IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC10-1295

ANGELA SAMPLES and KENNETH RAY SAMPLES, individually and as parents and next friends of MACKENZIE SAMPLES, a minor,

Petitioners,

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONERS' INITIAL BRIEF ON THE MERITS

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PREFACE

Petitioners, Angela Samples and Kenneth Samples ("the Samples"), individually and as parents and natural guardians for MacKenzie Samples, a minor, ask this Court to reverse the decision of the Fifth District Court of Appeal determining that section 766.31(1)(b)1, Florida Statutes, a part of the Florida Birth-Related Neurological Injury Compensation Act ("the NICA Act" or "the Act"), entitles two parents to only a single parental award of $100,000 in the aggregate, and that the statute is constitutional when so construed. Recognizing the potential constitutional violations resulting from its construction of the statute, the District Court certified the following question to this Court as one of great public importance:

> *Does the limitation in section 766.31(1)(b)11.*, [sic] *Florida Statutes, of a single award of $100,000 to both parents violate the Equal Protection Clause of the United States and Florida Constitutions?*

The certified question should be answered affirmatively, and the statute construed in such a manner as to avoid this Equal Protection violation.

The following symbols are used:

R. - Record below

T. - Transcript of August 14, 2009 hearing before Administrative Law Judge

STATEMENT OF THE CASE AND FACTS

MacKenzie Samples was born on August 20, 2007 to Angela and Kenneth Samples. (R. 2) At birth, MacKenzie suffered severe brain damage due to a lack of oxygen during the labor and delivery process. (R. 20, 22) MacKenzie's parents filed a petition with the Division of Administrative Hearings for benefits under Florida's Birth-Related Neurological Injury Compensation Act. (R. 2-4)

After conducting an investigation, the Florida Birth-Related Neurological Injury Compensation Association ("NICA") agreed that MacKenzie's injuries qualified her for the NICA program, and the Samples and NICA filed a Stipulation and Joint Petition for Benefits with the administrative law judge. (R. 37-50) That stipulation provided that as soon as it was approved by the administrative law judge, the Samples would begin receiving NICA benefits, including a single $100,000 lump sum award to both parents under section 766.31(1)(b)1, Florida Statutes. (R. 42) However, the Samples maintain that the parental award should be $100,000 for each parent, and therefore the stipulation allowed the Samples to preserve the issue of the interpretation and constitutionality of section 766.31(1)(b)1, Florida Statutes, to be argued before the administrative law judge at a later hearing. (R. 41-42) The stipulation was approved on June 17, 2009. (R. 57-61)

Prior to the scheduled hearing, the parties filed a second stipulation (R. 71-76), which included the following language:

> **E. Admitted Facts.**
>
> (1) Once NICA ascertains that a claim is covered, NICA frequently offers a lump sum payment of a parental award totaling $100,000, regardless of whether there are one or two parents involved in the claim. Such offer is subject to the subsequent approval of the ALJ.
>
> (2) Pursuant to Section 766.309, Florida Statutes, the ALJ must make all NICA awards, which includes the parental award pursuant to Section 766.31(1)(b)1, Florida Statutes. An ALJ has never ordered NICA to pay a parental award in excess of $100,000, regardless of whether there was one parent or two parents involved in the claim.
>
> (3) In a typical covered claim, NICA does not customarily argue that the parental award should be less than the full $100,000 authorized.
>
> (4) Once the ALJ has ordered payment of a parental award in the amount of $100,000, NICA pays the $100,000 parental award by check made payable to both parents jointly, unless otherwise ordered by the ALJ.
>
> (5) In the past, when there was a dispute between the parents with respect to the amount of the parental award to go to each parent, the ALJ has specified in the Final Order how much of the parental award would be paid to the mother and how much would be paid to the father. In those instances, the combined parental award was typically for the full $100,000.

At the hearing, the Samples argued that the language of section 766.31(1)(b)1 is ambiguous, and that for reasons of equal protection, it must be interpreted to authorize a separate award of up to $100,000 for each parent. (*See, e.g.*, T. 11-13). They also raised the issues of unconstitutional vagueness and a

denial of access to the courts. (T. 10, 16). The administrative law judge declined to rule on the constitutional issues, but allowed evidence and argument to be presented on them. The administrative law judge also took judicial notice of the Final Orders issued in the prior NICA cases of *Wojtowicz v. Florida Birth-Related Neurological Injury Compensation Association*, DOAH Case No. 93-4268N (July 22, 1994) (R. 181-190), and *Waddell v. Florida Birth-Related Neurological Injury Compensation Association*, DOAH Case No. 98-2991N (May 11, 1999).[1] (T. 5-6) After the hearing, the administrative law judge issued an order denying the Samples' claim for additional compensation under section 766.31(1)(b)1, and holding that the statute clearly provides for a single award of up to $100,000 to both parents combined. (T. 196-211)

The Samples appealed the decision to the Fifth District Court of Appeal, which held that section 766.31(1)(b)1, Florida Statutes is not ambiguous, and that it "clearly limits parental compensation to a single award not to exceed $100,000." *Samples v. Florida Birth-Related Neurological Compensation Ass'n*, 40 So. 3d 18, 20 (5th DCA 2010). The Fifth District further held that section 766.31(1)(b)1 is

