

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' REPLY BRIEF

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SUMMARY OF ARGUMENT

As interpreted by the lower court, the NICA statute violates the Equal Protection Clause, is unconstitutionally vague, and violates parents' constitutional right of access to the courts. The Samples' aggregate award treats them differently from a single parent, based solely on the number of claimants involved. This classification bears no reasonable relationship to any legitimate state objective.

The certified question should be answered in the affirmative, and the statute construed in such a manner as to allow an award to each parent individually, whether one or two parents are making a claim.

ARGUMENT

NICA HAS FAILED TO SHOW HOW TREATING PARENTS DIFFERENTLY BASED ON THE NUMBER OF CLAIMANTS INVOLVED IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST.

In their initial brief, the Samples challenged the constitutionality of section 766.31(1)(b)1, Florida Statutes, as interpreted by the lower court. In its answer brief, NICA has chosen to address only the Equal Protection argument. NICA's argument in defense of the lower court's ruling is not supported by Florida law.

A. Equal Protection

NICA first contends that no Equal Protection violation exists in this case because the Samples were treated the same as any other parents – all receive \$100,000 in the aggregate. This contention ignores the fact that treating the parents as an entity rather than as individuals necessarily results in an unfair classification.

Simply stated, a single parent generally receives at least twice as much compensation as a co-parent does. Because Mr. and Mrs. Samples are sharing a household, they will share the \$100,000 aggregate award. Had Mr. Samples predeceased his child or left the child's life completely, Mrs. Samples would have received \$100,000 herself. Had Mr. Samples been living independently of Mrs. Samples but still been involved in the child's life, each parent would have received

some unpredictable portion of \$100,000 – perhaps \$50,000, perhaps \$5,000, perhaps \$95,000, all depending on the absolute discretion of the ALJ.

Because parents receive compensation in the aggregate rather than individually, they are not treated the same, but receive wildly varying awards based solely on the number of claimants and the living situation of the other parent. NICA's position that all parents are equal depends on the fallacious premise that all parents in today's society share a single household and will use the \$100,000 award communally. Parents who do not fall within this ideal never receive the same award as those who do. Accordingly, this statutory scheme, as interpreted by the lower court, improperly differentiates between parents based on a classification that bears no rational relationship to any legitimate state objective, in violation of the Equal Protection Clause of the state and federal constitutions.

As discussed at length in the initial brief, the situation presented in the instant case is directly analogous to the situation addressed by this Court in its decision in *St. Mary's Hospital, Inc., v. Phillipe*, 769 So. 2d 961 (Fla. 2000). NICA recognizes the holding in that case, summarizing it on page 9 of its answer brief as follows:

The reasoning in *St. Mary's* for the Court's concerns for equal protection was based on the underlying premise that if non-economic damages are “limited to \$250,000 per incident in the aggregate, then the death of a wife who leaves only a surviving spouse to claim the \$250,000 is not equal to the death of a wife who leaves a

surviving spouse and four minor children, resulting in five claimants to divide \$250,000.”

As interpreted by the lower court, the aggregate award in the instant case leads to the same result – the catastrophic birth injury of a child with one parent is not equal to the same injury to another child with two parents forced to divide the aggregate award. Such a result “offends the fundamental notion of equal justice under the law.” *St. Mary’s Hospital*, 769 So. 2d at 972.

NICA claims that the holding in *St. Mary’s Hospital* is inapplicable here because *St. Mary’s Hospital* involved a tort action designed to provide noneconomic damages to the claimants, while the instant case involves a broad alternative no-fault system of limited compensation for a narrow class of injuries. This is a distinction without a difference.

First, as discussed at length in the initial brief, the parental compensation award at issue here is in fact an attempt to at least minimally compensate parents for their noneconomic damages. Indeed, NICA’s citation to the staff analysis, at p. 13 n.3 of the answer brief, supports the Samples’ position on this issue. There, the analysis first notes that compensation for the child is limited to net economic losses rather than noneconomic damages, specifically differentiating such compensation from the compensation for parents or legal guardians.

Additionally, even a no-fault system of limited compensation cannot be implemented in a manner that violates Equal Protection. The Samples do not

contend that the Legislature lacks the authority to limit an award or create such a system of compensation. What the Legislature cannot do is classify awards in such a way as to deprive claimants of their constitutional rights. As interpreted by the lower court, the aggregate parental award does exactly that.

NICA further attempts to distinguish *St. Mary's Hospital* by noting that only two parents can be involved in a statutory claim in the instant case, while *St. Mary's Hospital* dealt with the potential for multiple claimants. Again, such a distinction makes no difference. The analysis of an Equal Protection claim depends on whether a classification is arbitrary and unjust, not whether more than one person is harmed in each case.

Indeed, the fact that only two claimants are involved in each case under the instant statute renders much less compelling NICA's sole attempt to explain how this classification bears any rational relationship to the statutory purpose – its argument that such an interpretation is necessary to ensure the actuarial soundness of the plan. Unlike the situation in *St. Mary's Hospital*, where the maximum compensation of \$250,000 had the potential for a tenfold increase for a case involving a large family, in the instant case the largest sum that could possibly be awarded is an additional \$100,000 per family with an injured child.

