IN THE SUPREME COURT OF THE STATE OF FLORIDA

MIKE KOCHER, et al.,

Petitioners,

vs.

Case No. SC08-1319
Lower Case No. 2D03-5156

BAYFRONT MEDICAL CENTER, INC.

Respondent.

_____/

On Requested Discretionary Review of a Decision
from the Florida Second District Court of Appeal

RESPONDENT BAYFRONT MEDICAL CENTER, INC.'s ANSWER BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

As used herein Petitioners MIKE KOCHER and LYNN KOCHER are referred to as "THE KOCHERS." Their "Brief on Jurisdiction" dated July 28, 2008, will referred to as the "Brief." The FLORIDA BIRTH-RELATED NEUOLOGICAL INJURY COMPENSATION ASSOCIATION is referred to as "NICA." Respondent BAYFRONT MEDICAL CENTER, INC. is referred to as "BAYFRONT." The decision of the Second District Court of Appeal that THE KOCHERS wish this Court to review, Bayfront Medical Center, Inc. v. Florida Birth-Related Neurological Injury Compensation Association, et al, 982 So. 2d 704 (Fla. 2nd DCA 2008), shall be referred to as "Bayfront III."

STATEMENT OF THE CASE AND FACTS

The pertinent procedural history and underlying facts are set forth in Bayfront Medical Center, Inc. v. Division of Administrative Hearings, 841 So. 2d 626 (Fla. 2nd DCA 2003)("Bayfront I"), Bayfront Medical Center, Inc. v. Florida Birth-Related Neurological Injury Compensation Association, 893 So. 2d 636 (Fla. 2nd DCA 2005)("Bayfront II") and, of course, Bayfront III.

In Bayfront III, the Second District Court of Appeal finally answered the substantive question that had been pending since Bayfront I, to wit, does an obstetrician's pre-delivery notice of his participation in the NICA Plan alone, without further, redundant notice from the hospital, satisfy the legislative intent of § 766.316, Fla. Stat. In Bayfront III, the Second District Court of Appeal answered this question with an emphatic and reasoned "yes," and reversed the prior Order of the Administrative Law Judge that had held to the contrary.

In Bayfront III, the Second District Court of Appeal certified the following question as one of great public importance:

> 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?

Notably, the Second District Court of Appeal in Bayfront III, did not certify conflict with Board of Regents v. Athey, 694 So. 2d 46 (Fla. 1st DCA 1997). Instead, the Athey decision was distinguished on its facts. Bayfront III, 982 So. 2d at 709.

SUMMARY OF ARGUMENT

The Second District Court of Appeal's decision in Bayfront III does not certify conflict "with decisions of **every other** Florida District Court of Appeals on the same point of law" because it quite simply does not conflict "with decisions from **every other** Florida District Court of Appeals on the same point of law."

While Bayfront III admittedly contains a question certified to be of great public importance, it is not one where the answer will have broad impact or applicability. In fact, as fact-specific as NICA notice cases tend to be and because of changes in the subject statute, it will have little effect beyond this life of this case. Nor does Bayfront III, as THE KOCHERS claim, improperly deprive them of their "constitutional right to pursue their medical malpractice action in court against Bayfront" or "expand[] the scope of the exclusivity and immunity provided by NICA." To the contrary, Bayfront III is in complete accord with the constitutional considerations described by this Court in Galen, supra.

ARGUMENT

THE KOCHERS begin their "Legal Argument" with an accurate recitation of the very limited types of decisions of a District Court of Appeal this Court may review. From there, however, they go astray.

