IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO: SC08-1317
Lower Tribunal No(s): 2D01-1638

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.

ANSWER BRIEF OF RESPONDENTS GLENN

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INTRODUCTION

Respondents, COURTNEY LYNN GLENN, a minor, by and through GREGORY H. FISHER, as Court appointed guardian of the property of COURTNEY LYNN GLENN and ANNA LENTINI, f/k/a ANNA GLENN ("GLENN") by and through their undersigned attorneys acknowledge and adopt the abbreviations set forth in Petitioner's Preliminary Statement of its Initial Brief and said abbreviations will be used herein. The Record will be cited as "R." followed by the appropriate page numbers. The Appendix will be cited as "Appendix", followed by the appropriate page numbers.

The Respondents, GLENN, do not agree with NICA or All Children's claim that they are entitled to invoke the Florida Birth-Related Neurological Injury Compensation Plan's exclusivity benefits under § 766.303(2), *Fla. Stat.*, because Bayfront Medical Center failed to provide notice, as required by § 766.316, *Fla. Stat.*, and, therefore, waived the Plan's exclusive benefits for the health care providers involved.

STATEMENT OF THE CASE AND FACTS

These consolidated cases are before the Supreme Court on a question certified as one of great public importance by the Second District Court of Appeal ("District Court"). The question is as follows:

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 requirement of section 766.316, Florida Statutes (1997), if the hospital where the delivery takes place fails to provide notice of any kind?

Respondent, COURTNEY LYNN GLENN, was born on September 30, 1997 at Bayfront Hospital. Respondents, GLENN, filed their Third Amended Complaint on February 26, 2001 against Intervenor, All Children's Hospital, alleging a medical malpractice action associated with Courtney's care following the immediate post-delivery resuscitation. (R. 219)(R. Intervenor Ex. 1)(See Appendix A, ALJ's Final Order April 16, 2002, p. 4) "All Children's Hospital prevailed upon the court to abate the civil suit until it was resolved, by an administrative law judge, whether Courtney's injury was compensable under the Florida Birth-Related Neurological Injury Compensation Plan. (R. 223) (Appendix A, p. 4). On August 31, 2001, GLENN filed a petition with the Department of Administrative Hearings, alleging COURTNEY LYNN GLENN'S injuries occurred after her birth and immediate post resuscitative efforts which aggravated a pre-existing condition and rendered the child permanently and substantially physically impaired. (R. 224) (Appendix A, p. 5).

The findings of fact on the events leading up to COURTNEY LYNN GLENN's birth are outlined in the Final Order of

the ALJ. (R. 219)(See Appendix A).[1] It is undisputed that GLENN's obstetrician, a participating physician, gave proper notice under NICA. (R. 226 -227) (Appendix A, p. 8-9) It is also undisputed that All Children's is a pediatric institution which neither employs participating physicians nor has any on staff. (R. 227) (Appendix 1, p. 9). An evidentiary hearing on the petition was held on February 12, 2002, and GLENN argued the claimed injury occurred after labor, delivery, and immediate post resuscitative efforts and thus was not compensable under NICA. (Tr. 1-173) Conversely, All Children's argued that the notice provision of Section 766.316 Florida Statutes was met, and that the injury to COURTNEY LYNN GLENN was a birth-related neurological injury, and that All Children's was not required to give notice under the statute. *Id.*

The ALJ determined that Section 766.316 Florida Statutes notice provision was not met because Bayfront failed to provide notice. (R. 232-234). The ALJ further concluded that it was therefore "unnecessary" to address whether the injury to COURTNEY LYNN GLENN was compensable under NICA. (R. 228) The ALJ ordered GLENN to elect, in writing, whether to waive notice and pursue a claim for Plan benefits or whether to pursue their civil remedies instead. (R. 236)

GLENN filed a notice to pursue their civil remedies and not

[1] *See also* the Petition (R. 1-9) and Final Order (R. 219 -238)

waive notice on April 24, 2002. (R. 239 -240) A Final Order was entered on May 10, 2002 by the ALJ determining the issue of compensability need not be addressed due to GLENN'S decision to elect to pursue their civil remedies. (R. 265).

