In the
SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC08-1317
Lower Tribunal No(s): 2D02-1638

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.

APPELLANTS', MIKE AND LYNN KOCHER'S, REPLY BRIEF

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SUMMARY OF APPELLANT'S SUPPLEMENTAL ARGUMENT

Bayfront Hospital ("Bayfront") and the Florida Birth-Related Neurological Injury Compensation Association ("NICA") essentially argue in their respective briefs that the delivering physician's[1] pre-delivery notice to Kocher of his participation in the NICA Plan ("Plan") satisfied the notice requirements of Section 766.316, Florida Statutes, as it pertains to Bayfront, the hospital where the delivery and injury took place; such that Bayfront was not required to provide separate notice of its participation in the Plan in order to invoke the immunity afforded by thereunder.

APPELLANT'S ARGUMENT IN RESPONSE AND REBUTTAL TO ARGUMENT PRESENTED BY APPELLEE IN IT'S SUPPLEMENTAL BRIEF

By selectively doling out facts, Bayfront manages to suggest more substance to its argument than actually exists. However, if one examines the actual wording of the statute in question, in addition to the precedent of case law existing on the issue, Bayfront's specious argument becomes dubious at best.

Section 766.316, Florida Statutes provides, in pertinent part, that:

[1] The delivering physician was undisputedly not employed by Bayfront Hospital.

> "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 the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injuries…" (Emphasis added.)

This language could not be clearer. The arguments of Bayfront and NICA, as well as the Second District's decision herein under review, ignore the mandatory language of the Statute that requires **both** the hospital **and** each participating physician to provide notice to the obstetrical patient of their respective participation in the Plan as a condition precedent to their invoking NICA immunity, respectively.

Florida law is well established that when statutory language is clear, courts have "no occasion to resort to rules of construction-they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power." Daniels v. Florida Department of Health, 898 Sop. 2d 61 (Fla. 2005) (quoting Nicoll v. Baker, 668 So. 2d 989, 990-91(Fla. 1996).

As established by this Honorable Court in Galen of Florida, Inc. v. Braniff, 696 So.2d 308 (Fla. 1997) the purpose of the notice is to give an obstetrical patient an opportunity to make an informed choice between using health care providers participating in the NICA Plan or using providers who are not participants and

thereby preserving their civil remedies. Contrary to Bayfront and NICA's specious arguments, these healthcare providers include not just the delivering physician, but the delivering hospital as well.

The clear and unambiguous language of the statute mandates that **both the hospital and physician** must give notice, not to create a duplicative back-up, but because the hospital is a **separate and distinct entity** with, *inter-alia*, its own independent liability and its own set of employees. There is no reasonable alternative interpretation consistent with the patient's right to be notified of its physician's **and its hospital's** participation in, and consequent immunity under, the Plan.

It is understandable that Bayfront is arguing that the pre-delivery notice provided to Mrs. Kocher by the delivering physician of his participation in the Plan should suffice for Bayfront's statutory notice obligation, however, one cannot ignore the plain language of the statute in question, which requires **both** the physician and the hospital to give separate and independent pre-delivery notice to its obstetrical patients of their respective participation in the Plan before that healthcare provider may be afforded any immunity thereunder.

It is undisputed that Bayfront did not provide any notice whatsoever to the Kochers of its participation in the Plan, nor of its potential immunity thereunder, before her delivery.

Consequently, should this Honorable Court ultimately reaffirm Bayfront's statutory obligation to give separate and independent pre-delivery notice of its participation in the Plan, consistent with the plain language of the statute in question, as well as every other decision of Florida appellate courts on this issue, Bayfront would not be entitled to any immunity from the stayed medical malpractice action filed against it by the Kochers.

Except for the erroneous decision of the Second District Court of Appeal below, neither Bayfront nor NICA are able to cite in support of their dubious rationale any precedent holding that pre-delivery notice by either the hospital or the delivering physician of either's respective participation in the Plan satisfies the other's required separate and independent notice thereof.

In every other decision involving this limited issue, before a hospital or a delivering physician may avail itself of the Plan's immunity, respectively, they are required to provide separate and independent pre-delivery notice to their obstetrical patients. See, Board of Regents v. Athey, 694 So. 2d 46 (Fla. 1st DCA 1997); decision approved 699 So. 2d 1350 (Fla. 1997); University of Miami v. Ruiz, 916 So. 2d 865, (Fla. 3d DCA 2005), review dismissed, 948 So. 2d 723 (Fla. 2007); Gugelmin v. Department of Administrative Hearings, 815 So 2d 764 (Fla.4th DCA 2002); and Schur v. Florida Birth-Related Neurological, 832 So 2d 188(Fla. 1st DCA 2002).

