related Neurological Injury Comp. Ass'n v. Florida Div. of Admin. Hrgs*, 948 So. 2d 705, 707 (Fla. 2007).

On remand, the Second District addressed "whether sufficient notice was given under [NICA] for All Children's Hospital to obtain the benefit of the exclusivity of remedy provision set forth in section 766.303(2)." *All Children's Hospital*, 989 So. 2d at 3. Acknowledging that "proper notice of participation was given by the delivering physician," the Second District framed the "crucial issue" as follows: "Whether – assuming the infant suffered a compensable injury under the Act – the notice given by the physician was sufficient to establish All Children's entitlement to immunity from tort liability for the conduct of the neonatal nurses." *Id.* The court then determined that the disposition of the case was controlled by the court's companion decision in *Bayfront*, 982 So. 2d at 704. *Id.*

In *Bayfront*, the Second District concluded that "a physician's predelivery notice of his participation in the Plan satisfies the statutory notice requirement" as defined by this Court in *Galen*. *Bayfront*, 982 So. 2d at 708. The Second District reasoned that "any notice given by Bayfront would have been meaningless" because the notice provided to the patient by her physician put her on notice of her option to either continue in his care or to seek care from a non-participating physician, and that "additional notice provided by Bayfront would not have

enhanced [the patient's] understanding of her options." *Id.* The court went on to say that unlike the option the patient enjoyed with regard to her selection of a non-participating physician, "she could not have chosen to seek services at a hospital that was not covered by the Plan" because hospitals in Florida do not have the option of participating or declining to participate in the plan. *Id.* Finally, the court noted that hospitals have no duty to advise the patient that her physician is or is not a participating physician, but are simply required to provide patients with the NICA "Peace of Mind" brochure which does not address the participation status of any particular physician. *Id.* For all of these reasons, the court determined that the notice provided to the patient by her physician regarding his participation in NICA satisfied the statute. *Id.*

The Second District commented that a plain reading of the statute did not mandate notice from both the hospital and the physician, and that its interpretation was "consistent with the legislative intent of the statute." *Id*. at 708-09. The court reasoned that while the goal of the statute was to allow participating physicians to either reduce or eliminate their malpractice coverage by participating in the plan, the ALJ's interpretation of the statute would force physicians to carry costly malpractice insurance "to protect against a hospital's failure to provide notice." *Id*. at 709. Concluding that "[t]his would be contrary to the legislative purpose of the

Plan," the Second District "decline[d] to subscribe to the ALJ's interpretation of the statute." *Id.*

Based on its decision in *Bayfront*, the Second District in *All Children's Hospital* concluded that "the ALJ erred in holding that Bayfront's failure to give notice precluded All Children's from invoking the statutory exclusive remedy provision and being shielded from tort liability." *All Children's Hospital,* 989 So. 2d at 5. As it did in *Bayfront*, the court went on to certify the aforementioned question before this Court as one of great public importance. *Id.* at 4. The Second District did not address the fact that All Children's Hospital is exempt from the statute's notice requirement.

STANDARD OF REVIEW

"The interpretation of a statute is a purely legal matter and therefore subject to the *de novo* standard of review." *Dianderas v. Florida Birth-Related Neurological*, 973 So. 2d 523, 527-28(Fla. 5th DCA 2007), *citing Kephart v. Hadi*, 932 So. 2d 1086, 1089 (Fla. 2006).

SUMMARY OF ARGUMENT

The Second District's determination that the NICA Plan's notice requirement is satisfied when the patient receives timely notice that her obstetrician is a NICA participant is consistent with the goal of the NICA Plan and the intent of the statutory notice provision. The Florida legislature enacted the NICA Plan to reduce the high cost of medical malpractice litigation affecting obstetricians in Florida by providing an alternative no-fault method of compensation for a limited class of birth-related neurological injuries. The legislature's intent was to stabilize and reduce malpractice insurance premiums for providers of obstetric services. Because compensation under the NICA Plan is a claimant's exclusive remedy for qualifying injuries, the legislature determined that a patient is entitled to notice that her obstetrician is a NICA Plan participant. The purpose of the notice requirement was to give the patient an opportunity to make an informed choice between using a participating versus a non-participating obstetrician.

The Second District's determination that an obstetrician's pre-delivery notice of his or her participation in NICA satisfies the statutory notice requirement is consistent with the language and intent of the statute and this Court's holding in *Galen*. Because all hospitals in Florida participate in NICA, the only "choice" a patient has when it comes to the plan is to choose a non-participating *obstetrician*.