[1] *Wojtowicz* and *Waddell* are the only two NICA cases the parties are aware of in which the child's parents were unable to agree with one another on how to divide the parental award between themselves. In both cases, the Administrative Law Judge apportioned a single $100,000 award between the two parents, with the child's mother receiving a substantially larger portion than the father. The Administrative Law Judge based his apportionment of the awards at least partly on the notion that the parental award in section 766.31(1)(b)1, Florida Statutes is intended as compensation for the parents' loss of filial consortium.

constitutional, but based on this case's similarity to *St. Mary's Hospital, Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000), the court certified the following question as one of great public importance:

> *Does the limitation in section 766.31(1)(b)11.,* [sic] *Florida Statutes, of a single award of $100,000 to both parents violate the Equal Protection Clause of the United States and Florida Constitutions?*

Samples, 40 So. 3d at 31.

Petitioners timely filed their Notice to Invoke the Discretionary Jurisdiction of this Court. On September 17, 2010, this Court entered its order accepting jurisdiction pursuant to Article V, Section 3(b)(4) of the Florida Constitution.

SUMMARY OF ARGUMENT

Section 766.31(1)(b)1, Florida Statutes must be interpreted to provide for parental compensation of up to $100,000 for each parent or legal guardian involved in making the NICA claim. If the statute is interpreted to limit parental compensation to $100,000 in the aggregate, a sole parent involved in a NICA claim is entitled to receive a larger award than either parent may when there are two parents involved. Distinguishing between parents based solely on the number of claimants does not bear a rational relationship to any legitimate state objective, and violates the Equal Protection Clause of both the United States and the Florida Constitutions.

The NICA Act also fails to provide guidance as to how the Administrative Law Judge is to divide a single $100,000 award between two parents who do not wish to share it. Interpreting section 766.31(1)(b)1 to permit each parent to recover up to $100,000 avoids this unconstitutional vagueness. Finally, since the NICA Act is a statutory substitute for common-law remedies, interpreting section 766.31(1)(b)1 as Petitioners urge lessens its impingement on the constitutional right of access to the courts.

ARGUMENT

THE LIMITATION ON THE PARENTAL AWARD IN SECTION 766.31(1)(b)1, FLORIDA STATUTES, AS CONSTRUED BY THE FIFTH DISTRICT COURT OF APPEAL, VIOLATES THE FEDERAL AND STATE CONSTITUTIONS.

The Florida Birth-Related Neurological Injury Compensation Act was enacted by the Florida Legislature in an attempt to stem rising malpractice insurance premiums for physicians practicing in the area of obstetrics. *See* § 766.301(1)(c) Fla. Stat. (2010). The Act established a fund to provide compensation, on a no-fault basis, to those affected by certain catastrophic birth injuries.

At issue in the instant case is the proper scope of parental recovery provided for in section 766.31(1)(b)1 of the Act, as follows:

> (1) Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge shall make an award providing compensation for the following items relative to such injury:
>
> ****
>
> (b)1. Periodic payments of an award to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury, which award shall not exceed $100,000. However, at the discretion of the administrative law judge, such award may be made in a lump sum.

The Fifth District Court of Appeal concluded that the statute "clearly limits parental compensation to a single award not to exceed $100,000," no matter how many parents or legal guardians are involved in making a claim. *Samples v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 40 So. 3d 18, 20 (5th DCA 2010). Recognizing that this construction of the statute raises a potential constitutional problem, however, the lower court asked this Court to address the following question of great public importance:

> Does the limitation in section 766.31(1)(b)11. [sic], Florida Statutes, of a single award of $100,000 to both parents violate the Equal Protection Clause of the United States and Florida Constitutions?

Id. at 31.

That question should be answered in the affirmative, and the statute construed instead to allow an award of up to $100,000 for each parent. As interpreted by the lower court, the statute violates the Equal Protection Clause, is unconstitutionally vague, and violates parents' constitutional right of access to the courts. The statute is, however, ambiguous enough to be construed as providing for an award of up to $100,000 for each parent, thereby avoiding these constitutional problems.

A. Equal Protection

This Court has repeatedly held that the Equal Protection Clause requires that "all statutory classifications that treat one person or group differently than others

must bear some reasonable relationship to a legitimate state objective." *Abdala v. World Omni Leasing, Inc.*, 582 So. 2d 330, 333 (Fla. 1991). *See also, e.g., Haber v. State*, 396 So. 2d 707, 708 (Fla. 1981).[2] Section 766.31(1)(b)1, as interpreted by the lower court, fails to meet this test.