The Court in Athey, supra, established a "bright-line" rule requiring pre-delivery notice from **each health care provider** in order to preserve [its] NICA Plan immunity. "Under section 766.316, therefore, notice on behalf of the hospital **will not by itself satisfy the notice requirement** imposed on the participating physicians(s) involved in the delivery." 694 So. 2d 46, at 49. (Emphasis added.)

While Athey dealt with circumstances in which the hospital gave notice of the Plan but the delivering physician did not, **the requirement of separate and independent notice by each** was clearly established. The Court in Athey specifically rejected the notion that a healthcare provider under the Plan can ignore its independent notice requirement and then assert the Plan's exclusivity to defeat a civil action by attempting to piggy-back on the notice provided by another healthcare provider.

Similarly, in University of Miami v. Ruiz, supra, where an obstetrical patient acknowledged receiving a Florida Birth-Related Neurological Injury Compensation Plan brochure from the hospital, but did not receive any separate and independent notice from the delivering physician, the Third District held that the hospital's notice was "**inadequate to satisfy the …physicians' independent obligation to provide notice.**" 916 So. 2d 865, at 869. (Emphasis added.)

Again, the inaccurate notion that notice provided by one healthcare provider of its respective participation under the Plan would suffice as to another's, so as to

provide immunity from civil liability to the healthcare provider who did not provide notice, was specifically rejected.

Additionally, in Schur, supra, the court determined that a delivering physician, who was not employed by a separate healthcare provider who did provide notice of its participation in the Plan to an obstetrical patient, **was required to give "separate" notice of her participation in the Plan** and that because she failed to do so, this delivering physician was not entitled to immunity under the Plan. 832 So. 2d 188, at 192. (Emphasis added.)

Thus, the provision by one participating healthcare provider of pre-delivery notice of its participation under the Plan to its obstetrical patient, once again, was specifically held **not to satisfy the separate and independent** notice requirement of another's.

Lastly, in Gugelmin, supra, despite the failure of the delivering physician to give notice of his participation in the Plan, the court held that the delivering hospital was entitled to immunity under the Plan because of its participation in the Plan and because of its timely and independent notice to the obstetrical patient. 815 So. 2d 764, at 768.

These conclusions reached by the various district courts of appeal cited above throughout Florida, most of which were approved by this Court, regarding the independent obligation of both the physician and the hospital to provide

separate notice of their respective participation in NICA cannot logically be any different in instances where the physician gives its patient the statutorily required notice of its participation in the Plan but the hospital does not.

As unambiguously stated by this Court in Galen, supra:

"[T]he only logical reading of the statue is that before an obstetrical patient's remedy is limited by the NICA Plan, the patient must be given pre-delivery notice of the health care **provider's** participation in the plan..." (Emphasis added.)

Consistent with the plain wording of the statute, by stating the mandate in the singular possessive and not in the plural possessive, this Court has already established that each health care provider must give separate and independent notice of its own participation in the Plan to be entitled to assert any immunity from civil liability thereunder.

Accordingly, as the statute clearly and unambiguously requires **both** the hospital **and** the delivering physician to provide its obstetrical patients with pre-delivery notice of their separate and independent participation in NICA, the plain language of the statute controls and notice by one healthcare provider, in this case the delivering physician, of their own individual participation cannot properly serve as notice of the other's participation so as to eliminate the patient's common law right to sue for malpractice and/or negligence against the healthcare provider

who failed to provide such statutorily required notice, in this case the delivering hospital.

CONCLUSION

The instant decision of the Second District Court of Appeals, as well as the arguments of Bayfront and NICA, that the provision by the delivering physician of his statutorily required pre-delivery notice of his participation in NICA to the Kochers satisfied the separate and independent statutorily required notice as to Bayfront Hospital(which undisputedly did not provide any independent notice of its participation in NICA.) so as to preclude the Kochers from pursuing their medical malpractice action against Bayfront clearly is clearly erroneous.

Additionally, the Second District's interpretation, and that of Bayfront and NICA, of Section 766.316, Florida Statutes, violates the clear and plain wording of the statute, in contravention of the "strict construction" mandate of Florida law.

It further deprives the Kochers of their right to pursue their medical malpractice action in civil court against Bayfront by limiting them to the exclusive remedy of NICA after Bayfront undisputedly failed to provide the statutorily required separate and independent notice of its participation in the Plan.

Accordingly, the Kochers respectfully request this Honorable Court to reverse the Second District's decision below; determine that the immunity provisions of the NICA Plan do not apply to Bayfront and allow the Kochers to pursue their medical malpractice claim against Bayfront in civil court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF TYPE SIZE AND FONT

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

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