IN THE SUPREME COURT OF FLORIDA

ROBERT AND TAMMY BENNETT,
Individually and as parents and natural
guardians of TRISTAN BENNETT, a minor

Petitioners,

CASE NO.: SC10-364
L.C. Nos.: 1D07-5557

WILLIAM H. LONG, M.D., NORTH FLORIDA
1D07-5561
OBSTETRICS AND GYNECOLOGY, P.A., and
ST. VINCENT'S MEDICAL CENTER, INC.,

Respondents.

ANSWER BRIEF OF RESPONDENTS WILLIAM H. LONG, M.D., AND NORTH FLORIDA OBSTETRICS AND GYNECOLOGY, P.A.

On Review from the District Court of Appeal, First District,
State of Florida

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PRELIMINARY STATEMENT

In this answer brief, the Petitioners Robert and Tammy Bennett, will be referred to collectively as Petitioners or as the Bennetts. Tristan Bennett will be referred to as Tristan. Florida Birth-Related Neurological Injury Compensation Association, Petitioner in Case Number: SC10-390, will be referred to as NICA. Respondents, William H. Long, M.D., and North Florida Obstetrics and Gynecology, P.A., will be referred to both individually and collectively as Dr. Long or Respondents. Respondent St. Vincent's Medical Center, Inc., will be referred to as St. Vincent's.

Citations to the record of the District Court of Appeal, First District ("First District") will be by use of an "R.", followed by the page number, e.g., *R. 1052-1053.* Citations to the transcript of the DOAH hearing will be by use of a "T.", followed by the page number, e.g., *T. 34-35.* Citations to the exhibits jointly submitted and received at the DOAH hearing will be by use of "*Exhib.*", followed by the exhibit number and the page number within that exhibit, if available, e.g., *Exhib. 12, p. 5.* Citations to the opinion of the First District in the underlying case will be to the Southern Reporter, e.g., *St. Vincent's Medical Center v. Bennett,* 27 So.3d 65 (Fla. 1st DCA 2009). And, citations to the record of the

Florida Supreme

Court will be by use of “SCR.” followed by the page number, e.g., *SCR. 17*.

STATEMENT OF THE CASE AND OF THE FACTS

Statement of the facts: On the morning of September 26, 2001, Tammy Bennett was involved in a low speed motor vehicle accident near her home in Macclenny, Florida. *R. 1056.* At the time of the accident, Mrs. Bennett was 38+ weeks pregnant and had been previously scheduled for a caesarean section delivery on October 3, 2001, with her treating obstetrician Dr. William H. Long of North Florida Obstetrics and Gynecology, P.A. The scheduled c-section was to be performed at St. Vincent's Medical Center, Inc., in Jacksonville, Florida. *Id.*

Shortly after the accident, Ms. Bennett was transported by ambulance to Ed Fraser Hospital in Macclenny, where she received her initial care. *R. 1056-1057.* She was evaluated and treated at Ed Fraser Hospital for approximately two hours and was then transported by helicopter to St. Vincent's. She arrived at St. Vincent's at approximately 9:59 a.m., and was admitted to the labor and delivery department under the care of Dr. Long. *R. 1060, 1062*.

At approximately 12:45 p.m., Dr. Long determined that Mrs. Bennett was in renal failure and he made the decision to perform an emergency c-section to deliver the baby. *R. 1062; Exhib. 7.* The monitors were turned off at 12:47 p.m., and Mrs. Bennett was taken to the operating room. Tristan was delivered at 1:22 p.m. *R. 1062-1064*. Dr. Long noted evidence of a partial abruption upon

examination of the placenta after delivery. *R. 1064*.

Tristan did not cry upon delivery. *R. 1064.* She had minimal respiratory effort and required resuscitation with bulb, free flow oxygen, mechanical suction, and ambu bag and mask. *Id.* Arterial umbilical cord blood, which reflects the condition of the baby, was obtained at delivery. Blood gas testing yielded a pH of 6.76, PCO_2 of 51.2, PO_2 of 17, and a base excess (BE) of -28, all of which establish severe metabolic acidosis. *R. 1064-1065*. A second set of arterial blood gases were obtained from Tristan at 1:47 p.m., and revealed a pH of 7.14, PCO_2 of 31.7, PO_2 of 90, and a BE of -16.4. *R. 1065*. Although these blood gases were improved, they still showed severe metabolic acidemia. *T. 83-84.* Tristan was transferred from the newborn nursery to the special care nursery for further monitoring and treatment. *Id.*

In the first several days after delivery, nursery records described Tristan as lethargic, irritable, and having difficulty sucking on multiple occasions. *Exhib. 9.* A nursery note from September 30, 2001, stated that Tristan had "continued flailing of arms" and that one arm was restrained. *Id.* A physician progress note from October 1, 2001, described Tristan as a "critically ill female newborn." *Id.* Progress notes from October 2, 2001, depicted Tristan as a "critically ill infant

w/renal failure," and "Asphyxia ! Multiorgan failure." *Exhib. 9* (emphasis in

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original). During this post-delivery period, progress notes from Tristan's treating physicians documented her neurological status as grossly intact, within normal limits, or without deficit. *Exhib. 9.* However, no neurologist or pediatric neurologist had examined or was asked to consult on Tristan during this period.