The Fifth District Court of Appeal concluded that section 766.31(1)(b)1 limits parental recovery to $100,000, whether one parent is making a claim or more than one parent is involved.[3] *Samples*, 40 So. 3d at 20. Under this interpretation,

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[2]In its opinion below, the court applied a different test, holding that the Samples were required to show that: (1) they were treated differently under the law from similarly situated persons, (2) the statute "intentionally discriminates" against them, and (3) there was no rational basis for the discrimination. *Samples*, So. 3d at 23. With due respect to the lower court, the Samples do not believe the second part of this test is an accurate reflection of the law in Florida. A statute cannot logically "intend" to do anything. Further, the case cited by the lower court for this proposition, *Miller v. State*, 971 So. 2d 951, 953 (Fla. 5th DCA 2007), actually misstates a test used in another district court opinion – *McElrath v. Burley*, 707 So. 2d 836, 839 (Fla. 1st DCA 1998). In *McElrath*, an action for declaratory judgment, the court stated that in order to meet her burden, the plaintiff must show "that she was treated under the law differently from similarly situated persons, then that the defendant intentionally discriminated against her, and finally, that there was no rational basis for the discrimination." *Id.* at 839 (emphasis added). Not only is it unclear where the *McElrath* court came up with the second part of this test, but that court itself appears not to have actually considered the question of intentional discrimination in its analysis.

[3]Although Petitioners' argument is framed throughout in the context of parents, similar arguments could be applied in the situation of legal guardians, because section 766.31(1)(b)1 authorizes an award to "the parents or legal guardians." Presumably, there could be one guardian or more than one involved in a child's claim. As a practical matter, in all but the most unusual cases, the number of claimants for this award would be no greater than two.

then, parents seeking an award from the NICA program will be treated differently based on whether the injured baby has one or two parents involved in the claim. If only one parent makes a claim, that parent can (and always does) recover the maximum award of $100,000 (R. 74-75), but if two parents are involved in the claim, each parent can only recover some fraction of that amount.

This issue could arise in multiple scenarios. For example, a child might have only one parent seeking an award because the other parent has died or is simply an absentee parent not involved in the child's life in any way. If a child has two parents involved in a claim, they might be a happily married couple, they might be divorced, or they might never have married. The two parents might both be involved in child care, yet not live together or even speak to each other. Those parents might be willing to divide a single parental award evenly, or they might engage in litigation over how to divide the single-limit cap between themselves.

No matter the scenario, however, the single parent stands to be compensated in an amount at least twice as much as each parent in a two-parent situation. This critical distinction, based solely on the number of claimants, does not bear a rational relationship to any legitimate state objective.

When courts examine a piece of legislation to determine whether a division into classes is rationally related to a legitimate state objective, the courts will generally examine the purpose for which the legislation was passed, not merely

any conceivable purpose the parties or court can imagine. *See, e.g., The Florida Bar v. St. Louis*, 967 So. 2d 108, 121 (Fla. 2007) (classification in Florida Bar rule regulating attorney conduct was rationally related to legitimate state objective of promoting public welfare and trust and confidence in the legal process); *Amerisure Ins. Co. v. State Farm Mut. Ins. Co.*, 897 So. 2d 1287, 1291 (Fla. 2007) (classification in insurance statute was rationally related to legitimate state objective of regulating insurance rates); *St. Mary's Hospital, Inc., v. Phillipe*, 769 So. 2d 961, 971 (Fla. 2000) (classification in medical malpractice arbitration statute bore no rational relationship to stated legislative goal of alleviating the financial crisis in the medical malpractice insurance industry).

Here, the Florida Legislature has stated that the goals of the NICA plan are to stabilize and reduce malpractice insurance premiums for certain healthcare providers and to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries. In the preamble to the NICA chapter, the Legislature explained its intent, as follows:

> (1) The Legislature makes the following findings:
>
> ****
>
> (c) Because obstetric services are essential, it is incumbent upon the Legislature to provide a plan designed to result in the stabilization and reduction of malpractice insurance premiums for providers of such services in Florida.
>
> ****

> (2) It is the intent of the Legislature 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. This plan shall apply only to birth-related neurological injuries.

§§ 766.301(1)(c), 766.301(2), Fla. Stat. (2010).

These goals, then, are the "legitimate state objectives" that are the subject of an equal protection inquiry. Capping the parental award at $100,000 no matter how many parents are making a claim bears no rational relationship to these objectives, but instead conflicts with the goal of providing fair compensation.

In finding to the contrary, the Fifth District Court of Appeal concluded that capping the total parental award at $100,000 for both parents combined is rationally related to the goal of maintaining actuarial soundness for the NICA Plan. *Samples*, 40 So. 3d at 26. This Court should reject this finding, as actuarial soundness is not a "legitimate state objective" for purposes of equal protection analysis. Affirming such an objective would eviscerate equal protection review, because presumably it will always be less expensive, and thus better for a statute's actuarial soundness, to arbitrarily include some people in the reach of a statute and exclude others. *But see Doe v. Moore*, 410 F.3d 1337, 1348 (11th Cir. 2005) ("[s]tate budget concerns and resource allocation are legitimate government interests"); *accord Miller v. State*, 971 So. 2d 951, 955 (Fla. 5th DCA 2007).

Although it may be true that the continued actuarial soundness of the NICA Plan helps achieve the overall legislative goals, that is not enough. After all, any discriminatory classification that saves the NICA Plan money is presumably better for the Plan's continued actuarial soundness. For example, it would undoubtedly be better for the Plan's actuarial soundness if brown-eyed parents making a claim were limited to an award of only $5.00. Surely NICA would agree that such a discriminatory classification would violate the Constitution.