THE INSTANT APPEAL

NICA filed a Notice to Invoke Discretionary Jurisdiction of the Supreme Court pursuant to Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure requesting review of the question certified by the Second District a one of great public importance in the instant case. All children's filed an unopposed motion to consolidate Bayfront, All Children's, and Kocher's cases, respectively, and the Motion was granted. The three (3) appeals were consolidated by Order of this Court dated October 14, 2008. This Honorable Court accepted jurisdiction by Order dated January 30, 2009.

STANDARD OF REVIEW

This appeal concerns statutory interpretation of the notice requirements under §766.316, *Fla. Stat.*, and, therefore, is reviewed *de novo* by this Court. *See Holzhauer-Mosher v. Ford Motor Co.*, 772 So. 2d 7, 10 (Fla. 2d DCA 2000)(statutory construction is a question of law). *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 Neu*rological Injury Compensation Ass'n, 813 So.2d 155, 159 (Fla. 4th DCA 2002).

SUMMARY OF THE ARGUMENT

Respondents, GLENN, disagree with the merits of the arguments set forth by Petitioner, NICA, in its Initial Brief of February 24, 2009.

GLENN does not agree with NICA or All Children's, claim that they are entitled to invoke the Florida Birth-Related Neurological Injury Compensation Plan's exclusivity benefits under §766.303(2), *Fla. Stat.*, because Bayfront Medical Center failed to provide notice to GLENN, as required by §766.316, *Fla. Stat.*, and, therefore, waived the Plan's exclusive benefits for the health care providers involved. Section 766.316 Florida Statutes is a statute in derogation of common law and as such strict construction should be applied to the statute. The plain and unambiguous language of the statute clearly requires that Notice of a health care provider's participation in NICA be given to the patient. Notice given by one provider does not the hospital the right to claim exclusivity under the NICA statute. In the case at hand, Bayfront failed to give NOTICE, and therefore, it has no right to claim exclusivity. Since All Children's is a contracted agent of Bayfront, it has no right to claim NICA's protection.

ARGUMENT

I. SECTION 766.316 IS A STATUTE IN DEROGATION OF COMMON LAW AND MUST BE STRICTLY CONSTRUED.

This case is governed under the 1997 version of Florida Statute §766.316. Because NICA "is a statutory substitute for common law rights and liabilities, it should be strictly construed to include only those subjects embraced within its terms." Florida Birth-Related Neurological Injury Compensation Assoc. V. Florida Div. Of Admin. Hearings, 686 So.2d 1349,1357 (Fla. 1997). This Honorable court opined "since Fla. Statute §766.316 is in derogation of common law, it must be strictly construed." Id. at 1354-1355. *See also Fluet v. Florida Birth-Related Neurological Injury Compensation Association*, 788 So. 2d 1010, 1013 (Fla. 2d DCA 2001)(statutes in derogation of law must be strictly construed to preserve common law rights). Strict construction of the statute requires this court hold that both the participating provider and hospital must provide notice. Bayfront failed to provide notice in the instant case and therefore the case should be sent back to Circuit Court for GLENN to seek their common law remedies.

Section 766.316 provides in pertinent part as follows:

> 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 obstetrical patients thereof 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. (Emphasis added)

766.316 Fl Stat. (1997)

The language of the statute is unambiguous. "The purpose of the statute 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 civil remedies." *Galen of Florida, Inc. V. Braniff,* 696 So.2d 308, 309 (Fla. 1997)*citing Turner v. Hubrich,* 656 So. 2d 970, 971 (Fla. 5th DCA 1995).

NICA argues, and the Second District Court has opined, that because all Florida Hospitals are required to give notice, and are participants in the plan, there was no harm in notice not being given by the hospital in this case. *See Bayfront Medical Center, Inc. v. Florida Birth-Related Neurological Injury Compensation Ass'n,* 982 So.2d 704 (Fla. 2d DCA 2008). NICA further argues that the hospital should be excused if notice was given by the treating physician, even though the clear and unambiguous language of the statute requires the hospital to give notice as well.