Therefore, when a patient receives notice that her obstetrician is a NICA participant, the intent of the notice statute is satisfied.

Denying NICA protection when a patient receives notice of her obstetrician's participation in NICA, simply because the hospital has not furnished duplicate notice, defeats the legislature's goal in enacting the NICA Plan. The point of the plan is to reduce the high cost associated with litigation surrounding qualifying birth related neurological injuries. No legitimate public policy purpose is served by denying NICA protection to the physician who gave notice, to the delivering hospital, or to other healthcare providers entitled to NICA protection, when it is undisputed that the patient in fact received notice of her obstetrician's participation in NICA. The Second District arrived at the correct result when it determined that duplicate notice by the hospital is not necessary when the patient has received notice of her obstetrician's participation in the plan.

The opposition briefs maintain that independent notice by the hospital is necessary to accomplish the purpose and intent of the NICA Plan. Yet, the briefs offer no sound reason for this argument. The only "notice" hospitals are charged with providing the patient is the NICA "Peace of Mind" brochure, which simply advises the patient of the existence of the NICA Plan and that her healthcare provider may be a plan participant. When the patient has already received notice from her obstetrician of his or her participation in the plan, the NICA form

brochure is meaningless. For that reason, the legislature amended section 766.316 to clarify that receipt of the brochure from *either* the hospital *or* the physician raises a rebuttable presumption that the statute's notice requirement has been met. No *reasonable* explanation has been offered by the opposition to justify eviscerating NICA protection for all healthcare providers when a patient is on notice of her obstetrician's participation in the plan, simply because duplicate notice has not been given.

In addition to resolving the certified question, All Children's Hospital respectfully requests that this Court clarify that healthcare providers like All Children's Hospital – which are not subject to the statute's notice requirement – are entitled to invoke NICA's exclusive remedies *without regard* to the patient's receipt of duplicate NICA notice from the hospital. The ALJ below incorrectly determined that no healthcare provider – including All Children's Hospital – could invoke NICA's exclusive remedies because Bayfront did not provide Ms. Lentini with a NICA notice brochure. That determination not only ignored that the statutory notice requirement was satisfied when Ms. Lentini received notice of her obstetrician's participation in NICA, but that the legislature expressly *exempted* certain healthcare providers – like All Children's Hospital – from the notice requirement.

The ALJ conceded that All Children's Hospital is not required to give notice as a condition precedent to its right to invoke NICA protection. Yet, he determined that All Children's Hospital was barred from seeking protection under the plan because Bayfront did not give Ms. Lentini a NICA form brochure. Clearly absent from the ALJ's order was any explanation for the penalty he imposed on All Children's Hospital when the hospital was not even required to give notice, and where Ms. Lentini indisputably received notice of her obstetrician's participation in NICA. To avoid the unjust and unreasonable result that has resulted from the ALJ's determination in this case and in similar cases to follow, All Children's Hospital respectfully requests that this Court clarify that All Children's Hospital is entitled to invoke NICA's exclusive remedies, without regard to whether notice was given by any other healthcare provider.

ARGUMENT

I. A PHYSICIAN'S PREDELIVERY NOTICE TO THE PATIENT OF HIS OR HER PARTICIPATION IN NICA SATISFIES THE NOTICE REQUIREMENTS OF SECTION 766.316, FLORIDA STATUTES

The Second District's narrow determination that the NICA notice requirement is satisfied when the patient receives notice that her obstetrician is a participant in the NICA Plan upholds the legislature's goal in enacting the plan and is consistent with the language and intent of the statutory scheme. The Second District's holding is also consistent with this Court's decision in *Galen*. All Children's Hospital respectfully requests, therefore, that this Court approve the Second District's decision, and answer the certified question in the affirmative.