This Court addressed a similarly arbitrary limitation on recovery in *St. Mary's Hospital, Inc.*, 769 So. 2d at 961. There, the relevant statute imposed a cap on non-economic damages in pre-suit arbitration under the Medical Malpractice Act. The statute provided that "non-economic damages shall be limited to a maximum of $250,000 per incident." *Id.* at 964 (emphasis supplied). As in this case, the statute was challenged on the basis that it would be unjust to make multiple claimants share the same cap. *Id.* at 967.

This Court agreed, holding that where there are multiple claimants, such as when medical malpractice results in a death leaving multiple family survivors, the statute must be read to limit the recovery of each beneficiary to $250,000, rather than limiting the total recovery of all beneficiaries combined. *Id.* at 972. Any other construction of the statute, this Court explained, would create significant equal protection concerns. *Id.* at 971. Interpreting the statute in such a manner

that in one case a sole survivor can recover the entire $250,000 while in another case five survivors are left to divide that same amount "offends the fundamental notion of equal justice under the law." *Id.* at 972.

In reaching this conclusion, this Court noted that the legislative intent behind the malpractice arbitration statute was to alleviate the financial crisis in the medical liability insurance industry. *Id.* at 972. Interpreting the statutory cap to apply to all claimants in the aggregate would be inappropriate because "differentiating between a single claimant and multiple claimants bears no rational relationship to the Legislature's stated goal of alleviating the financial crisis in the medical liability insurance industry." *Id.* at 971.

If applying a single cap to multiple claimants bears no rational relationship to reducing malpractice insurance premiums for the arbitration statute at issue in *St. Mary's*, then it bears no rational relationship to that same goal in the NICA scheme. In both situations, awarding one claimant a different amount of money based solely on whether there is another claimant in the picture is a completely arbitrary distinction and bears no reasonable relationship to the stated legislative intent.

Indeed, awarding some parents less money from the NICA fund will not help to stabilize and reduce medical malpractice insurance premiums. In fact, the funds used to run the program do not even come from malpractice insurance

companies. Instead, they come from the initial seed money from the Legislature and annual assessments on hospitals and physicians. *See* § 766.314, Florida Statutes.[4]

Awarding the higher sum for each parent may even result in fewer claimants attempting to avoid the NICA program in order to pursue their common-law medical malpractice remedies.[5] Certainly, treating all parents equitably – and compensating them for a greater portion of their enormous loss – can only further the second part of the legislative goal, which is to provide compensation to families on a no-fault basis for these catastrophic injuries.

The Fifth District Court of Appeal attempted to distinguish this Court's decision in *St. Mary's* because that case dealt with tort liability for non-economic

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[4] Although NICA argued below that the $100,000 aggregate limit is necessary to ensure NICA's actuarial soundness (*see, e.g.*, R. 161), the speciousness of this argument becomes more apparent when one considers that the amount of the parental award has remained unchanged since the NICA statutes were first enacted in 1987. *See* § 766.31(b), Fla. Stat. (1988). Furthermore, in 2002 the NICA program was reported to have accepted a total of 161 claims over the course of its existence, and to have approximately $299 million set aside against those claims, plus another $320 million in additional assets. Saul Spigel, *Virginia and Florida Child Brain Injury Compensation Funds*, Sept. 11, 2003, http://biotech.law.lsu.edu/policy/2003-R-0620.htm. The actuarial soundness of the fund is at best a red herring.

[5] As this Court is surely aware, the casebooks are full of appellate decisions involving parents trying to get out of the NICA program and pursue their common-law remedies. *See, e.g., Florida Birth-Related Neurological Injury Comp. Ass'n v. Florida Div. of Admin. Hearings*, 948 So. 2d 705 (Fla. 2007); *Galen v. Braniff*, 696 So. 2d 308 (Fla. 1997).

damages, while the parental award under the statute at issue here "is primarily intended to compensate parents for the added burdens and costs of providing care for a child with permanent and severe neurological injuries, not as damages to make parents whole for the loss of consortium negligently caused." *Samples*, 40 So. 3d at 25. This interpretation of the purpose of the parental award is incorrect.

Several other provisions of the statute specifically compensate the parents for the added economic burden of caring for a child with this type of injury. Section 766.31, read as a whole, provides for compensation for out-of-pocket expenses for medical care, rehabilitation and training, drugs, equipment, travel, and residential or custodial care related to the injury; it also provides for compensating parents for their loss of income if they opt to provide residential or custodial care in their home. Among other things, NICA pays for handicapped-accessible vehicles and home renovations, and it even recompenses parents for the cost of diapers after a child is past the normal age for toilet training. *Benefit Handbook* at 6-8, 11, http://www.nica.com/parents/CoverageGuidelines_Final.pdf (last visited Nov. 9, 2010).

The parental award is clearly not intended as an extra windfall for costs already covered under other statutory provisions. Indeed, the NICA statutes themselves refer to the parental award as "noneconomic damages":

> Within 60 days after a claim is filed, the association shall estimate the present value of the total cost of the claim,

> including the estimated amount to be paid to the claimant, the claimant's attorney, the attorney's fees of the association incident to the claim, and any other expenses that are reasonably anticipated to be incurred by the association in connection with the adjudication and payment of the claim. For purposes of this estimate, the association should include the maximum benefits for noneconomic damages (emphasis added).