From the time of delivery to October 3, 2001, Tristan suffered the following conditions: severe metabolic acidosis, declining renal function to renal failure, acute tubular necrosis (ATN), oliguria, disseminated intravascular coagulation (DIC), fluid retention, respiratory distress, hyponatremia, elevated liver enzymes and thrombocytopenia. *R. 1066, 1069.* She was also placed on antibiotics for possible sepsis. *Id.*

On the morning of October 3, 2001, Tristan suffered from a pulmonary hemorrhage, with frank blood noted orally. *R. 1067*. She was apneic and had a heart rate below 80 bpm that was decreasing. She also had decreasing oxygen saturation to the 40% range. *R. 1067-1068.* She was intubated and given a blood transfusion. *R. 1068.* Later that day, Tristan arrested, with her heart rate falling to 53 bpm and her oxygen saturations decreasing to 23%. *Id.; Exhib. 29, p. 40.* CPR was administered until Tristan's heart rate reached 77, and was

increasing. *Id.* Oxygen saturations increased to 65%. *Id.* Minutes later, Tristan had another drop in both her heart rate and oxygen saturations. *Id.* Tristan recovered, but remained unstable throughout the remainder of the day. *R. 1068-1069.* Arterial blood gases collected after the arrest and after the second episode of low heart rate showed a pH of 7.03 and BE of -12.2, and a pH of 6.88 and BE of -23.5, respectively. *Id.; T. 163-164.* Physician progress notes from October 4, 2001, state: "possible seizure last night . . . #10 CNS: Had no obvious CNS dysfunction till last night." *R. 1069.*

On October 5, 2001, Tristan was seen for the first time by pediatric neurologist Carlos Gama, M.D. *R. 1069-1070.* Dr. Gama's consultation report described Tristan's condition at delivery as:

> The baby was floppy with some gasping efforts but unable to sustain respirations . . . The initial blood gases demonstrated pH 7.14, PO2 80, PCO2 32, base excess of -16.4 . . .[1] [she] was continued to be monitored in the intensive care unit where she was noted to have initially appropriate urine output which declined progressively within the first day or two of life to the point that she was oliguric. With this the BUN and creatinine have increased which suggest acute tubular necrosis.

Exhib. 9. Tristan was eventually discharged home on November 14, 2001, with

[1] These "initial blood gasses" are actually the second set obtained at 1:47 p.m., in the special care nursery (although the PO_2 was "90" and not the "80" stated by Dr. Gama).

follow-up appointments with her primary care physician, a nephrologist, a neurologist, and physical and occupational therapists. *R. 1071.*

Dr. Gama continued to see Tristan after her discharge from St. Vincent's. In an office note from November 27, 2001, Dr. Gama's assessment was:

> In general, **it is my opinion that Tristan is status post severe perinatal distress with hypoxic ischemic encephalopathy, metabolic acidosis, associated with coagulopathy and complicated with one cardiac arrest requiring resuscitation while at the special care nursery.** The result of all of these complications is culminated with what appears to be a severe hypoxic ischemic encephalopathy with multi-cystic encephalomalacia and seizure disorder. The seizures seem to be stable. Family is aware of findings by CT scan and implications with regard to the baby's overall future development, seizure risk, cerebral palsy risk and neurological sequelae.

R. 1072; Exhib. 10 (emphasis added).

Tristan was subsequently seen by pediatric neurologist, David Hammond, M.D. Dr. Hammond's impression in July 2006, was static encephalopathy, quadriplegic cerebral palsy, complex-partial epilepsy, and stable global developmental delay. *Exhib. 11.*

Statement of the case: In April 2004, the Bennetts filed an Amended Complaint in the circuit court against Dr. Long, St. Vincent's, and 14 other defendants, alleging negligence in their care and treatment of Mrs. Bennett and Tristan. Dr. Long moved to abate the circuit court action, pending determination

by the Division of Administrative Hearings (DOAH) of the compensability of the injuries under the Florida Birth-Related Neurological Injury Compensation Association ("NICA") Plan, i.e., section 766.301, *et seq.* Florida Statutes. The circuit court case was abated, allowing the matter of NICA compensability to be heard.

On July 12, 2006, the Bennetts filed their Petition for Determination of Availability of NICA Coverage with DOAH, asserting that:

> **By the time of her birth by cesarean section, Tristan Bennett had suffered a hypoxic ischemic event that caused brain damage**. Tristan Bennett then **suffered further injury to her brain** during the first several days of her life, well after the immediate post-delivery resuscitative period.

R. 6 (emphasis added). The Bennetts' petition requested a "determination of whether Tristan Bennett's injuries [were] qualifying injuries under the NICA Plan . . . ." *R. 5, 11.* If the injuries were determined to be qualifying injuries, the Bennetts requested that the Administrative Law Judge (ALJ) determine that Dr. Long and St. Vincent's did not have NICA immunity because of their alleged failure to provide pre-delivery notice to Petitioners or because their pre-delivery notice was inadequate. *R. 11-12.* The Bennetts also requested the ALJ determine that no health care provider be "entitled to NICA immunity for any injuries or damages that Tristan Bennett suffered that did not occur during labor,

delivery, or the immediate post-delivery resuscitative period . . . ." *R. 12.* Finally, in the event that the ALJ determined that the Bennetts' claim was compensable under NICA, and that notice was properly given, the Bennetts requested that benefits available under the NICA plan be awarded. *R. 12 -13.*

NICA responded to the petition, giving notice that it was of the view that Tristan did not suffer a "birth-related neurological injury," as defined by section 766.302(2), Florida Statutes. *R. 1054.* NICA requested a hearing be held to resolve the issue. *Id.* Dr. Long and St. Vincent's were accorded leave to intervene in the DOAH proceeding. *R. 36-37, 79-80, 246-248, 1054.* A DOAH hearing was scheduled before ALJ William J. Kendrick. *R. 1055.*

Prior to the DOAH hearing, the parties submitted a Pre-Hearing Stipulation, affirming the petition's statement that "by the time of her birth by caesarean section, [Tristan] had suffered a hypoxic ischemic event that caused permanent brain damage." *R. 833.* At the hearing, the parties reiterated and made clear to the ALJ that there was no dispute that Tristan had suffered a "brain injury, caused by oxygen deprivation, which rendered her permanently and substantially mentally and physically impaired." *R. 1072; T. 4-5.*