THE KOCHERS begin their argument in support of this Court's jurisdiction by claiming that Bayfront III "conflicts with decisions of **every other** Florida District Court of Appeals on the same point of law." (Brief at page 8-9). In doing so, THE KOCHERS appear to be attempting to invoke this Court's jurisdiction under Article V, Section 3(b)(3), of the Florida Constitution. To that end, The KOCHERS point to Athey, supra, University of Miami v. Ruiz, 916 So. 2d 865 (Fla. 3rd DCA 2005), Northwest Medical Center, Inc. v. Ortiz, 920 So. 2d 781 (Fla. 4th DCA 2006) and Weeks v. Florida Birth-Related Neurological, 977 So. 2d 616 (Fla. 5th DCA 2008), rev. denied, 2008 WL 2522435 (Fla., June 23, 2008) as cases in supposed conflict with Bayfront III. A closer look at the factual and legal underpinnings each of these cited cases, however, demonstrates the error THE KOCHERS' first jurisdictional argument.

In each of the cited decisions, the issue presented was not (as it is here) whether a physician's timely and proper pre-delivery notice of his or her participation in the NICA Plan was sufficient to satisfy the requirements of § 766.316 without redundant notice by the hospital. Rather, the issue in all of the cited decisions was whether the physician's failure to provide any notice at all could be excused. In fact, in Athey and in Ortiz, neither the

physician nor the hospital provided notice.[1] In Ruiz and Weeks, the hospital did give notice, but the physicians did not. In all of these cases, the absence of notice by the physician of his or her participation in the NICA Plan was deemed to be controlling.[2] These significant factual and legal differences quite simply undermine THE KOCHERS' claim that this Court can and should exercise its jurisdiction under Article V, Section 3(b)(3), of the Florida Constitution. See Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962)("We have said that conflict must be such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter. . . . If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise.")(citations omitted).

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[1] As acknowledged by THE KOCHERS, the Athey court specifically identified the circumstances under which a hospital such as BAYFRONT is required to provide NICA notice. (Brief at 9)("The First District Court of Appeals in Athey stated 'if a hospital has a participating physician on its staff, to avail itself of NICA exclusivity the hospital is required to give pre-delivery notice to its obstetrical patients."). This holding not only does not conflict with Bayfront III, it is absolutely consistent with Bayfront III. 982 So. 2d at 708 ("Hospitals with participating physicians on staff are simply required to provide obstetrical patients with the NICA-prepared 'Peace of Mind' brochure.").

[2] This fact was also key to the Second District Court of Appeals' decision in Florida Health Sciences Center, Inc. v. Division of Administrative Hearings, 974 So. 2d 1096 (Fla. 2nd 2007), rev. denied, 2008 WL 2262438 (Fla., May 23, 2008).

THE KOCHERS' next claim that "the Second District Court of Appeals candidly admitted a conflict with the decision reached by the First District in Athey," (Brief at 11), appears to be an attempt to invoke this Court's jurisdiction under Article V, Section 3(b)(4), of the Florida Constitution. But it misstates the Second District Court of Appeals' decision. If anything, the Second District Court of Appeal "candidly admitted" (and, as stated above, correctly so) the significant factual differences between the instant case and those in Athey:

> Finally, we acknowledge that the language of Athey, 694 So. 2d 46, quoted by the ALJ suggests that our conclusion is in conflict with that First District opinion. However, we note that the issue in Athey was whether the facts supported the waiver of predelivery notice. Because the sufficiency of Mrs. Kocher's physician's predelivery notice of participation was not at issue here, the Athey language included in the ALJ's order was dicta.

Bayfront III, 982 So. 2d at 709.[3] "Candidly admitting" factual differences between two cases is hardly the kind of statement that Article V, Section 3(b)4 envisions. See State v. Vickery, 961 So. 2d 309, 311 (Fla. 2007)("We thus hold that district court decisions that simply acknowledge, discuss, cite, **suggest**, or in any other way recognize conflict do not provide a proper basis

[3] The correctness of the Second District's characterization of the ALJ reference to Athey as "dicta" is apparent from the ALJ's reference itself. See Bayfront III, 982 So. 2d at 707, fn 6. In fact, as the Second District Court of Appeal noted, the ALJ added his own parenthetical language to the actual language from the Athey decision to justify his erroneous conclusion.

for a party to seek this Court's review under our 'certified conflict' jurisdiction.")(emphasis added). Thus, THE KOCHERS' second argument in favor of this Court's jurisdiction falls short, too.