§ 766.314(9)(a), Fla. Stat. (emphasis added).

There is no other element of compensation under the NICA Plan that could be referred to here as "noneconomic damages" except for the parental award. Everything else listed in the Plan is clearly economic damages.

Since the award compensates for parents' lost filial consortium, there is no logical or just reason to reduce the amount that can be recovered by one parent just because there is a second parent who also suffered his or her own loss. Because forcing multiple claimants to share a single cap in this way bears no rational relationship to the legitimate legislative purpose of the NICA Plan, such an interpretation violates equal protection.

The failure of the Administrative Law Judge to award $100,000 each to Mr. and Mrs. Samples, or to conclude he was even permitted to award up to $100,000 each, renders the Act unconstitutional as applied in this case. In order to avoid equal protection concerns, section 766.31(1)(b)1 must be interpreted to authorize an award of up to $100,000 for each parent or guardian individually, without regard to the number of parents or guardians involved in the claim.

B. Unconstitutional Vagueness

In reaching its decision below, the Fifth District Court of Appeal considered numerous constitutional challenges to the statute. While not part of the certified question, this Court has the discretion to consider these other matters as well. *See, e.g., In re Adoption of Baby E.A.W.,* 658 So. 2d 961, 964 (Fla. 1995), *cert. denied*, 516 U.S. 1051 (1996). To fully resolve the issues involved in this case and further clarify the law in this area, Petitioners ask this Court to address their arguments regarding the vagueness of the statute and the lower court's decision denying them access to the courts.

This Court has held that a vague statute is "one that fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement." *Southeastern Fisheries Ass'n v. Department of Natural Res.*, 453 So. 2d 1351, 1353 (Fla. 1984). The statute at issue here, as interpreted by the lower court, gives no guidance to the administrative law judge as to how the amount awarded should be determined or how it is to be divided between competing claimants. Because of this imprecision and lack of guidance, the statute invites arbitrary and discriminatory enforcement, particularly when two parents do not wish to share a single award with each other.

In the past, the administrative law judge has interpreted the parental award at least partly as a substitute for parents' common-law claim for lost filial consortium.

For example, in his final order in *Wojtowicz v. Florida Birth-Related Neurological Injury Compensation Association*, DOAH Case No. 93-4268N (July 22, 1994) (R. 181-190), the judge made the following findings:

> 18. The foregoing provision offers no guidance as to the basis upon which an "award" to the parents is to be premised. Accordingly, it is presumed that the Legislature intended that such award be based on the same factors that support an award at common law….
>
> 19. Pertinent to this case, the parents of a child who has suffered a significant injury resulting in the child's permanent total disability had, at common law, a right to recover indirect economic losses such as income lost by the parent in caring for the child[6] and for the permanent loss of filial consortium suffered as a result of the injury…. In this context, "consortium" has been defined "to include the loss of companionship, society, love, affection, and solace of the injured child, as well as ordinary day-to-day services that the child would have rendered…."
>
> 20. Given that the foregoing factors are the premise upon which the award of $100,000 must rest, so must those factors be balanced, relative to the impact the child's injury has had on the respective interests of the parents, in apportioning the award between the parents.
>
> (emphasis added)

[6] Petitioners note that NICA actually provides separate compensation for "income lost by the parent in caring for the child" under section 766.31(1)(a) and section 766.302, Florida Statutes.

See also, Waddell v. Florida Birth-Related Neurological Injury Comp. Ass'n, DOAH Case No. 98-2991N (May 11, 1999).

The Samples agree that the parental award in section 766.31(1)(b)1 is intended as a constitutionally mandated substitute for parents' common-law tort claims for the lost society and affection of their severely injured child. *See United States v. Dempsey*, 635 So. 2d 961 (Fla. 1994). If they are correct, and the parental award truly is based on noneconomic damages, the vagueness problem is somewhat lessened, because the administrative law judge has at least some basis for deciding how much money, up to the maximum permitted, to award.

For this same reason, as discussed above, the parents' equal protection claims are strengthened by this interpretation. If each parent is to be given a substitute remedy for giving up his or her loss of common-law filial consortium rights, there is no rational basis to reduce any parent's remedy based solely on the fact that there happens to be another parent also making a claim for his or her own consortium damages.

If, however, the parents' recovery is not based on such rights, as the Fifth District Court of Appeal found, then the administrative law judge is left to make an award with no guidance whatsoever. Such an interpretation renders the statute unconstitutionally vague and subject to utterly arbitrary enforcement. Statutes should be construed, where possible, "so as not to conflict with the constitution."

State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994). The lower court failed to do so here, and its decision should be reversed.

C. Access To Courts

The common law provided a parental right of access to court for redress of injuries to a child, and this Court has found that recognition of a parent's right to recover for lost filial consortium when a child is severely and permanently injured is required by the Florida Constitution. *Dempsey*, 635 So. 2d at 962, 965. However, if the circumstances of an infant's injury meet the NICA Act's statutory definition,[7] the child's parents normally have no option but to accept NICA benefits in lieu of any common-law remedy. *See* § 766.304, Fla. Stat. (2010). To further interpret the statute as requiring a division of $100,000 where two parents are involved pushes the Act's barrier to court access to the constitutional breaking point.