Because of the stipulations of the parties, the only issues before the ALJ were whether Tristan's brain injury occurred in the course of labor, delivery, or

resuscitation in the immediate postdelivery period and whether Dr. Long and St. Vincent's provided sufficient notice of their NICA participation.[2] *T. 4-5; R. 1078.* On the issue of the timing of Tristan's neurological injury, Dr. Long took the position and argued *inter alia* that the statutory presumption of Section 766.309(1)(a), Florida Statutes, applied in this case, i.e., the injury was "presumed" to be a birth-related neurological injury where it was demonstrated that Tristan suffered a brain injury caused by oxygen deprivation that rendered her permanently and substantially mental and physical impaired. *T. 4-5, 215-216, 238; R. 930-934, 1074.* For support, Dr. Long cited to *Orlando Reg'l Healthcare Systems, Inc. v. Alexander*, 909 So.2d 582 (Fla. 5th DCA 2005), *receded from, in part, on other grounds, Weeks v. Florida Birth-Related Neurological Injury Comp. Ass'n, et al.*, 977 So.2d 616 (Fla. 5th DCA 2008). *R. 931.*

The Bennetts argued the presumption of section 766.309(1)(a), did not apply because "the claimants" had not demonstrated that Tristan had sustained a brain or spinal cord injury caused by oxygen deprivation. *T. 173-174.* Rather, the Bennetts argued that they had demonstrated that Tristan suffered her profound injury on October 3, 2001, which was outside the labor and delivery periods and, therefore, NICA compensability did not apply. *Id.*

[2] The ALJ's findings and conclusions, regarding Respondents' proper notice are

not at issue in this appeal.

At hearing, no party offered expert testimony from a neurologist or pediatric neurologist to address the likely timing of Tristan's brain injury. *R. 1077.* The Bennetts had withdrawn their pediatric neurologist one month before the hearing. *T. 212-213.* In response, Dr. Long elected not to retain a pediatric neurology expert.[3] *Id.*

The Bennetts presented the deposition testimony of Richard Fields, M.D., a board certified obstetrician/gynecologist, and Norman Pryor, M.D., who is board certified in pediatrics and pediatric nephrology. Dr. Long and St. Vincent's offered the live and deposition testimony of Gary V. Hankins, M.D.

Dr. Hankins is board certified in obstetrics and gynecology, and in maternal fetal medicine. *T. 40.* He is a member of the American College of Obstetricians and Gynecologists ("ACOG"). *T. 42.* Dr. Hankins has chaired many ACOG committees, including a task force for neonatal encephalopathy and cerebral palsy (NECP). *T. 42-43.* As chair of the NECP, Dr. Hankins participated in the monograph on defining the pathogenesis and pathophysiology of cerebral palsy and encephalopathy. *T. 43-44; Exhib. 27, pp.41-42.* One of the issues the NECP

[3] The effect of Petitioners' strategy on Dr. Long cannot be overstated. Aware of the presumption of section 766.309(1)(a), and the *Alexander* case, Respondents were cognizant that Petitioners had the initial burden of overcoming the rebuttable presumption. Without an expert in pediatric neurology, Petitioners burden became virtually insurmountable.

task force examined was the timing of hypoxic ischemic events occurring during the intrapartum period, i.e., the period surrounding delivery. *T. 45.*

Dr. Hankins testified that Tristan suffered a hypoxic ischemic event between 12:47 p.m., when the monitors were turned off, and delivery at 1:22 p.m. *T. 79.* That hypoxic ischemic event caused Tristan to be born in a condition of severe metabolic acidosis or acidemia, as demonstrated by the cord blood gasses, in particular, a pH of 6.76 and BE of -28.[4]

T. 79; Exhib. 27, pp. 84-86. Dr. Hankins described these initial blood gas results as "stunningly bad." *T. 76-77.* He stated that acidemia is the result of oxygen deprivation, which causes injury to tissues in the brain and other organs. *T. 77-78.* If this injury occurs in the infant's brain, "you're almost always going to have other working systems that are affected." *Id.* According to Dr. Hankins, Tristan's condition at delivery, in combination with her subsequent hospital course and the ultimate diagnosis of cerebral palsy, were consistent with her suffering oxygen deprivation and its associated injuries shortly before delivery. *T. 77-80.*

[4] Regarding Tristan's Apgar scores, 6 and 8, Dr. Hankins opined that they were "assisted" in that Tristan was given oxygen in the immediate post-delivery period. *T. 81.* He also opined that Apgar scores are subjective and there is not a strong correlation between Apgar scores and acid-base status. *T. 81-82; Exhib. 27, pp. 84-86.* There is also poor correlation between such scores and ultimate neurological outcomes. *Id.* Even Petitioners' expert, Dr. Fields, agreed that there is no correlation between Apgars and pH, and Apgars and eventual outcome. *Exhib. 23, p. 67.*

The ALJ denied NICA compensability. *R. 1052-1099.* Regarding application of the statutory presumption of section 766.309(1)(a), the ALJ rejected Dr. Long's argument, concluding that:

> The presumption is for Petitioners' (Claimants') benefit, and is not available to aid other parties in satisfying their burden to establish that Tristan's brain injury occurred in the course of labor, delivery, or resuscitation.

R. 1075-1076. The ALJ added that there was "credible evidence produced **(in Tristan's medical records)** to support a contrary conclusion, and to require resolution of the issue without regard to the presumption." *R. 1076* (emphasis added). No expert testimony was cited to as support for the ALJ's finding.

On the timing of Tristan's brain injury, the ALJ found that although Tristan suffered a multi-system failure as a result of oxygen deprivation between 12:47 p.m., and the time of birth, she did "not suffer a brain injury or substantial neurologic impairment until after she experienced profound episodes of oxygen deprivation on October 3, 2001, following the onset of pulmonary hemorrhaging and pulmonary arrest." *R. 1077.* Accordingly, the ALJ concluded that Tristan's injuries did not qualify for coverage under the NICA Plan.