THE KOCHERS' final attempt to convince this Court to accept jurisdiction next focuses on the above-quoted certified question, and the argument that Bayfront III has constitutional implications in this case and beyond. The reality, however, is that Bayfront III is in complete accord with the oft-mentioned concerns of the Legislature when, in enacting the NICA Plan, timely notice of a provider's participation in NICA within a reasonable time before delivery was deemed essential to shield the Plan from constitutional challenge. See Galen, 696 So. 2d at 310. It is also in complete accord with logic and fundamental rules of statutory interpretation.

In this case, Mrs. Kocher's physician was the only "provider" who could elect to "participate" in the NICA Plan and, therefore, the only "provider" who needed to supply Mrs. Kocher with information sufficient for her to make choice between using a "provider" who participated and one who did not. In this case, Mrs. Kocher's physicians did provide her with NICA notice (the statutorily-mandated NICA brochure and an explanation that the physicians in the practice were NICA participants) within a reasonable time before delivery. In this case, Mrs. Kocher did have an

opportunity to change physicians and protect THE KOCHERS' constitutional right to pursue their common law remedies against anyone and everyone involved in the delivery process.[4] As the Second District Court of Appeal held, nothing more (i.e. the meaningless provision of a second copy of the same brochure) was required.

As is apparent from the "conflict" cases cited by the KOCHERS, the factual scenario present in this case whereby the participating physician provides NICA notice but a hospital does not, is the exception rather than the rule. As is further apparent by the very nature of this protracted appeal, a hospital like BAYFRONT would do well to provide NICA notice early and often to all obstetrical patient regardless of whether the delivering physician is employed by the hospital or not. Furthermore, a hospital would be well-advised to obtain written confirmation that they have done so. Indeed, the 1998 amendments to § 766.316, Fla. Stat., provide the following incentive for them to do so:

> [NICA] notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of

[4] THE KOCHERS have never challenged the fact that, by accepting continuing care after timely and sufficient NICA notice was provided, their claimed constitutional right to pursue their common law remedies against the delivering physician was waived. In fact, the delivering physician was never named in the underlying litigation, was never made part of the administrative proceeding, and has never participated in any of the appellate proceedings.

> a patient's rights and limitations under the plan. The hospital **or** the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met.

(emphasis added).[5] The case law provides a further incentive. See Gugelmin v. Division of Administrative Hearings,, 815 So. 2d 764 (Fla. 4th DCA 2002). If nothing else, the extensive case law from this Court and the various District Court of Appeals has sent the loud and clear message that NICA notice is not something to be taken lightly and, by establishing bright-line rules and by giving meaning to every word in the subject statute, has limited the conceivable scenarios under which the sufficiency of the notice provided will be litigated. The point is that while THE KOCHERS may reasonably feel that the certified question is of great importance to them, it is not one for which the answer will have "an impact that extends well beyond the particular litigants herein."

[5] Section 7, Chapter 98-113, Laws of Florida, provided that the "[a]mendments to section 766.316, Florida Statutes, shall take effect on July 1, 1998, and shall apply only to causes of action accruing on of after that date."

CONCLUSION

For all of the foregoing reasons, and consistent with this Court's recent decisions to decline to exercise jurisdiction to review NICA notice cases from the District Court of Appeals, See Florida Health Sciences Center, and Weeks, supra, BAYFRONT respectfully requests that this Court decline the invitation to review Bayfront III.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the following on this ____ day of August, 2008:

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CERTIFICATE OF TYPE SIZE AND FONT

I HEREBY certify that the BAYFRONT's Answer Brief on Jurisdiction has been printed in 14 point Times New Roman font.

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