A. The Goal of the NICA Plan

The Florida legislature established the NICA Plan effective January 1, 1989. *See Fla. Stat.* § 766.303(1). Under the plan, once an ALJ determines that a birth-related neurological injury has occurred and that obstetrical services were provided by a participating physician, the NICA Plan benefits become the exclusive remedy available to claimants, foreclosing any medical malpractice claim against "any person or entity directly involved with the labor, delivery, or immediate post-delivery resuscitation during which such injury occurs, arising out of or related to a

medical negligence claim with respect to such injury." *See Fla. Stat.* § 766.303(2).[3]

The goal of the NICA Plan is to stabilize the medical malpractice litigation exposure affecting obstetricians by providing an alternative method of compensation, without fault, to children who have suffered brain or spinal cord injury during labor, delivery, or the post-delivery resuscitation process, thereby reducing malpractice insurance premiums. *See* Fla. Stat. §§ 766.301(2) and 766.302(2); *see also Galen*, 696 So. 2d at 310. In enacting the Plan, the legislature made the following findings:

> (a) Physicians practicing obstetrics are high-risk medical specialists for whom malpractice insurance premiums are very costly, and recent increases in such premiums have been greater for such physicians than for other physicians.
>
> (b) Any birth other than a normal birth frequently leads to a claim against the attending physician; consequently, such physicians are among the physicians most severely affected by current medical malpractice problems.
>
> (c) Because obstetric services are essential, it is incumbent upon the Legislature to provide a plan designed to result in stabilization and reduction of malpractice insurance premiums for providers of such services in Florida.
>
> (d) The costs of birth-related neurological injury claims are particularly high and warrant the establishment of a limited system of compensation irrespective of fault. . .

[3] All Children's Hospital is entitled to invoke NICA's exclusive remedies because it provides "immediate post-delivery resuscitation" services through its advanced neonatal nurse practitioners.

See Fla. Stat. § 766.301(1)(a)-(d). The legislature then expressed the "intent" underlying the NICA Plan – to "provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation." *See Fla. Stat.* § 766.301(2).

In construing the NICA Plan, the courts must be guided by the legislature's clearly expressed intent to alleviate Florida's medical malpractice crisis by stabilizing and reducing malpractice insurance premiums for providers of obstetric services in Florida. *See Fla. Stat.* § 766.301(1)(c); *see also Florida Birth-Related Neurological Injury Comp. Ass'n v. Florida Div. of Admin. Hrgs*, 686 So. 2d 1349 (Fla. 1997) (the Plan must be interpreted in a manner consistent with the legislature's intent to "provide compensation, on a no-fault basis, for a limited class of catastrophic injuries … in an effort to stabilize and reduce malpractice insurance premiums for providers of obstetric services in Florida"); *Fluet v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 788 So. 2d 1010 (Fla. 2d DCA 2001) (the court is guided in its interpretation of the statute not only by its plain language but by its purpose, which is to "limit a participating physician's exposure to civil liability"); *The Florida Bar v. Sibley*, 995 So. 2d 346, 350 (Fla. 2008) ("The purpose and intention of a legislative act should be construed to fairly and liberally accomplish the beneficial purpose for which it was adopted.").

B. The Intent of the Notice Provision

In proposing the NICA Plan, the 1987 Academic Task Force for Review of the Insurance and Tort Systems ("Task Force") recommended that the plan contain a notice requirement, explaining in its report:

> The Task Force recommends that healthcare 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.

Galen, 696 So. 2d at 310, *citing* Task Force Report at 34. This Court noted in *Galen* that the Task Force "obviously believed that because not all healthcare 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." *Galen*, 696 So. 2d at 310 n.1. Because all Florida hospitals are required to participate in NICA, this Court was presumably referring to the patient's right to know that her chosen *obstetrician* is a NICA participant so that she can make an informed choice between using a participating versus a non-participating obstetrician. *Galen*, 696 So. 2d at 309-10. After all, the obstetrician's participation in the plan, or lack thereof, is the ultimate determinant of plan applicability.

In line with the Task Force's recommendation, the legislature included the following "notice" provision in the statute which provides, in part:

> **766.316. Notice to obstetrical patients of participation in the plan.**
>
> 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 section 766.314(4)(c), under the [NICA Plan] shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan.

The notice form referred to in the statute is the "Peace of Mind For An Unexpected Problem" form furnished by NICA to healthcare providers for distribution to patients. *See, e.g., Dianderas v. Florida Birth Related Neurological,* 973 So. 2d 523 (Fla. 5th DCA 2007) (concluding that the NICA "Peace of Mind" form brochure satisfies the legislative mandate of providing a "clear and concise explanation of a patient's rights" under the plan). In addition to explaining the "patient's rights and limitations under the plan" as required by the statute, the Peace of Mind brochure further provides:

> You are eligible for this protection *if your doctor is a participating physician in the NICA Plan. If your doctor* is a participating physician, that 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 your healthcare provider has provided you with a copy of this informational form, your healthcare provider is placing you on notice that one or more *physician(s)* at your healthcare provider participates in the NICA Plan.