Dr. Long and St. Vincent's appealed the ALJ's ruling to the District Court of Appeal for the First District. On appeal, the First District reversed, holding

that the ALJ erred as a matter of law in failing to apply the rebuttable presumption provided by section 766.309(1)(a). *St. Vincent's Medical Center v. Bennett*, 27 So.3d 65, 66 (Fla. 1st DCA 2009). Specifically, the First District held:

> As noted, the parties stipulated that Tristan is permanently and substantially mentally and physically impaired. Further, the ALJ found that the injury was a neurological one; that is, it involved the brain or the spinal cord. There was no dispute below concerning whether Tristan has sustained a neurological injury. Given the stipulation and the ALJ's findings of fact, we hold that the ALJ erred as a matter of law in not applying the presumption of compensability.

Bennett, 27 So.3d at 70. Judge Kahn dissented with a written opinion.

The Bennetts moved for rehearing, rehearing en banc, clarification and certification. *SCR. 18-81*. The First District denied the Bennetts' motion seeking rehearing, rehearing en banc, and certification. *SCR. 135*. The First District clarified, however, that by the majority decision, the ALJ was "to enter an order finding that the claim filed by the Bennetts is subject to compensation under the NICA Plan." *Id.* Judge Kahn again dissented.

The Bennetts sought discretionary jurisdiction in this Court based on alleged direct and express conflict with another district court of appeal under Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. The Court accepted jurisdiction of the case by order dated May 11, 2010.

SUMMARY OF THE ARGUMENT

The First District's holding, regarding the application of the presumption of compensability of section 766.309(1)(a), was not error and is not in conflict with any principle of statutory construction or with any other decision of another District Court of Appeal**.** The First District followed the plain language of section 766.309(1)(a), and correctly held that the presumption of compensability should have been applied by the ALJ in light of the parties' stipulations and the ALJ's findings.

In arguing that the First District "disregarded" the plain language of the presumption statute, the Bennetts "disregard" the fact that they stipulated that Tristan suffered an injury to the brain caused by oxygen deprivation that rendered her permanently and substantially, mentally and physically impaired. The ALJ then accepted the parties' stipulation, finding that it was "undisputed that Tristan suffered brain injury, caused by oxygen deprivation, which rendered her permanently and substantially mentally and physically impaired." Accordingly, the Bennetts, as claimants, plainly demonstrated to the ALJ that the prerequisites of section 766.309(1)(a), were met and the presumption of compensability should have been applied.

There is no conflict between the First District's opinion and other district courts "on the same question of law," because the First District accounted for the legislative intent of the NICA Plan when reading the plain language of the NICA statutes. Florida law is well-settled that when interpreting and construing statutes, courts are guided by the plain language of the statute along with a consideration of the legislature's expressed intent.

If one reads the plain language of the statute in question, as the parties urge this Court to do, it is clear that section 766.309(1)(a), applies the presumption irrespective of the parties. The presumption does not favor one party over another, it favors compensability of the injury. Once the required is demonstration is made, as it was in this case, a rebuttable presumption that the "injury is a birth-related neurological injury" shall arise.

With a proper application of section 766.309(1)(a), the presumption that Tristan's injury was a birth-related neurological injury under section 766.302(2), was in place. The Bennetts then had the obligation to present sufficient evidence rebutting the presumption. They failed to present such evidence. Accordingly, the presumed fact that Tristan's injury was a birth-related neurological injury

remained intact. The Bennetts also failed to present competent substantial evidence that could support a finding that Tristan's birth-related neurological injury did not fit within section 766.302(2).

The Bennetts argued below that although they stipulated that Tristan had suffered an injury to the brain caused by oxygen deprivation, which rendered her permanently and substantially mentally and physically impaired, they effectively rebutted the presumption of section 766.309(1)(a), with Tristan's medical records, which allegedly had no description of any neurological injury until after the events of October 3, 2001. In rejecting that argument, the First District correctly stated that the NICA Plan does not require that the neurological damage, i.e., injury to the brain or spinal cord, be manifest during "labor, delivery, or resuscitation in the immediate postdelivery period.

The First District is not in conflict with *Orlando Reg'l Healthcare Sys., Inc. v. Florida Birth-Related Neurological*, 997 So.2d 426 (Fla. 5th DCA 2008), in applying the phrase "immediate postdelivery period." The First District did not "rule" or hold that the Bennetts' claim, or any other claim, was NICA compensable merely because the "immediate postdelivery period" can include an extended period of days when a baby is delivered with a life threatening condition that requires close supervision. The First District merely cites to *Orlando Reg'l*,

in dicta, for the proposition that the phrase "immediate postdelivery period" has been construed to include an extended period of days under certain factual circum-stances.

ARGUMENT

Standard of review. In determining that Tristan's injury was not a "birth-related neurological injury," the ALJ concluded that the presumption contained in section 766.309(1)(a), was "for Petitioners benefit" only and not available to "aid other parties" like Dr. Long. Although this conclusion is drawn and explained in the Final Order's "Findings of Fact" section, it is a clearly a conclusion of law, drawn from the ALJ's interpretation of the applicable NICA statutory provisions.

The standard of review for an ALJ's interpretation of the NICA statutes is de novo. *See Alexander*, 909 So.2d at 586. An ALJ's order will be reversed by the appellate court when the ALJ's interpretation of the law is clearly erroneous. *See Schur v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 832 So.2d 188, 191 (Fla. 1st DCA 2002). The Florida Supreme Court reviews the district courts' interpretation of a statute de novo. *See Florida Birth-Related Neurological Injury Comp. Ass'n v. Dep't of Admin. Hearings*, 29 So.3d 992 (Fla.

2010)(hereinafter *"Bayfront"*).

An ALJ's findings of fact are reversible on appeal when they are not supported by competent substantial evidence in the record. *See Nagy v. Florida Birth-Related Neurological Injury Comp. Assoc.*, 813 So.2d 155 (Fla. 4th DCA 2002); §120.68(10), Fla. Stat.; §120.68(1), Fla. Stat. (The appellate court shall "set aside agency action if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record.").