Again, statutes in derogation of common law must be strictly construed. *Robinson v. Lane,* 557 So. 2d 908, 909 (Fla. 1st DCA 1990) *citing Carlile v. Game and Fresh Water Fish*

Commission, 354 So. 2d 362, 364 (Fla. 1977). "Courts will not infer that such a statute was intended to make any alteration other than was specified and plainly pronounced, and the statute will not be interpreted to displace the common law further than is necessary." *Id. at 909.* When interpreting a statute, courts are guided not only by the plain language of the statute, but also the purpose of the legislation. *See White v. Florida Birth Related Neurological Injury Compensation Ass'n*, 655 So. 2d 1292, 1296 n.1 (Fla. 5th DCA 1995) (holding plain language of the statute will not be disturbed absent ambiguity or conflict); Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. Of Admin. Hearings, supra, (holding legislative intent is polestar by which court must be guided in interpreting statutes). Further, All Children's cite cases that are not NICA cases in their Brief to support their Notice argument. (*See* Respondent All Children's Brief April 19, 2004, p. 38-39*)*. The fundamental difference in the cases cited by All Children's is that they all received *actual* notice; it was the mode or method in which they received the notice that was incorrect. These cases are not applicable because §733.316 Florida Statutes requires each party to give their own Notice.

The Second District's conclusion in *Bayfront* ignores the language of the statute, by requiring "both the hospital with a participating physician on its staff and each participating

physician shall provide notice to the obstetrical patient, violating the strict construction of the statute and the fact that "all words in a statute...be construed so as to give them some effect, not so as to render them meaningless surplussage." *Fla. Police Benev. Ass'n, Inc. v. Dep't of Agric. Consumer Servs.*, 574 So.2d 120, 122 (Fla. 1991) *See also* (Kocher's Initial Brief p. 14). The only notice given in GLENN'S case was by their treating physician, and under the plain language of the statute, the hospital was also required to give notice to be afforded the plan's exclusivity. Respectfully, the unambiguous language of the statute should be afforded strict construction, thereby, finding that proper Notice was not given and NICA immunity does not apply, as to the hospital.

II. NEITHER THE HOSPITAL, NOR ANY OTHER ENTITIES ACTING AS AGENTS OF THE HOSPITAL, CAN CLAIM NICA IMMUNITY BASED ON THE PARTICIPATING PHYSICIAN HAVING GIVEN NOTICE.

NICA's argument, supported by Bayfront, All Children's, and accepted by the Second District Court of Appeal that the Statute's notice requirement is meaningless to hospitals as notice by a hospital should not be required since all Florida hospitals are NICA participants contravenes the plain language of the statue and the legislative intent behind the statute. Additionally, NICA, argues that notice by the hospital is duplicative because the patient has already been informed by the treating physician that they are a plan participant (Brief at 16). By proposing this argument, NICA, is proposing that the

statute allows them to have it both ways, meaning when the treating participating physician provides notice, there is no need for the hospital to provide "duplicate" notice; however, if the treating physician fails to provide notice, which often they may have no way of knowing whether the treating physician gave notice or not, then the hospital should provide notice so they can be covered under NICA. The burden of NICA"s argument is that the hospital *always* should provide such back up notice, but that if it fails to do so, the hospital should be forgiven it if turns out in retrospect that the treating physician did notify the patient of the doctor's participation in the plan. [2]

The District Court in *Bayfront* echoed this reasoning. After quoting the Court's statement in *Galen*, 696 So.2d at 309-310, that the "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 not a participant...", the court in Bayfront *first decided that "health care provider"* means the physician and no on else. On the assumption that the hospital's duty to provide notice is thus entirely duplicative of the doctor's, and given that the doctor in Bayfront did notify the patient, the court then held that "any notice given

2 GLENN'S response brief is substantially the same as the FJA's amicus curiae brief, thus using some of the same language and argument contained in the FJA's brief.

by Bayfront would have been meaningless." 985 So.2d at 708.

This argument clearly does not follow the plain language of the statute. The statute provides "each hospital with a participating physician on its staff and each participating physician . . .shall provide notice . . ." (Emphasis Added). 1997 Fla. Statute 766.316. "This unambiguous language cannot be reconciled with either the sweeping argument that hospitals should never be required to give notice, because all Florida hospitals have to be NICA participants, or the more-limited argument that hospitals should be excused from giving notice if the treating obstetrician already has done so." (Amicus Brief) Strict construction of the statute does not support NICA's arguments.