This Court has held that a restriction on an established right, such as the right to recover for lost filial consortium, is not permissible without "(1) providing a reasonable alternative remedy or commensurate benefit, or (2) legislative showing of overpowering public necessity for the abolishment of the right and no

[7] The NICA Act generally applies any time an infant over 2,500 grams at birth is permanently and substantially mentally and physically injured by oxygen deprivation or mechanical injury during birth in a hospital. *See* § 766.302(2), Fla. Stat.

alternative method of meeting such public necessity." *Smith v. Department of Ins.*, 507 So. 2d 1080, 1088 (Fla. 1987).

In addressing the first part of this test, the lower court found that the Samples had "limit[ed] their argument on this exception to 'commensurate benefit' and ignored the 'reasonable alternative remedy' portion of the standard." *Samples*, 40 So. 3d at 29. The Samples submit that a "reasonable alternative remedy" and a "commensurate benefit" are not actually two different things that must be disproven separately. Rather, these two concepts are different ways of describing or defining the same thing – that is, some kind of fair substitute for the right being taken away.[8] A parental award capped at $100,000 in the aggregate for two parents is not a fair substitute for the parents' right to recover for the loss of filial consortium.

The Legislature was undoubtedly correct in finding that catastrophic injuries of the type covered by NICA "result in unusually high costs for custodial care and rehabilitation." § 766.301(2), Fla. Stat. (2010). The Legislature also evidently

[8] While *Smith* uses the phrase "reasonable alternative remedy or commensurate benefit," it cites *Kluger v. White*, 281 So. 2d 1 (Fla. 1973) for the law, and *Kluger* only mentions a "reasonable alternative." Similarly, many other cases speak of one or the other, but they do not suggest that they are two separate concepts that may be provided as substitutes for the right of access to the courts. *See, e.g.*, *University of Miami v. Echarte*, 618 So. 2d 189, 194 (Fla. 1993) (discussing "commensurate benefit"), *Martinez v. Scanlan*, 582 So. 2d 1167, 1171 (Fla. 1991) (discussing "reasonable alternative"), *Sasso v. Ram Property Mgmt.*, 452 So. 2d 932, 933 (Fla. 1984) (discussing "reasonable alternative").

recognized the prospect of huge malpractice liability when an infant of normal birth weight suffers permanent, severe neurological injuries from mechanical forces or prolonged oxygen deprivation during birth in a modern hospital setting. *See* § 766.301(1)(b), Fla. Stat. (2010). Given the lifetime care costs resulting from such catastrophic injuries, assured prompt payment of those costs may well be a valuable and commensurate benefit to a person injured at birth, in exchange for giving up a lawsuit that could take years and has an uncertain outcome. At any rate, the Samples are not contesting the constitutionality of the statute's provisions for an injured child.

For parents, however, the desirability of such a trade-off is more doubtful. Because the statute is "no-fault," parents of an injured child lose the emotional satisfaction that comes with a judgment of malpractice or the determination of losses by a jury of one's peers. The trade-off is also less of a commensurate substitute because presumably, in most cases, there is no need for speedy recovery of intangible damages the way there often is for financial help with a child's medical and other care. The intangible losses suffered by the parent of a severely injured child are very personal emotional losses raising economic and social considerations different from those attending economic losses.

As this Court held in *Dempsey*, "it is the policy of this state that familial relationships be protected and that recovery be had for losses occasioned because

of wrongful injuries that adversely affect those relationships." 635 So. 2d at 964. As this Court also expressly recognized, "[t]he loss of a child's companionship and society is one of the primary losses that the parent of a severely injured child must endure." *Id.*

The idea that such a loss is compensable by a mere $100,000 recovery, even if that recovery is on a "no-fault" basis, is highly questionable, and that questionable situation is made worse when a NICA claim involves two parents who must split the $100,000. Although section 766.31(1)(b)1 uses the plural "parents," the common-law right to recover for loss of filial consortium is one that a mother or father may assert individually, not a collective right shared by a child's two parents. *West Volusia Hosp. Auth. v. Jones*, 668 So. 2d 635, 636 (5th DCA 1996) (holding that child's father's individual claim for loss of filial consortium was "separate and distinct" from that of child's mother).

When a single parent is involved, the Act's parental recovery provision functions as a cap. Normally, the entire $100,000 is awarded as a lump sum, with no dispute from NICA (R. 74-75), presumably because it is obvious that the individual loss of any parent with such a severely injured child easily exceeds $100,000.[9] When two parents are involved, however, the most either parent can

[9] By definition, children in the NICA program have suffered a neurological injury leaving them "permanently and substantially mentally and physically impaired." §

receive in an even split is $50,000, a completely untenable amount. Indeed, the award has been split in a far less equitable manner in the past, and any split gives rise to an unnecessary source of strife between parents who are already experiencing great difficulties. *See, e.g.*, *Waddell*, *supra* at 20 (awarding $2,500 to child's father and $97,500 to child's mother); *Wojtowicz*, *supra* at 22 (awarding $5,000 to child's father and $95,000 to child's mother) (R. 181-190).