Dianderas, 973 So. 2d at 526. (Emphasis added.)

Section 766.316 was amended in 1998 to include the following three sentences, which apply to causes of action accruing on or after July 1, 1998:[4]

> 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 notice requirements of this section have been met.* Notice need not be given to a patient when a patient has an emergency medical condition as defined in section 395.002(9)(b) or when notice is not practicable.

(Emphasis added.) The amendment was enacted in response to this Court's holding in *Galen* that "healthcare providers must, when practicable, give their obstetrical patients notice of their participation in the plan a reasonable time prior to delivery" as a condition precedent to invoking NICA's remedies, since the "purpose" of the notice requirement is "to give an obstetrical patient an opportunity to make an informed choice" between using a participating versus a non-participating obstetrician. *Id.* at 309-10. This Court explained that NICA participants could "preserve their immune status" by notifying their patients of their participation in NICA a reasonable time before delivery – suggesting that the point of the statute is to advise the patient of her *obstetrician's* participation in

[4] Although the statute was amended after the minor's birth, the Florida courts have the right and duty to consider subsequent legislation when arriving at the correct meaning of a statute. *See, e.g.*, *Gay v. Canada Dry Bottling Co. of Fla.*, 59 So. 2d 788, 790 (Fla. 1952); *see also Palma Del Mar Condominium Ass'n v. Commercial Laundries of West Florida, Inc.*, 586 So. 2d 315, 317 (Fla. 1991).

NICA, and that NICA immunity arises when the *obstetrician* provides the statutory notice. *Id.*

C. Notice to the Patient of her Obstetrician's Participation in NICA Satisfies the Statute

The Second District's determination that an *obstetrician's* pre-delivery notice of his or her participation in NICA satisfies the statutory notice requirement is consistent with *Galen*. Applying this Court's reasoning in *Galen*, the Second District correctly concluded that notice from the hospital was not necessary to further the statute's purpose because (1) the obstetrician's notice gave the patient an option to either continue in his care or to seek care from a nonparticipating physician; and because (2) the patient had no option to seek a non-participating hospital in Florida. *Bayfront*, 982 So. 2d at 708. Therefore, with notice of the obstetrician's participation in NICA given and received, the purpose of the statute was satisfied.

The Second District's interpretation of the statute furthers the goal of the NICA Plan – to *protect obstetricians* from the sky-rocketing cost of malpractice insurance by providing an exclusive method of compensation for a limited class of catastrophic injuries. The Second District correctly noted that unlike hospitals, which are required to participate in NICA and are assessed equally, obstetricians have the *option* of participating or declining to participate in the NICA Plan. *Bayfront*, 982 So. 2d at 708. It logically follows that the only real choice a Florida

patient has when NICA is invoked is to use a participating or a nonparticipating *obstetrician*. The purpose of the statute is met, therefore, when the patient receives notice that her obstetrician is a NICA participant, and is timely afforded an opportunity to either continue in his or her care or to choose a non-participating physician. No legitimate purpose would be served by denying NICA protection to the physician who gave notice, to the delivering hospital, or to a provider not required to give notice, when the patient *in fact received notice* of her physician's participation in NICA and, armed with that knowledge, was able to make an informed choice to remain in that physician's care or to seek the services of a non-participating physician.

The Second District's interpretation is also consistent with the plain language of section 766.316, Florida Statutes. The statute is titled "[n]otice to obstetrical patients of *participation* in the plan." Consistent with its title, the statute provides for notice by hospitals with a *"participating physician"* on staff and by each *"participating physician,"* making clear that the *purpose* of the notice is to inform the patient of her *obstetrician's* participation in NICA. The statute contains no unyielding requirement that *both* the hospital *and* the participating physician must provide the patient *with the same NICA form brochure*. Indeed, the legislature clarified in the 1998 amendment to the statute that *either* the hospital *or* the participating physician may elect to have the patient sign a form

acknowledging receipt of the NICA notice, and that the "[s]ignature of the patient acknowledging receipt of the notice form" from *either* the hospital *or* the participating physician "raises a rebuttable presumption that the *notice requirements of this section have been met.*" *If* duplicate NICA notice from *both* the hospital *and* the participating physician were necessary, the legislature would not have said that the statutory notice requirement is met by the signature of the patient acknowledging receipt of the NICA notice form from *either* the hospital *or* the physician.