I. THE FIRST DISTRICT'S HOLDING, REGARDING THE APPLICATION OF THE PRESUMPTION OF COMPENSABILITY OF SECTION 766.309(1)(a), WAS NOT ERROR AND IS NOT IN CONFLICT WITH ANY PRINCIPLE OF STATUTORY CONSTRUCTION OR WITH ANY OTHER DECISION OF ANOTHER DISTRICT COURT OF APPEAL. In the First D holding that the ALJ's failure to apply the statutory presumption of compensability was clearly erroneous given the parties' stipulations and the findings of fact by the ALJ. That holding is not in conflict with any principle of statutory construction or with any other Florida court.

A. The First District followed the plain language of section 766.309(1)(a), and correctly held that the presumption of compensability should have been applied by the ALJ in light of the Bennetts' petition, the parties' stipulations, and the ALJ's findings.

In a NICA proceeding, the ALJ shall determine, based upon all available evidence, whether the injury claimed is a "birth-related neurological injury." *See* §766.309(1)(a), Fla. Stat. In making that determination:

> If the claimant has demonstrated, to the satisfaction of the administrative law judge**, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and that the infant was thereby rendered permanently and substantially mentally and physically impaired**, a rebuttable presumption **shall** arise that the injury is a birth-related neurological injury as defined in s. 766.302(2).

§766.309(1)(a), Fla. Stat. (Emphasis added).

In arguing that the First District "disregarded" the plain language of the presumption statute, the Bennetts "disregard" the fact that their petition to determine availability of NICA coverage asserted that: "By the time of her birth by cesarean section, Tristan Bennett ("Tristan") had suffered a hypoxic ischemic event that caused brain damage[,]" and that Tristan "then suffered further injury to her brain" in the first several days of her life after the resuscitive period. *R. 6.* Likewise, in Dr. Long's petition for leave to intervene, he asserted that the petition alleged that "on September 26, 2001, [Tristan] suffered a birth related neurological injury covered by NICA." *R. 18.* "[I]n every case, the 'issues in a cause are made

solely by the pleadings.'" *See Rickenbach v. Kosinski*, 32 So.3d 732, 735 (Fla. 5th DCA 2010)(Quoting *Hart Props., Inc. v. Slack*, 159 So.2d 236 (Fla. 1963)).

More importantly, the Bennetts also "disregard" the fact that, at hearing, they stipulated with the other parties that Tristan "did suffer an injury to the brain caused by oxygen deprivation that rendered [her] permanently and substantially, mentally and physically impaired." *T. 4-5; R. 833, 836, 841.* As evidenced by the "Findings of Fact" portion of the Final Order, the ALJ accepted the parties' stipulation, finding that it was "undisputed that Tristan suffered brain injury, caused by oxygen deprivation, which rendered her permanently and substantially mentally and physically impaired." *R. 1072.* Because the
cord injury caused by oxygen deprivation . . . and that the infant was thereby rendered permanently and substantially mentally and physically impaired . . . ." Under these factual circumstances, the prerequisites of section 766.309(1)(a), were met and the presumption of compensability should have been applied by the ALJ.

In reversing the ALJ, the First District correctly held:

> As noted, the parties stipulated that Tristan is permanently and substantially mentally and physically impaired. Further, the ALJ found that the injury was a neurological one; that is, it involved the brain or the spinal cord. There was no dispute below concerning whether Tristan has sustained a neurological injury. Given the stipulation and the ALJ's findings of fact, we hold that the ALJ erred as a matter of law in not applying the presumption of compensability.

St. Vincent's, 27 So.2d at 70. The First District obviously found it significant that the parties had stipulated that Tristan was permanently and substantially mentally and physically impaired and that Tristan had suffered a neurological injury due to oxygen deprivation. *St. Vincent's*, 27 So.2d at 69-70.

Florida law is well settled that stipulations properly entered into by the parties and relating to a matter upon which it is appropriate to stipulate are "binding upon the parties and upon the court." *Turner v. Miami-Dade County School Board*, 941 So.2d 508, 509 (Fla. 1st DCA 2006) (Quoting *Gunn Plumbing, Inc. v. Dania Bank*, 252 So.2d 1, 4 (Fla. 1971)). A properly entered stipulation will relieve a party of an obligation to establish the matter and preclude the opposing party from establishing the contrary.[5] *Id.* Stipulations narrowing the issues are of value to the legal system as they simplify issues, limit or shorten litigation, save costs to the parties, and preserve judicial economy and resources. *Rickenbach*, 32 So.3d at 735.

The stipulations that the Bennetts participated in, which the ALJ accepted, easily demonstrated that Tristan "sustained a brain . . . injury caused by oxygen deprivation . . . and that the infant was thereby rendered permanently and

[5] At no time did the Bennetts seek to rescind, reform, void or set aside the

substantially mentally and physically impaired . . . ." *See* §766.309(1)(a), Fla. Stat. Thus, the application of the presumption in this case fit within the required plain reading of the statute.

In order to sidestep the obvious lack of conflict between the First District's opinion and other district courts "on the same question of law," the Bennetts assert that the analysis utilized by the First District in interpreting NICA's statutory scheme is in conflict with the plain language of the statute and with the analyses used in *Bayfront* and *Nagy*, because the First District accounted for legislative intent in construing the NICA Plan. The Bennetts' assertion is without merit.

First, the First District's analysis to which the Bennetts take issue, relates to their argument below that a NICA claimant can ignore or waive the presumption under section 766.309(1)(a). *See St. Vincent's*, 27 So.2d at 70-71. That analysis did not involve the decision to apply the presumption under the pleadings, stipulations, and facts of this case. As shown *supra*, there was no elaborate statutory analysis used by the First District on that question. The court simply applied the plain language of section 766.309(1)(a), to the stipulated facts and the findings of fact by the ALJ.

Second, the Bennetts characterize the analysis at issue as that serving the

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stipulation. *See Gunn Plumbing*, 252 So.2d at 4.

Legislature's "presumed intent," rather than the plain language of the statute. *Init. Brief at 13.* The First District did not "presume" any intent. Indeed, the legislative intent cited by the First District, is taken directly from the "findings and intent" of the NICA Plan. *See* §766.301, Fla. Stat. It is rather contrived to argue that the First District "presumed" the intent of the legislature when the court cited to the very statute the legislature passed establishing the intent of the legislation.