In the NICA Act's preamble, the Legislature, evidently assuming that certain elements of recovery under the Act were not commensurate with the common-law rights taken away by the Act, stated the following with regard to public necessity:

> Because obstetric services are essential, it is incumbent upon the legislature to provide a plan designed to result in the stabilization and reduction of malpractice insurance premiums for providers of such services in Florida.

766.302(2), Fla. Stat. (2010). In a common-law suit for medical malpractice leading to such injuries, it is likely that a jury would find that the parents of a child with such injuries have suffered the loss of nearly all of that child's society and affection. Jury awards for parents' noneconomic damages in such cases tend to be far more than $100,000 per parent, and certainly more than that amount divided between both parents. *See, e.g.*, *Eagleman v. Korzeniowski*, 924 So. 2d 855, 858 (4th DCA 2006) (noting jury award of $7 million to each parent of brain-injured child for loss of filial consortium); *Dempsey by and through Dempsey v. United States*, 32 F.2d 1490, 1492-3 (11th Cir. 1994) (affirming award of $1.3 million to parents "for loss of society and affection" of severely brain-injured child); *see also Bravo v. United States*, 532 F.3d 1154 (11th Cir. 2008) (discussing various Florida jury awards for loss of filial consortium).

§ 766.301(c), Fla. Stat. (2010).

Even assuming for the sake of argument that the Legislature has thus shown an overpowering public necessity, there has been no showing that it is necessary to cap parental recovery at $100,000 in the aggregate, rather than $100,000 per parent, in order to meet it. In *St. Mary's*, this Court found "no rational relationship" between forcing a potentially unlimited number of family members to share a $250,000 cap and the Legislature's goal of alleviating the financial crisis in the medical malpractice insurance industry. 769 So. 2d at 971. The same rationale applies here – there is no reason to believe forcing two parents to share a $100,000 cap, rather than awarding $100,000 to each, will further the same legislative goal.

The Petitioners do not dispute the constitutionality of the Act, if it is interpreted to provide a $100,000-per-parent recovery, even though there may well be compelling grounds to do so.[10] However, the Act's language should be construed to avoid an unduly restrictive statutory interpretation that is neither necessary nor even rationally expected to advance the Act's stated goals. The

[10] *See Ferdon v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440, 462, 468-474 (Wis. 2005) (finding, in light of historical developments and lack of proven efficacy, that cumulative $350,000 cumulative cap on noneconomic damages was not rationally related to goal of lowering medical malpractice insurance premiums); Sandy Martin, M.D., *NICA – Florida Birth-Related Neurological Injury Compensation Act: Four Reasons Why This Malpractice Reform Must Be Eliminated*, 26 NOVA L. REV. 609, 619-20 (2002) (citing other factors and a changed climate as stabilizing and decreasing malpractice premiums, and observing that authorities have noted the inability to attribute such changes to NICA).

lower court's decision not only violates equal protection, but draws the Act into further conflict with the Constitution.

D. Ambiguity

Finally, Petitioners note that the lower court's construction of the statute was not mandated by the actual language of the statute itself. When construing a statute, the intent of the Legislature is said to be the "polestar" by which courts must be guided. *E.A.R. v. State*, 4 So. 3d 614, 629 (Fla. 2009). In determining legislative intent, courts must look "primarily" to the plain text of the statute. *Id.* When the text is unambiguous, the Court's inquiry can go no further. *Id.* However, the text of section 766.31(1)(b)1 is not unambiguous.

The Legislature's use of the term "an award" in section 766.31 is far from precise. Read in its entirety, the statute states, in pertinent part, that the administrative law judge is to "make an award providing compensation for the following items relative to such injury." Then, among the items for which the award is to provide compensation, the statute lists both "[a]ctual expenses" for a variety of types of medical care and services, as well as "[p]eriodic payments of an award to the parents or legal guardians… which award shall not exceed $100,000." Taken all together then, the administrative law judge is to "make an award providing compensation for," among other things, "periodic payments of an award." It is this second "award" which is the subject of argument here.

Obviously, the idea of an award providing compensation for payment of an award does not lend itself to clear interpretation.

Even taken alone, the phrase "an award to the parents…, which award shall not exceed $100,000" could just as easily be interpreted to mean "an award to the parents…, which award shall not exceed $100,000 to each," as it can to mean "an award to the parents, which award shall not exceed $100,000 to both combined." The mere fact that the term "award" is used in the singular is not enough to make the statute clear. Any time the award is split between two parents, for example, the singular "award" actually becomes two "awards" – each of which should be capped individually. As this Court explained in *St. Mary's Hospital, Inc.:*

> where the Legislature has intended to limit claimants' damages in the aggregate in other contexts, they have done so explicitly. For example, in section 768.28(5), a provision of Florida's Wrongful Death Act which limits damage claims against the state, the Legislature limited to $200,000 the State's liability for damages arising out of the same incident. Section 768.28(5) states in pertinent part: "Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000. § 768.28(5), Fla. Stat. (1999)" (emphasis that of the Court).

769 So. 2d at 968.

Similarly, when enacting the NICA statutes, the Legislature could easily have specified that the parental award was intended to be limited to $100,000 to both parents combined, but it chose not to do so, leaving the statute ambiguous.