The ALJ's determination that the statutory notice provision is not satisfied unless *both* the participating physician and the hospital give the patient the same NICA form ignores the settled principle that *when notice is actually received*, strict compliance with the mode of serving statutory notice is not required. *See, e.g.*, *Patry v. Capps*, 633 So. 2d 9 (Fla. 1994); *Agency for Healthcare Admin., Bd. of Clinical Laboratory Personnel v. Florida Coalition of Professional Laboratory Organizations, Inc.*, 718 So. 2d 869, 873 (Fla. 1st DCA 1989); *Southern Steel Co. v. Hobbs Constr. & Dev., Inc.*, 543 So. 2d 843, 845 (Fla. 3d DCA 1989); *Phoenix Ins. Co. v. McCormick*, 542 So. 2d 1030, 1032 (Fla. 2d DCA 1989). As this Court noted in *Patry*, it "cannot be seriously argued" that the goal of a statutory scheme is not accomplished where timely receipt of notice is acknowledged and no prejudice has occurred. *Patry*, 633 So. 2d at 11-12. Likewise, when a patient

receives timely notice of her obstetrician's participation in NICA and is thereby afforded an opportunity to make an informed choice to continue in his or her care, no useful purpose is served by denying NICA's remedies simply because the delivering hospital has not provided the patient with duplicate NICA notice.

The Second District correctly concluded that the ALJ's "all or nothing" approach to notice would undermine the statutory scheme. *Bayfront*, 982 So. 2d at 709. The legislature enacted the NICA Plan to address the crisis facing obstetricians from the high cost of medical malpractice insurance premiums. *Id.*, *citing Fla. Stat.* § 766.301(1)(a). The intended result of the statute is to allow the participating physician to reduce his or her malpractice coverage by participating in the NICA Plan and paying the higher assessments. *Bayfront*, 982 So. 2d at 709. The Second District recognized that the ALJ's interpretation of the statute circumvents that intent by forcing a participating physician who has chosen to pay the higher Plan assessments to *also* carry costly malpractice insurance "to protect against a hospital's failure to provide notice." *Id.* Finding the ALJ's interpretation contrary to the legislative scheme, the Second District wisely declined to subscribe to his erroneous interpretation of the statute. *Id.*

D. The Opposition Briefs Do Not Advocate a Sound Reason for Accepting the ALJ's Interpretation of the Notice Statute

The birth parents in the companion case (the "Kochers") have filed an Initial Brief on the Merits which misstates, in various respects, the nature and effect of

the Second District's holding.[5] For example, the Kochers argue that the Second District "determined that the plain language of [§ 766.316] is *nonsensical*" because all Florida hospitals are NICA participants and should be relieved of the notice requirement. (Kocher's brief at 12.) The Second District, however, never said that the language of section 766.316 is "nonsensical." Rather, the court simply determined that when a patient receives pre-delivery notice of her physician's participation in NICA so that the patient is afforded an opportunity to make an informed choice between remaining in that physician's care or using a nonparticipating provider, the purpose of the statute is satisfied without the need for additional NICA notice from the hospital. *Bayfront*, 982 So. 2d at 708.

The linchpin of the Second District's holding was that notice from the participating physician had in fact been timely given and received. Under those facts, the patient's understanding of her options would not have been enhanced by receipt from the hospital of a NICA notice brochure. *Bayfront*, 982 So. 2d at 708. The court's opinion is silent with regard to the circumstance of a participating physician's failure to provide NICA notice, where it would make sense to scrutinize the hospital's separate notice under the statute. The Kocher's

[5] The Glenns did not petition this Court to review the Second District's decision. Therefore, the Glenns are respondents in these consolidated cases.

interpretation of the Second District's decision to mean that it is "nonsensical" to *ever* require a hospital to provide notice, therefore, is incorrect.

The Kochers go on to argue that it "makes sense" that a hospital should be required to provide notice *independent* of that provided by the participating physician to give the patient an opportunity to give birth outside of Florida, or in a hospital where all staff physicians have "opted out" of NICA. (Kochers' brief at 13.) *This* argument is nonsensical and reads words into the statute. Section 766.316 simply requires that the patient receive notice "as to the limited no-fault alternative for birth-related neurological injuries." *See Fla. Stat.* § 766.316. This Court has interpreted the statute to mean that a patient is entitled to notice that she has limited her common law remedies by choosing a participating obstetrician, and an opportunity to select a non-participating physician. *Galen*, 696 So. 2d at 309-10.