Third, the First District's analysis is not "misguided" but is actually consistent with the analyses used in both the *Bayfront* and *Nagy*. The First District and the cases cited by the Bennetts, adhere to the principle that when interpreting and construing statutes, courts are guided by the plain language of the statute **along with** a consideration of the legislature's expressed intent. As this Court stated in *Bayfront*, "If the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended." 29 So.3d at 997. In *Nagy*, the Fourth District stated, "In interpreting the [NICA] Plan, this court is guided by the plain language of its statutes and the Legislature's expressed intent." 813 So.2d at 159-160.

Indeed, this view of statutory construction is nothing new to this case or to

other cases interpreting the NICA plan. In *Florida Birth-Related Neurological Injury Comp. Ass'n v. Florida Div. of Admin. Hearings*, 686 So.2d 1349, 1354 (Fla. 1997)(hereinafter "*Birnie*"), this Court stated:

> Where, as here, the legislature has not defined the words used in a phrase, the language should usually be given its plain and ordinary meaning. Nevertheless, consideration must be accorded not only to the literal and usual meaning of the words, but also to their meaning and effect on the objectives and purposes of the statute's enactment. Indeed, "[i]t is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided [in construing enactments of the legislature]." (Internal citations omitted).

See also Fluet v. Florida Birth-Related Neurological Injury Comp. Ass'n, 788 So.2d 1010 (Fla. 2d DCA 2001). In light of the well settled analysis cited to and used in *Bayfront* and *Nagy*, one would be hard-pressed to label the First District's analysis "misguided" as the Bennetts do.

Finally, the sentence Petitioners take issue with in the First District's opinion, i.e., "[T]he ultimate goal in construing a statutory provision is to give effect to the legislative intent[,]" actually appeared in the ALJ's order. *See R. 1075.* Not surprising, Petitioners had no problem with the statement on appeal below when they were the prevailing parties.

This Court has frequently reversed course on granting jurisdiction after briefing on the merits has revealed that conflict jurisdiction has been improvidently granted. *See e.g.*, *State v. Wightman*, 14 So.3d 211 (Fla. 2009); *Healthcare and Retirement Corp. of America Inc. v. Bradley*, 997 So.2d 400 (Fla. 2008); *Florida Dept. of Children and Families v. H.D.*, 985 So.2d 1059 (Fla. 2008); *State v. Moninger*, 982 So.2d 682 (Fla. 2008); *Elwell v. State*, 979 So.2d 956 (Fla. 2008); *Luton v. State*, 974 So.2d 384 (Fla. 2008). This is one such case where jurisdiction has been improvidently granted. Accordingly, the Court should discharge jurisdiction and dismiss this appeal.

B. The First District properly applied the plain language of section 766.309(1)(a), and rejected the Bennetts' argument that a petitioner can ignore or waive a presumption where the evidence before the ALJ demonstrates the required statutory injury.

The Bennetts argue that the First District ignored the so-called operative language of section 766.309(1)(a), i.e., the conditional clause, "If the claimant has demonstrated. . . ." The First District did not ignore the statute's operative language, rather, the court properly relied on and followed it.

"Demonstrate" means: "1. To prove or make evident by reasoning or adducing evidence. 2. To describe or illustrate by experiment or practical application. . . . 3. To show or reveal. . . ." *The American Heritage Dictionary*,

380 (Second College Ed. 1991); *see Orlando Reg'l*, 997 So.2d at 431 ("When necessary, the plain and ordinary meaning can be ascertained by reference to a dictionary."). By asserting in their petition that Tristan, by the time of her birth, had "suffered a hypoxic ischemic event that caused brain damage" and by stipulating Tristan suffered "an injury to her brain caused by oxygen deprivation that rendered [her] permanently and substantially, mentally and physically impaired," the Bennetts proved, made evident, and/or showed, i.e., demonstrated, that the prerequisites of statutory presumption had been met. Thus, the First District properly applied the presumption under the factual and procedural circumstances of this case and, in effect, refused to allow Petitioners to "wiggle out" of the demonstration they voluntarily and willingly made.

The other language of the First District's opinion that the Bennetts take exception to, i.e., "that the presumption arises upon the presentation of evidence demonstrating the required injury," does not effectively rewrite the statute. Again, the language at issue was used in response to the question of whether a claimant may ignore or waive the presumption, where there is evidence presented demonstrating the required injury. *See St. Vincent's*, 27 So.3d at 71. At that point in the opinion, the First District had already found that the ALJ erred as a matter of law in failing to apply the presumption under the factual circumstances

of this case. *See St. Vincent's*, 27 So.2d at 70-71. In addressing the ability of a claimant to waive the presumption, the First District stated:

> We are not persuaded that legal representatives of an injured claimant can ignore or waive the presumption under section 766.309(1)(a). Under this section, the presumption arises upon the presentation of evidence demonstrating the required injury. While it is true that claimants bear the initial burden of proof under section 766.309(1)(a) and under the act generally, it is also true that the NICA Plan is intended to reduce malpractice claims brought under traditional tort law. . . . Applying the presumption of compensability in this case best serves the Legislature's intent. On the other hand, dispensing with the presumption at the request of a claimant would undermine that intent.

St. Vincent's, 27 So.3d at 70-71. As evidenced by its context, the First District's statement is not a rewrite of the statute. The passage simply explains how the presumption arose in this case and why the NICA Plan should not allow a rejection or waiver of the presumption once it is established by the presentation of evidence.

(1) The Bennetts further argue that "that the plain language of the [section 766.309(1)(a)] allows the presumption to arise only for the benefit of the claimant," is supported by the statute's legislative history. This argument is without merit.