Further, parts of a statute are not to be construed alone, but must be considered *in pari materia* with the overall statutory scheme to ascertain the overall legislative intent. *Florida Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1264 (Fla. 2008). In the present case, the District Court based part of its finding that section 766.31(1)(b)1 is unambiguous on the fact that "the statute plainly authorizes no-fault 'compensation,' not fault-based 'damages.'" *Samples*, 40 So. 3d at 22. Aside from the fact that any clear distinction between "compensation" and "damages" is dubious,[11] reading other parts of the Act *in pari materia* shows that the parental award is also referred to in the Act as "noneconomic damages":

> Within 60 days after a claim is filed, the association shall estimate the present value of the total cost of the claim, including the estimated amount to be paid to the claimant, the claimant's attorney, the attorney's fees of the association incident to the claim, and any other expenses that are reasonably anticipated to be incurred by the association in connection with the adjudication and payment of the claim. <u>For purposes of this estimate, the</u>

[11] According to *Black's Law Dictionary*, one definition of "compensation" is "[p]ayment of damages, or any other act that a court orders to be done by a person who has caused injury to another." BLACK'S LAW DICTIONARY 301 (8th ed. 2004). "Damages" is defined by the same source as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." *Id.* at 416.

> association should include the maximum benefits for noneconomic damages.

§ 766.314(9)(a), Fla. Stat. (emphasis added).

Further, statutes are to be construed to avoid fundamental legal conflicts with the common law or the Constitution:

> Statutes in derogation of the common law are to be construed strictly…. They will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced. A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard.

Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 364 (Fla. 1977). *See also Slawson v. Fast Food Enterprises*, 671 So. 2d 255, 257-58 (4th DCA 1996) ("In other words, statutes abolishing or limiting the common law must be clear as to the abrogation or change; when the extent of the abrogation or change is not clear from the text of the statute, then the common law rule stands.").[12]

[12] In *Slawson*, the victim of an assault which occurred on a restaurant's premises sued the intentional tortfeasor, and also sued the restaurant for negligence in failing to protect a business invitee from a reasonably foreseeable attack. 671 So. 2d 256. The defendant restaurant claimed that section 768.81(3), Florida Statutes, a comparative fault statute, allowed its liability to be reduced in proportion to the intentional tortfeasor's percentage of fault, and the trial court agreed. *Id.* The statute at issue provided that it "applie[d] to negligence cases" and that it did "not apply…to any action based upon an intentional tort." *Id.* at 256-7. In reversing the

The Florida Birth-Related Neurological Injury Compensation Act is a statutory substitute for common-law rights, and as such, "it should be strictly construed to include only those subjects clearly embraced within its terms." *Florida Birth-Related Neurological Injury Compensation Association v. McKaughan*, 668 So. 2d 974, 977 (Fla. 1996). The language of section 766.31(1)(b)1 does not clearly and unequivocally demonstrate that an award of up to $100,000 cannot be given to <u>each</u> parent.

As noted above, "[i]t is a fundamental rule of statutory construction that, if at all possible, a statute should be construed to be constitutional." *St. Mary's Hospital, Inc.*, 769 So. 2d at 972. To avoid the multiple constitutional problems discussed herein, the statute must be interpreted to provide for separate parental awards. If it cannot be so interpreted, then that portion of the statute providing for parental awards must be struck down, and parents should be free to pursue their common-law damages for loss of consortium in a court of law.

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trial court, the Fourth District began by examining the common-law history of contributory and comparative negligence. *Id.* at 257. The Court went on to construe the phrase "based on an intentional tort" not merely to include actions "including an intentional tort" or "alleging an intentional tort" (which the plaintiff's negligence suit against the restaurant did not), but to "imply…the necessity to inquire whether the entire action against or involving multiple parties is founded or constructed on an intentional tort." *Id.* at 258.

CONCLUSION

The Florida Legislature enacted the NICA Plan with the dual laudable goals of stabilizing malpractice insurance premiums in this field and providing compensation, on a no-fault basis, for certain catastrophic injuries to children. In attempting to achieve these goals, the Legislature could not have intended to establish a system that reduces the maximum potential award to a child's parent based solely on the fact that another parent is involved in the child's life as well. Yet this is the effect of the lower court's decision.

For the reasons set forth above, Petitioners respectfully ask this Court to answer the certified question in the affirmative, and to hold that section 766.31(1)(b)1, Florida Statutes is unconstitutional if interpreted to allow for only a single award of up to $100,000 no matter how many parents are making a claim.

Petitioners further ask this Court instead to construe this ambiguous statute in the only manner that bears a rational relationship to the legislative goals, finding that it allows an award of up to $100,000 for each parent.

Finally, should this Court determine that the statute cannot be so interpreted, Petitioners ask that the statute be declared unconstitutional as violating the Equal Protection Clause, as unconstitutionally vague, and as violating the constitutional right of access to the courts.

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I certify that a copy hereof has been furnished by U.S. Mail this ___ day of November, 2010, to Wilbur Brewton, Esq., Brewton, Plante, P.A., 225 South Adams St., Suite 250, Tallahassee, FL 32301.

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I hereby certify that the foregoing has been prepared using 14-Point Times New Roman font.

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