The Kochers ignore that the point of the statute is to advise the patient that *her obstetrician* is a NICA participant. Indeed, the form brochure supplied by the hospital simply states: "You are eligible for this protection *if your doctor* is a participating physician in the NICA Plan." *Dianderas*, 973 So. 2d at 526. Where, *as here*, the patient receives notice of her obstetrician's participation in NICA and, armed with that knowledge, chooses to remain in her physician's care, additional notice from the hospital is meaningless. Once the patient has been given the

opportunity to make an informed choice between using a participating versus a non-participating obstetrician, the purpose of the notice is satisfied and the receipt of additional notice from the hospital becomes irrelevant. That is the point of the Second District's decision.

The Kochers' argument that the Second District's decision violates the principle that courts should never presume the legislature has enacted purposeless or useless legislation is equally misplaced. (Kocher's brief at 13-14.) The Second District did not hold that it was useless for the legislature to provide for notice by the hospital. Rather, the court simply determined that the statute is satisfied when a patient *receives notice* of her obstetrician's participation in NICA and, therefore, is afforded an opportunity to make an informed choice between remaining with that physician or using a non-participating physician. The parties do not dispute that the statute serves a valid purpose; the only question before this Court is whether that purpose is satisfied when a patient receives timely notice of her physician's participation in the NICA Plan.

Nor is the Second District's decision in conflict with decisions of other Florida district courts of appeal, as the Kochers incorrectly contend. (Kochers' brief at 16-17.) The Kochers assert in their brief that the Second District "recogniz[ed] and acknowledg[ed]" that the court's conclusion was "in conflict" with the First District's decision in *Board of Regents v. Athey*, 694 So. 2d 46 (Fla.

1st DCA 1997), *approved*, 699 So. 2d 1350 (Fla. 1997). (Kochers' brief at 9.) The Second District found no such conflict; nor is *Athey* – which deals with an entirely different set of circumstances – in conflict with the Second District's holding. In *Athey*, unlike in the companion cases below, neither the hospital nor the physician provided the patients with pre-delivery notice of the physicians' participation in NICA. *Athey*, 694 So. 2d at 48. Because *Athey* addresses an entirely distinct set of facts – *where no notice was given to the patient* – the case presents no conflict with the Second District's decision in this case.

University of Miami v. Ruiz, 916 So. 2d 865 (Fla. 3d DCA 2005) is also distinguishable from the present case. (Kochers' brief at 11.) In *Ruiz*, unlike the present case, the hospital provided the patient with notice, but the physicians did not. *Ruiz*, 916 So. 2d at 856. Because the hospital's notice did not indicate that it was given on behalf of any physician associated with the hospital, or that any physician in the hospital was a NICA Plan participant, the court determined that the statute was not satisfied. *Ruiz*, therefore, *supports* the Second District's determination that notice of the obstetrician's participation in NICA is the critical point of the statute. *Id*. at 869.

Finally, *DeSouza v. Ortiz*, 901 So. 2d 269 (Fla. 4th DCA 2005) and *Weeks v. Florida Birth-Related Neurological*, 977 So. 2d 616 (Fla. 5th DCA 2008) are entirely inapposite. The court in *DeSouza* simply addressed whether the trial court

exceeded its jurisdiction by lifting a stay in effect while the ALJ determined whether the subject injury was compensable under the NICA Plan. *Ortiz*, 901 So. 2d at 270. The issue in *Weeks* was whether the healthcare providers were entitled to invoke the "emergency medical condition" exception to the notice requirement even though the obstetrician-patient relationship had commenced *before* the onset of the emergency. *Weeks*, 977 So. 2d at 618. The issues in those cases have no bearing on the issue before this Court.

The Kochers alternative argument that the Second District's decision is contrary to the Task Force's recommendation is also incorrect. (Kochers' brief at 18.) This Court noted in *Galen* that the Task Force, in recommending a notice provision, obviously believed that "fairness require[d] that the patient be made aware that she has limited her common law remedies by choosing a participating provider" because "not all healthcare providers are required to participate in the NICA plan." *Galen*, 696 So. 2d at 310 n.1. Consistent with the Task Force's recommendation, the purpose of the notice requirement is to advise the patient of her *obstetrician's* participation in NICA – not the hospital's participation, since all hospitals in Florida participate in NICA. The Second District's determination that notice received by the patient of her obstetrician's participation in NICA satisfies the statute, therefore, is entirely consistent with the Task Force's recommendation.