As detailed in the initial brief, NICA's insinuation that it is on the verge of financial collapse is contrary to reality. Moreover, the scope of compensation

under the statutory scheme is quite broad, covering everything from medications to equipment to accessibility renovations. §766.31(1)(a), Fla. Stat.; *see also Benefit Handbook* at 6-9, 13, http://www.nica.com/parents/CoverageGuidelines_Final.pdf (last visited Feb. 10, 2011). As a practical matter, the total award to a child who survives for many years can approach millions of dollars. An extra \$100,000 award to a parent is but a proverbial “drop in the bucket” in the overall statutory scheme.

Accordingly, to the extent that actuarial soundness can ever in itself justify a classification such as that at issue here, no such justification saves the lower's court's interpretation of the instant statute. While limiting compensation as NICA proposes would undoubtedly save money in some cases, finding this rationale to be sufficient under these circumstances would effectively eliminate equal protection review.

As the Samples noted in their initial brief, 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. The Equal Protection Clause prevents such an arbitrary classification where, as here, it has no reasonable relationship to the statutory purpose.

B. Vagueness & C. Access to Courts

As noted above, the Samples based their constitutional challenge to this statute on several grounds, including grounds of unconstitutional vagueness and interference with the right of access to the courts. NICA has chosen to limit its response to the Equal Protection issue certified as a matter of great public importance, labeling the Samples' arguments on these other issues “improper.”

As this Court has frequently recognized, its review in these cases is not limited to the certified question: “our review extends to the ‘decision’ of the district court, rather than the question on which it passed.” *Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace*, 332 So. 2d 610, 612 n.1 (Fla. 1976). *Accord*, *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 964 (Fla. 1995), *cert. denied*, 516 U.S. 1051 (1996); *Reed v. State*, 470 So. 2d 1382, 1383 (Fla. 1985). Once this Court has accepted jurisdiction, it has the authority to consider any other issues decided by the court below, as long as those issues are properly raised and argued. *Caufield v. Cantele*, 837 So. 2d 371, 377 n. 5 (Fla. 2002).

The Samples respectfully request that this Court consider its arguments on these other constitutional issues as well. These issues were properly preserved below and fully briefed by the Samples. Further, these issues have yet to be addressed by this Court, whose guidance on these matters could alleviate further costly and time-consuming litigation in other cases.

D. Ambiguity

Finally, NICA contends that the statute is unambiguous and accordingly cannot be construed in the manner suggested by the Samples. A nearly identical argument was rejected by this Court in *St. Mary's Hospital*. There, this Court recognized that the Legislature has explicitly limited claimants' damages in the aggregate in other contexts. 769 So. 2d at 968. Its failure to do so in the statute at issue there allowed this Court to construe the statute in a manner that eliminated the Equal Protection violation. The same construction should be applied here.

After asserting that only the plain language of the statute can be considered, NICA then goes well beyond the plain language and cites to a staff analysis prepared in 1989, purporting to show an intent to limit the maximum parental award in the aggregate. First, a staff analysis comes into play in considering a legal issue only under certain narrow circumstances, when an enacted statute is ambiguous and legislative history must be consulted to determine the Legislature's intent as to that statute. *See, e.g., Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006) (when statutory language is unambiguous, courts will not look behind plain language to determine intent). NICA's reliance on this analysis is therefore contrary to its position that the statute is unambiguous.

Even where a statute is ambiguous, moreover, staff analyses are not conclusive of legislative intent, but are only "one touchstone of the collective

legislative will.” *White v. State*, 714 So. 2d 440, 443 n. 5 (Fla. 1998). Indeed, as former Justice Cantero has noted, viewed realistically staff analyses add little to the investigation of legislative intent, where these analyses are written by unelected employees of only one house of the Legislature, where they are subject to packing via the influence of interest groups and other legislative insiders, and where no evidence exists that any of the legislators who voted for the proposed bill even read the analysis, much less agreed with it; the only truly reliable indications of a legislators’ intent are the words of the bill that they voted to make law. *American Home Assurance Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 375-376 (Fla. 2005) (Cantero, J., concurring in part and dissenting in part).

Again, as this Court noted in *St. Mary's Hospital*, the Legislature certainly had the capability to add such “in the aggregate” language to the statute if that was its intent. It did not do so here.

More importantly, this Court has recognized the “fundamental rule of statutory construction that, if at all possible, a statute should be construed to be constitutional.” *St. Mary's Hospital*, 769 So. 2d at 972. Construing the instant provision in the manner suggested by NICA renders the statute unconstitutional.

CONCLUSION

For the reasons provided herein and in their initial brief, the Samples respectfully request that this Court answer the certified question in the affirmative and construe the statute to allow an award of up to \$100,000 for each parent. Should this Court determine that the statute cannot be construed in such a manner, the Samples request 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.

DATED this ____ day of February, 2011.

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CERTIFICATE OF SERVICE

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

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CERTIFICATE OF FONT COMPLIANCE

I hereby certify that the foregoing has been prepared using 14-Point Times
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