If one reads the plain language of the statute in question, as the parties urge this Court to do, it is clear that section 766.309(1)(a), applies the presumption

irrespective of the parties. The statute does not contain any language restricting the "benefit" of the presumption to the "claimant." Indeed, nowhere in section 766.309(1)(a), do the phrases "in favor of" or "to the benefit of" appear. Had the legislature intended the presumption to favor or benefit a one party over another, it certainly would have said so *See Broz v. Rodriguez, M.D.*, 891 So.2d 1205, 1207 (Fla. 4th DCA 2005)(The court is required to presume that the legislature says in a statute what it means and means in a statute what it says there.).

Furthermore, there is a great difference between stating "if" a party demonstrates evidence to establish the presumption and stating that a party will "benefit" from the presumption. *See Aetna Casualty & Surety Co. v. Huntington Nat'l Bank*, 609 So.2d 1315, 1317 (Fla. 1992)(Citing the well-known maxim that it must be assumed that the legislature knows the meaning of the words and expressed its intent by the use of words found in the statute.) Respondents have never argued that the presumption of section 766.309(1)(a) may be triggered by a demonstration by someone other than a claimant.

Section 766.309(1)(a), plainly provides that when the required demonstration is made, as it was in this case, a rebuttable presumption that the "injury is a birth-related neurological injury" as defined under section 766.302(2),

shall arise. The statutory presumption does not favor one party over another, it favors compensability of the injury. *See Orlando Reg'l,* 997 So.2d at 432.

Such a plain reading of the statute promotes the overall goal of the NICA legislation, that is: to address the adverse impact of high-cost malpractice premiums on the delivery of obstetric services in the State and to provide "compensation, irrespective of fault, for birth-related neurological injury claims." §§766.301(1)(a), (2); 766.303(1), Fla. Stat.; *see Bayfront*, 29 So.3d at 995; *Nagy*, 813 So.2d at 159.

Additionally, the plain reading adopted by the First District does not run afoul of the strict construction concept applicable to statutes that substitute for common law rights and liabilities. It is certainly arguable that strict construction is not even implicated here, where the statute in question is neither vague nor ambiguous. *See Hess v. Walton,* 898 So.2d 1046 (Fla. 2d DCA 2005). Notwithstanding, the First District's application of the statute appropriately "includes only those subjects clearly embraced within its terms," and does not displace the common law "further than is clearly necessary." *See Nagy,* 813 So.2d at 159-160, n. 4; *Birnie,* 686 So.2d at 1354; *Carlile v. Game and Fresh Water Fish Comm'n*, 354 So.2d 362, 364 (Fla. 1977). If not for the fact that

Tristan's injury clearly fell within the NICA plan under the plain reading of the applicable statutes, her representatives would be free to pursue a common law remedy for damages. *See Birnie, supra.*

(2) The Bennetts' argument regarding the nature and effect of the legislative changes in 1989 is of no consequence because of the First District's clear holding. Indeed, whether the First District somehow replaced the phrase "If the claimant has demonstrated . . ." with "where it has been demonstrated," is not implicated here because, as argued *supra*, the court correctly held that the Bennetts, as claimants, established the prerequisites of section 766.309(1)(a), by stipulation.

Further, Petitioners' argument that the statute's amended language somehow shows that the presumption only provides a benefit to claimants highlights their fundamental misunderstanding of the plain language of the statute (both versions) and the goals of the NICA Plan. *See Init. Brief at 17-20.* Again, the presumption of section 766.309(1)(a) is not designed to "favor" one party over another. Rather, it is designed to favor "compensability" for the injury under the NICA Plan. *See Orlando Reg'l*, 997 So.2d at 432 (Holding that "[T]he ALJ failed to apply the **statutory presumption favoring compensability** for this claim.") (emphasis added)); *Alexander*, 909 So.2d at 586.

Finally, this specific argument was not raised in the court below and is not preserved for review in this higher court. *See Sunset Harbour Condo. Ass'n v. Robbins*, 914 So.2d 925, 928 (Fla. 2005).

(3) Finally, the First District's decision also did not "ignore" the NICA Plan's purpose to provide compensation to infants falling under the Plan. Indeed, the court began its analysis of the application of the presumption by citing to NICA's purpose, to wit.: "The NICA Plan was established by the Legislature to provide no-fault compensation for birth-related neurological injuries to infants." *St. Vincent's, 27 So.3d at 68.* Further, the First District later stated, "under the NICA statutory scheme 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[,]'" and that, "[a]pplying the presumption of compensability in this case best serves the Legislature's intent." *Bennett*, 27 So.3d at 71 (emphasis added, citations and footnote omitted). Thus, the court obviously accounted for NICA's purpose to provide compensation for the benefits of claimants falling under the Plan. The Bennetts seem to forget that the end result of the First District's decision is that they will receive benefits under the NICA Plan. This result belies the argument that the First District ignored the purpose of the Plan to provide compensation for the benefit of

claimants.

II. THE FIRST DISTRICT CORRECTLY DETERMINED THAT THE PRESUMPTION OF COMPENSABILITY AROSE AND THAT THE BENNETTS FAILED TO PRESENT SUFFICIENT EVIDENCE TO REBUT THAT PRESUMPTION.

With a proper application of the presumption set out in section 766.309(1)(a), a rebuttable presumption arose that Tristan's injury was a "birth-related neurological injury" covered under the NICA Plan. With the presumption in place, the Bennetts had the obligation to present sufficient evidence rebutting it. The evidence presented by the Bennetts failed to rebut the presumption and, as a matter of law, the presumed fact that Tristan's injury was a "birth-related neurological injury as defined in section 766.302(2)," remained intact.

A. Section 766.309(1)(a), creates a rebuttable presumption defined by section 90.302(1), Florida Statutes, shifting the burden of producing evidence rebutting the presumption in this case to Petitioners.

