Case No. SC08-1319
Lower Tribunal No.: 2D03-5156
Florida Bar No. 0628220
On Requested Discretionary Review from the
District Court of Appeal of Florida, Second District

In the
SUPREME COURT OF THE STATE OF FLORIDA

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION; and MIKE KOCHER and LYNN KOCHER, as Parents and natural guardians of CHRISTOPHER KOCHER, a minor,

Petitioners

vs.

BAYFRONT MEDICAL CENTER, INC.

Respondent

PETITIONERS', MIKE AND LYNN KOCHER'S, BRIEF ON JURISDICTION

The Ferraro Law Firm
Dino G. Galardi, Esquire
4000 Ponce De Leon Boulevard
Suite 700
Miami, Florida 33146
(305) 375-0111
(305) 379-6222 (fax)

Dated: July 28, 2008

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	**3**
INTRODUCTION	**4**
STATEMENT OF THE CASE AND OF THE FACTS	**4-7**
SUMMARY OF ARGUMENT:	**8**
THE DISTRICT COURT OF APPEAL'S DECISION CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURT OF APPEALS OR OF THIS COURT.	
THE DISTRICT COURT OF APPEALS CERTIFIED THE DECISIVE QUESTION RELATIVE TO ITS HOLDING AS BEING ONE OF GREAT PUBLIC IMPORTANCE.	
LEGAL ARGUMENT	**8-12**
CONCLUSION	**12**
CERTIFICATE OF SERVICE	**13**
CERTIFICATE OF TYPE SIZE AND FONT	**14**

TABLE OF AUTHORITIES

Cases	Page
Bayfront Medical Center, Inc. v. Div. of Admin. Hearings 841 Sp. 2d 626 (Fla. 2d DCA 2003)	6
Bayfront Medical Center, Inc. v. Florida Birth-Related Neurological Injury Compensation Ass'n. 893 So. 2d 636 (Fla. 2005)	6
Board of Regents v. Athey 694 So. 2d 46 (Fla. 1st DCA 1997)	7, 9 10, 11
Kyle v. Kyle 139 So. 2d 885 (Fla. 1962)	8
NICA v. Bayfront 955 So. 2d 531 (Fla. 2007)	6
NICA v. DOAH 948 So. 2d at 716-717	6
Northwest Medical Center, Inc. v. Oritz 920 So. 2d 781 (Fla. 4th DCA 2006)	9, 10
University of Miami v. Ruiz 916 So. 2d 865 (Fla. 3rd DCA 2005)	9, 10
Weeks v. Fla. Birth-Related Neurological 2008 WL 268704 (Fla. 5rh DCA 2008)	9, 10

STATUES, RULES

Case No. 99-1081-CI-11	5
V. section 3(b)(3)	8
Rule 9.030(a)(2)(A)(iv, v, vi)	8
Section 766.316 Florida Statues	6, 9, 11
694 So. 2d at 49	9
916 So. 2d at 869	10

INTRODUCTION

The Petitioners, Mike and Lynn Kocher, as parents and natural guardians of Christopher Kocher, a minor, were Appellees in the District Court of Appeal, Second District, along with the Florida Birth-Related Neurological Injury Compensation Association. Bayfront Medical Center, Inc. was the Appellant. The parties herein shall be referred to as “Kochers”; “NICA”; and, “Bayfront”.

STATEMENT OF THE CASE AND OF THE FACTS

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

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

It is also undisputed that Bayfront, the hospital at which the labor and delivery took place, did not provide Kocher with proper notice that it was a participating NICA healthcare provider before her delivery.

On February 12, 1999, the Kochers filed a medical malpractice action solely against Bayfront in the Sixth Judicial Court for Pinellas County, Florida, bearing

Case No. 99-1084-CI-11, due to Bayfront's failure to provide the required NICA notice.

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

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

The Administrative Law Judge ("ALJ") determined that the injuries incurred by the infant, Christopher, during delivery were compensable under NICA; that the delivering physician was a NICA participant, and that he provided proper notice to the Kochers of his participation in NICA.

However, the ALJ further determined that Bayfront failed to provide the Kochers with the requisite notice of its participation in NICA. Consequently, the ALJ determined that the immunity provisions of NICA did not apply to Bayfront

and the Kochers had the option of either accepting benefits pursuant to NICA, or pursuing their medical malpractice claim against Bayfront.

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

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

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

On January 16, 2008, the Second District Court of Appeals, on remand, entered the decision at issue herein, which was rendered final by the denial of the Kocher's and NICA"s motions for clarification and rehearing, on June 3, 2008.

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

Recognizing and acknowledging that their conclusion is in conflict with the First District Court of Appeals' decision in Board of Regents v. Athey, 694 So. 2d 46 (Fla. 1st DCA 1997), the Second District Court of Appeals certified, as one of great public importance, the question of whether a delivering physician's provision of his participation in NICA satisfies the statutory notice requirements of NICA if the delivering hospital fails to provide notice of any kind.

SUMMARY OF ARGUMENT

THE DISTRICT COURT OF APPEAL'S DECISION CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURT OF APPEALS OR OF THIS COURT

THE DISTRICT COURT OF APPEALS CERTIFIED THE DECISIVE QUESTION RELATIVE TO ITS HOLDING AS BEING ONE OF GREAT PUBLIC IMPORTANCE.