The Kochers conclude by arguing that it is contrary to due process to deprive a patient of her common law remedy to sue a hospital when the hospital has not given pre-delivery notice. (Kochers' brief at 20.) The Kochers again overlook that the point of notice by the hospital is to advise the patient that her obstetrician may be a NICA participant – not that the hospital is a participant, since all hospitals participate in NICA. There is no justification for denying all healthcare providers protection under NICA because the hospital did not give the patient a NICA notice brochure, when it is undisputed that the patient *already received* the statutorily required notice from her obstetrician. Contrary to the Kochers' belief, the NICA notice statute was not enacted as a trap for the unwary hospital which fails to give notice, or to provide an escape hatch from NICA for claimants and their attorneys hoping to recoup a large jury award.

The Amicus Curiae Brief of the Florida Justice Association ("FJA") also avoids the critical question before this Court: how is the purpose of the statute served by requiring a hospital to provide the patient with the NICA form brochure as a condition precedent to NICA's application, *when the patient has already received notice of her obstetrician's participation in the Plan*? Because the point of the statute is to advise the patient that she has chosen a participating obstetrician, no purpose whatsoever can be served by denying NICA protection to

all healthcare providers, simply because a hospital has not given the patient notice of the NICA Plan.

Entirely ignoring this point, FJA advocates a rule requiring notice by the Florida hospital "whether the patient's obstetrician himself had provided notice or not." (*Id.* at 1-2.) FJA reasons that notice by the hospital is necessary to alert the patient that the hospital employs other participating physicians who might assist in the delivery. (*Id.* at 10.) FJA goes on to argue that the hospital's notice affords the patient an opportunity to choose to deliver her child *outside of Florida or even the United States*. (*Id.* at 2; 11.)

FJA's suggested interpretation of the notice provision ignores the goal of the statute and leads to an absurd result. *See Fla. Dep't of Environ. Protec. v. Contractpoint Fla. Parks, LLC*, 986 So. 2d 1260, 1265-66 (Fla. 2008). The statute is designed to afford the patient an opportunity to choose between using a participating versus a non-participating obstetrician – not a hospital outside of Florida, much less outside of the United States. *See, e.g., Galen*, 696 So. 2d at 309-10 ("The purpose of the notice 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 and thereby preserving her civil remedies.").

As a matter of public policy, it makes no sense to hold all healthcare providers accountable in an action for medical malpractice when the patient has received timely notice of her obstetrician's participation in NICA, simply because the patient did not receive duplicate NICA notice from the hospital. The point of the notice provision is not to subject a hospital on the one hand, or an obstetrician on the other, to civil remedies for failing to provide the patient with the NICA brochure. The point of the statute is to assure that the patient receives notice of her obstetrician's participation in NICA so that she can choose to use a non-participating physician if she wishes. That goal was satisfied in this case, and no legitimate public policy reason has been advanced for subjecting all healthcare providers to costly medical malpractice litigation under the circumstances of this case.

Finally, the FJA makes a glaring misstatement in its brief. FJA argues: "The Statute's language is not meaningless. It is not surplusage. Bayfront and ***All Children's*** were required to follow it." (FJA brief at 5.) FJA overlooks that All Children's Hospital is ***not subject to the statute's notice requirement*** because it has no "participating physicians on staff." Regardless of this Court's resolution of the certified question, therefore, no basis exists for depriving All Children's Hospital of its right to invoke NICA's exclusive remedies because All Children's Hospital was never subject to the statute's notice requirement to begin with. FJA's

comment with regard to All Children's Hospital, therefore, is entirely misplaced and should be ignored.

II. ALL CHILDREN'S HOSPITAL IS ENTITLED TO INVOKE NICA'S EXCLUSIVE REMEDIES BECAUSE IT IS NOT SUBJECT TO THE STATUTE'S NOTICE REQUIREMENT

The certified question does not address All Children's Hospital's unique role in this case or, indeed, the healthcare system. The certified question asks whether the obstetrician's pre-delivery notice of his or her participation in the plan satisfies the statutory notice requirement where the delivering hospital fails to provide additional NICA notice. It is undisputed, however, that All Children's Hospital is not subject to the statutory notice requirement because the hospital is a pediatric institution with no participating physicians on staff. Although the ALJ determined in the proceedings below that no healthcare provider – including All Children's Hospital – could invoke NICA's exclusive remedies because of Bayfront's failure to provide NICA notice, no court has yet addressed the error in the ALJ's conclusion with respect to All Children's Hospital, which is not even subject to the statute's notice provision. Because this Court has accepted jurisdiction to resolve the certified question, the Court may also address the merits of this issue. *See, e.g.*, *Savoie v. State*, 422 So. 2d 308, 310 (Fla. 1982) (once Supreme Court accepts jurisdiction to resolve legal issue in conflict, it may in its discretion consider other issues properly raised and argued).