Moreover, the unambiguous statutory language makes sense, because the patient's obstetrician is not the only doctor who might be treating her. "There may be other doctors who are either employees of the hospital or have staff privileges, who also have opted into NICA; and because they also may be treating the patient, the patient also needs to know about them." (Amicus Brief) As NICA points out (Brief at 15) this court said in Galen, 696 So.2d at 309-310, that NICA protects the patient's "informed choice between" those "participating in the NICA plan or [instead] using a provider who is not a participant...." That choice applies not just to the hospital as an institution,

but just as much to all of its employees—and indeed, to all doctors who have hospital staff privileges.[3] Such notice gives the patient the option to seek a hospital in which other relevant doctors on staff have opted out of the Plan or to seek treatment outside the State—a choice that the Florida Legislature and this Court have said is a meaningful one.[4]

"The Sanctity of the patient's choice is protected by the unambiguous statutory language." (Amicus Brief) It is not dependent on the *probability—or on* NICA's prediction—that "in almost all instances" (Initial Brief at 17), a patient properly notified of NICA participating by her obstetrician will choose to stay with that obstetrician, and thus to stay with the "hospital where her NICA participating physician could provide

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

4 This point debunks NICA's argument, and the *Bayfront* court's holding, 982 So.2d at 708, that the plain language of the Statute is nonsensical, because all Florida hospitals are NICA participants. The court said in *Bayfront* that "unlike the option Mrs. Kocher enjoyed with regard to the selection of a nonparticipating physician, she could not have chosen to seek services at a hospital that not covered by the Plan. The Statute does not provide any hospital with the option of participating or declining to participate in the Plan; rather, all hospitals are assessed equally." 982 So.2d at 708 *citing* §766.314(4)(a),(5)(a). However, given that the Statute also covers employees of the hospital, or other doctors with staff privileges, who might or might not opt out of the program, the unambiguous language of the Statute does fulfill the mandate of *Galen that such notice will* "give and 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 participating provider and thereby preserving her civil remedies." 696 So.2d at 309-310. (Amicus Brief)

such services." (Id at 17) This prediction misses the entire point that the legislature has given choice *to the patient.* It has implicitly rejected NICA's presumption of the choice that a patient would likely make. (Amicus Brief) As this Court held in *Galen, 696 So.2d at 309, t*he Statute requires that the patient be given the "opportunity" to make the choice.

Respectfully, NICA, Bayfront, All Children's and the Second District are incorrect and these arguments should fail, particularly in GLENN's case where it has been stipulated that Bayfront did not give notice.

III. ALL CHILDREN'S DOES NOT HAVE NICA IMMUNITY, BECAUSE IT IS AN APPARENT AGENT/CONTRACTED HEALTHCARE PROVIDER OF BAYFRONT HOSPITAL THAT FAILED TO GIVE REQUISITE STATUTORY NOTICE UNDER §733.316 FLORIDA STATUTES.

Should this court determine that any participating physician or hospital, acting *individually* can obtain the benefit of NICA by giving the statutory notice required of *that* healthcare provider, All Children's in that event as an apparent agent/contracted healthcare provider of Bayfront has no NICA immunity. Bayfront did not provide the statutorily required notice under §766.316 Fla. Statute. This precludes the hospital from claiming NICA immunity, as the 1997 version of the statute which governs this case requires both the participating provider and the hospital to provide notice. All Children's alleged their entitlement to immunity based on the participating provider having given notice. The case cited at *Gugelman v.*

Florida Birth-Related Neurological Injury Compensation Ass'n, 815 So.2d 764, 767 (Fla. 4th DCA 2002) s*pecifically states i*f a healthcare provider wants protection under the NICA plan, it must claim that it is a participant. *Gugelman* stands for the principal that if notice is provided, immunity is given under the NICA plan. *Id.* However, *Gugelman* is distinguishable from GLENN'S case because it was a treating physician who failed to provide notice, not the Hospital. *Id.* at 764 -767. The court reasoned that the hospital was covered under the NICA plan in *Gugelman* because it gave notice; however, the treating physician was not covered under the plan because he did not provide notice. *Id. Guglelman* fell under the same 1997 version of §766.316 Florida Statutes that applies in GLENN'S case because of the date the incident occurred. Thus, *Gugelman,* supports the position, if you do not give notice, you do not receive immunity under the NICA plan. In GLENN'S case, the physician gave notice, the hospital (Bayfront) did not, the hospital <u>does not</u> get immunity. The persons from All Children's who were present at the birth of GLENN were present at the request of Bayfront and acting as their agents. Therefore, assuming All Children's can claim NICA immunity such claim would rise or fall based upon the validity of the hospital's notice <u>only</u>. In this case, it is stipulated that Bayfront did not provide notice, therefore All Children's argument must fail.