LEGAL ARGUMENT

Pursuant to the pertinent provisions of article V, section 3(b)(3) of the Florida Constitution, this Court has subject matter jurisdiction over a decision of a District Court of Appeal that conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law; that passes upon a question certified to be of great public importance; or that is certified to be in direct conflict with other district courts of appeal. See also, Florida Rules of Appellate Procedure, Rule 9.030(a)(2)(A)(iv, v, vi).

The test of this Court's jurisdiction is to determine whether the court of appeal has announced a decision on a point of law which, if permitted to stand, would be out of harmony with a prior decision of this Court or another court of appeal on the same point, thereby generating confusion and instability among the precedents. Kyle v. Kyle, 139 So. 2d 885 (Fla. 1962)

The Kochers respectfully submit that the instant decision of the Second District Court of Appeals herein conflicts with decisions of **every other** Florida

District Court of Appeals on the same point of law. See, Board of Regents v. Athey, supra.; University of Miami v. Ruiz, 916 So 2d 865 (Fla. 3rd DCA 2005); Northwest Medical Center, Inc. v. Ortiz, 920 So. 2d 781 (Fla. 4th DCA 2006); and Weeks v. Fla. Birth-Related Neurological, 2008 WL 268704(Fla. 5th DCA 2008).

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

Section 766.316 provides in pertinent part that:

"Each hospital with a participating physician on its staff **and** each participating physician…shall provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injuries…" (Emphasis added.)

The First District Court of Appeals in Athey stated "if a hospital has a participating physician on its staff, to avail itself of NICA exclusivity the hospital is required to give pre-delivery notice to its obstetrical patients. In addition…a participating physician is required to give notice to the obstetrical patients to whom the physician provides services. Under section 766.316, therefore, notice on behalf of the hospital will not by itself satisfy the notice requirement imposed on the participating physician(s) involved in the delivery." 694 So. 2d at 49.

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

In Ruiz, supra., the Third District Court of Appeals determined that the ALJ correctly found, in the underlying NICA proceedings, that a hospital's notice was inadequate to satisfy the physician's independent obligation to provide notice. 916 So. 2d at 869.

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

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

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

Accordingly, the instant decision of the Second District Court of Appeals that the provision by the delivering physician of the statutorily required notice of

his participation in NICA to the Kochers had satisfied the independently required notice from the hospital (which undisputedly did not provide such notice of its participation in NICA.) so as to preclude the Kochers from pursuing their medical malpractice action against Bayfront clearly conflicts with the above-referenced decisions.

The Second District's interpretation of section 766.316, Florida Statutes deprives the Kochers of their constitutional right to pursue their medical malpractice action in court against Bayfront by limiting them to the exclusive remedy of NICA after Bayfront undisputedly failed to provide the statutorily required notice of its participation in NICA.

As referenced above, the Second District Court of Appeals candidly admitted a conflict with the decision reached by the First District in Athey, as well as certifying, as one of great public importance, the decisive question relative to its decision herein, to wit: does the provision of pre-delivery notice of his participation in NICA by the delivering physician satisfy the notice requirements of all participating healthcare providers pursuant to section 766.316, Florida Statutes, if the delivering hospital fails to provide notice of any kind?

The Second District's instant decision is one of exceptional importance because, by improperly narrowing the instances in which hospitals must provide notice of their participation in NICA; and by improperly expanding the scope of

the exclusivity and immunity provided by NICA, this decision has impinged upon and significantly curtailed a constitutional right previously guaranteed to every parent yet to deliver a child at a Florida hospital.

This decision will also impact many other cases as a judicial precedent; it will significantly affect the remedies of other existing victims of medical malpractice, as well as the accountability of healthcare providers in the State of Florida; and, as it presently stands, has an impact that extends well beyond the particular litigants herein.

CONCLUSION

The decision herein of the Second District Court of Appeals clearly conflicts with decisions of other district courts of appeal on the same question of law.

Furthermore, the Second District Court of Appeals, itself, noted a conflict with the decision of at least one other district court decision and has also certified the crucial question as it pertains to its decision herein as "one of great public importance".

Accordingly, the Kochers respectfully request that this Honorable Court assume jurisdiction to consider this case and resolve the obvious conflict created as a result of the instant decision herein.

Respectfully submitted,

By: /s/ *Dino G. Galardi, Esq.*

Dino G. Galardi, Esq.
Florida Bar No.: 0628220
Attorney for Petitioner
4000 Ponce De Leon Boulevard
Miami, Florida 33146
Telephone: (305) 375-0111
Facsimile: (305) 379-6222

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 28th day of July, 2008:

Wilbur E. Brewton, Esquire
Roetzel & Andress, LPA
225 South Adams Street, Suite 250
Tallahassee, Florida 32301

David S. Nelson, Esquire
Barr, Murman, Tonelli, Slother & Sleet, P.A.
201 East Kennedy Boulevard, Suite 1700
Tampa, Florida 33602

By: */s/ Dino G. Galardi, Esq.*

DINO G. GALARDI
Florida Bar No.: 0628220

CERTIFICATE OF TYPE SIZE AND FONT

I HEREBY certify that the Petitioner's Brief on Jurisdictional has been printed in 14 point Times New Roman.

By: */s/ Dino G. Galardi, Esq.*________
Dino G. Galardi
Florida Bar No.: 0628220