It is undisputed that Ms. Lentini received timely notice from her obstetrician of his participation in the NICA Plan. The ALJ's conclusion that duplicate notice was required before All Children's Hospital – which was not required to give notice – could invoke NICA not only ignores that the statutory notice requirement was satisfied in this case by the notice given to Ms. Lentini by her obstetrician, but that the legislature has expressly *exempted* certain healthcare providers from that notice requirement. *If* the legislature had intended to require duplicate notice by *all* NICA participants as a condition precedent to *any* healthcare provider invoking NICA immunity, why did it expressly provide that certain classes of NICA-covered providers need give no notice? Section 766.303(2) provides for NICA coverage with respect to "any person or entity directly involved with the labor, delivery or immediate post-delivery resuscitation," such as All Children's Hospital, even though such providers *are not required to give notice*. *See Fla. Stat.* § 766.303.

The legislature was aware that such providers, which include pediatricians, neonatologists, and other healthcare providers like All Children's Hospital, need not participate in NICA in order to obtain its benefits. Indeed, the legislature was likely aware that almost invariably, those providing resuscitation services after birth do not know they will do so until the need arises at the last minute, with the result that they are in no position to give notice. The ALJ conceded that All

Children's Hospital was not required to give notice, even though it was entitled under the statute to invoke NICA protection. Clearly absent from his order is any explanation for his determination that All Children's Hospital must be penalized for Bayfront's failure to provide notice, when All Children's Hospital was not required to give notice, and where Ms. Lentini indisputably received notice of her obstetrician's participation in NICA. The ALJ's conclusion that a party not required to give notice must forfeit NICA immunity, because duplicate notice by the hospital was not given, serves no legitimate public policy purpose.

Even if All Children's Hospital's right to invoke NICA could be linked to another healthcare provider's satisfaction of the statutory notice requirement, All Children's Hospital is still entitled to invoke NICA's remedies based on the fact that the obstetrician, Dr. Moreland, fully complied with the statute. Nothing in the language of section 766.316 supports the ALJ's determination that duplicate notice by *both* the participating physician *and* the delivering hospital is a condition precedent to the right of *any* healthcare provider to invoke NICA protection – especially a healthcare provider like All Children's Hospital which is not required to give notice. To the contrary, such a construction is contrary to the policy concerns underlying the enactment of the NICA Plan.

The ALJ's "all or nothing" approach not only ignored the legislative purpose underlying the statutory notice provision, but the intent underlying the NICA Plan

as a whole. As this Court has held, principles of statutory construction should be applied to *uphold* the policies underlying the Plan. *See, e.g., Florida Birth-Related Neurological Injury Comp. Ass'n*, 686 So. 2d 1349 (Fla. 1997). The Plan's "goal of stabilizing the perceived medical malpractice insurance crisis affecting obstetricians by reducing their malpractice insurance premiums," *Galen* at 311, is not served by requiring notice from *both* the participating physician *and* the delivering hospital before *any* healthcare provider may invoke NICA's exclusive remedies.

In this case and in cases similar to it, manifest injustice and an unreasonable result will follow if participating physicians, hospitals, or other protected healthcare providers are denied the benefit of the NICA Plan's exclusive remedy, simply because others beyond their control have failed to provide the statutory notice – even though they themselves may have done so, or had no duty to do so. Such a result is even more unreasonable where, as here, notice was in fact given and received, and the statute's purpose was therefore served. Finally, such a result defeats the very purpose of the Plan – the stabilizing of insurance rates and healthcare costs – for no legitimate public policy reason.

CONCLUSION

For the reasons set forth herein, All Children's Hospital, Inc. respectfully requests that this Court approve the decision of the Second District Court of

Appeal in this case. In addition, All Children's Hospital respectfully requests that this Court clarify that because All Children's Hospital, Inc. was not required under the statute to provide NICA notice, the hospital is entitled to invoke NICA's exclusive remedies without regard to whether notice was given by any other healthcare provider.

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 April 13, 2009.

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Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with Rule 9.210, *Fla. R. App. P.*, and is in the required font of Times New Roman 14.

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