Nurse Couch was an agent of All Children's that was provided to Bayfront under a contractual agreement performing a nondelegable duty under agency principals with Bayfront. (R. Attachment 1) (Appendix B, Couch's Deposition, p. 7) The fact that Couch was a contracted agent is evidenced by several factors including Bayfront's consultant report for COURTNEY LYNN GLENN signed by Couch, as well as the Bayfront's Special Care Nursery Admission Orders signed by Couch. (R. Attachment 1) (Appendix C) (Appendix D) Moreover, Couch has her own office at Bayfront and only spends two to three weeks at All Children's every 12-18 months to keep her skills up in a Level 3 nursery. (R. Attachment 1) (Appendix B, p. 18-19) The fact that Couch is a contracted agent of Bayfront is further exemplified by the fact neonatologists and doctors at Bayfront oversee Couch while she works at Bayfront. (R. Attachment 1) (Appendix B, 12) Nurse Couch also oversaw the Bayfront nurses in the nursery and also gave them direct orders as to COURTNEY LYNN's care. (R. Attachment 1) (Appendix B, p.18) All of the aforementioned facts confirm that Couch is a contracted agent of Bayfront. (R. 223) (See *also*, Appendix A-D)

The general rule is that a hospital is not liable for the negligent acts of a physician who is not its employee, but an independent contractor. Shands v. Juliana, 863 So.2d 343, 346 (Fla. 1st DCA 2003). However, "even where a physician is an

independent contractor, a hospital that "undertakes by [express or implied] contract to do for another a given thing is not allowed to "escape [its] contractual liability [to the patient] by delegating performance under a contract to an independent contractor." *See also Pope v. Winter Park Healthcare* Group, 939 So.2d 185(Fla. 5th DCA 2006).

GLENN'S case is also distinguishable because the injuries claimed against All Children's did not occur during "labor, delivery or immediate post resuscitative efforts." NICA is inapplicable to the facts alleged and GLENN should have the opportunity to pursue her course of action chosen, which is to go back to circuit court to pursue her civil remedies.

Therefore, regardless of this court's holding as it pertains to the certified question, judicial economy would best be served by remanding this case back to circuit court. [5]

CONCLUSION

GLENN disagrees with NICA and All Children's, claim that they are entitled to invoke the Florida Birth-Related Neurological Injury Compensation Plan's exclusivity benefits

[5] *See* (R. 238) (Appendix A, p. 18) "Presumably, a finding that Courtney qualified for coverage under the Plan would be of the benefit to All Children's Hospital in the pending civil suit since it would resolve that Courtney suffered profound injury during labor, delivery, or resuscitation in the immediate post – delivery period, in contrast to Plaintiffs' allegations in the civil suit that the profound injury occurred following resuscitation. However, to the extent Petitioners can demonstrate in a civil suit that All Children's employees, following resuscitation, were negligent in the care of Courtney, which aggravated her condition, it doubtful that the Plan would foreclose the pursuit of such a suit. That issue is, however, a matter for the trial court to resolve and not the administrative law judge."

under § 766.303(2), *Fla. Stat.*, because Bayfront Medical Center failed to provide notice to GLENN, as required by § 766.316, *Fla. Stat.*, and, therefore, waived the Plan's exclusive benefits for the health care providers involved. The Second District's interpretation of §733.316 Florida Statutes does not support the plain meaning of the statute and violates the strict construction that should be utilized when interpreting the statute. The statute is clear and unambiguous and as such requires that each entity provide notice.

Therefore, Respondent, GLENN, respectfully requests this Honorable Court remand GLENN'S case to the 6th Circuit Court so that they may pursue their civil remedies against All Children's.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in compliance with the Rule 9.210, *Fla. R. App. P.* (2009), and is in the required font of Courier New 12-point.

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