The parties appear to agree that the ALJ was correct in concluding that the presumption of section 766.309(1)(a), is a section 90.302(1), presumption because it was "established primarily to facilitate the determination of a particular action in

which the presumption is applied, rather than to implement public policy. . . ." [6] *R. 1096-1097; see* §90.303, Fla. Stat.; *see e.g., Berwick v. Prudential Prop. and Cas. Ins. Co.*, 436 So.2d 239 (Fla. 3d DCA 1983). A section 90.302(1) presumption is one affecting the burden of producing evidence and, as such, requires the trier of fact "to assume the existence of the presumed fact, unless credible evidence sufficient to sustain a finding of the nonexistence of the presumed fact is introduced . . . ." *See* §90.302(1), Fla. Stat.

If sufficient credible evidence is introduced by the party opposing the presumption, then "the existence or nonexistence of the presumed fact shall be determined from the evidence without regard to the presumption." *See* 90.302(1), Fla. Stat. A section 90.302(1), presumption is commonly referred to as "bursting bubble" or "vanishing" presumption. *See Public Health Trust of Dade County v. Valcin*, 507 So.2d 596, 600 (Fla. 1987).

As argued *supra*, the First District correctly held, as a matter of law, that the presumption of section 766.309(1)(a), applied to this case. Thus, by operation of

[6] The First District did not discuss this aspect of the ALJ's order. Indeed, the type of presumption section 766.309(1)(a), is, has not been addressed by any Florida appellate court, and very well may be one intending to implement public policy, shifting the burden of proof. *See* §766.301, Fla. Stat. (Legislative findings and intent.); *and, Warfel v. Universal Ins. Co. of North America*, 36 So.2d 136 (Fla. 2d DCA 2010)(Analysis of both majority and dissent.), *review granted*, 2010 WL 2708450 (Fla. July 7, 2010).

that statute, a rebuttable presumption arose that Tristan's injury was a "birth-related neurological injury" compensable under NICA. The burden to rebut that presumption was then placed on the party seeking to show that the presumed fact was not valid. *See* §90.302(1), Fla. Stat; *see e.g., Alexander*, 909 So.2d at 586-587; *also Levin v. Ethan Allen, Inc.*, 823 So.2d 132, 134-135 (Fla. 4th DCA 2002) (Holding that the burden of rebutting a statutory presumption of insolvency lied with the party asserting that it was not insolvent.).

Here, the burden to rebut the presumption was on the Bennetts because it was their position at hearing that the presumed fact, i.e., that Tristan's injury was a birth-related neurological injury under section 766.302(2), was not, in fact, valid. *See* §90.302(1), Fla. Stat. Only after the Bennetts met their burden, would the presumption fall away and the burden shift to Respondents, under the circumstances of this case, to show that Tristan's injury was a birth-related neurological injury compensable under NICA. *See Warfel*, 36 So.2d at 140 (Stating that when the party against whom the presumption operates "produces evidence which fairly and reasonably tends to show that the real fact is not as presumed," the impact of the presumption is dissipated.)(*Quoting Murray v. Schreiner*, 825 So.2d 527 (Fla. 2d DCA 2002)).

If the Bennetts failed to meet their burden to rebut the presumption by a greater weight of the evidence, the presumed fact remained in place. *See Warfel*, 36 So.2d at 139-140 (If the presumption is not rebutted by credible evidence, the party favored by the presumptive fact is entitled to a directed verdict.); Charles Ehrhardt, *Ehrhardt's Florida Evidence*, §302.1 (2008 ed.). The First District correctly concluded that the Bennetts failed to meet their burden.

B. There was no credible and sufficient evidence presented, i.e., competent substantial evidence, to support a finding that the Bennetts rebutted the presumption of section 766.309(1)(a) or that could support a finding that Tristan's birth-related neurological injury did not fit within section 766.302(2).

Dr. Long argued below that the evidence supporting the ALJ's finding that Tristan's injury was not a birth-related neurological injury was not competent and substantial and, therefore, could not rebut the presumption of section 766.301(1)(a). *See SCR., Tab A.* By reversing the ALJ and remanding for an "order finding that the claim filed by the Bennetts is subject to compensation under the NICA Plan," the First District tacitly held that the evidence presented by the Bennetts was not credible and sufficient to rebut the presumed fact that Tristan's injury was a birth-related neurological injury compensable under NICA. *SCR. 135.*

The Bennetts argue, however, that there was competent substantial evidence supporting the ALJ's finding that Tristan's neurological impairment occurred not at delivery but on October 3, 2001. In doing so, they rely on the ALJ's statement that, "there was credible evidence produced (in Tristan's medical records) to support a contrary conclusion [of the statutory presumption], and to require resolution of the issue without regard to the presumption." *Init. Brief at 29* (citing *R. 1076*). The Bennetts' argument is without merit. It bears remi leading to oxygen deprivation to the brain. Instead, the ALJ was only required to determine **when** that brain injury occurred. This was a question of fact, rather than a conclusion of law and, accordingly, the ALJ should have considered the expert testimony presented at the hearing. *See Orlando Reg'l*, 997 So.2d at 431, n. 3 (Holding that the ALJ erred in failing to consider the experts' analyses of what "immediate" meant under the circumstances of the case.). In finding that Tristan suffered her neurological injury not during delivery, but on October 3, 2001, the ALJ did not rely on, or even cite to, any of the expert medical testimony presented. *R. 1077-1078.*

By failing to rely on any expert medical testimony, the ALJ impermissibly placed himself in the role of "medical expert" and reached beyond the facts as found in the medical records, to make factual conclusions as to the meaning and

significance of the information in the medical records. In doing so, the ALJ's conclusion as to the compensability of this claim was not based on competent and substantial evidence. *See e.g., Brasington Cadillac-Oldsmobile v. Martin*, 641 So.2d 442, 444 (Fla. 1st DCA 1994)(Holding that expert testimony is required to establish causal relationship between incident and resulting conditions where they are beyond observation or not readily accessible to lay persons); *see also, Sasser v. Humana of Florida, Inc.*, 404 So.2d 856, 857 (Fla. 1st DCA 1981)(In medical malpractice cases.); *accord, Crest Products v. Louise*, 593 So.2d 1075, 1077 (Fla. 1st DCA 1992)(In workers' compensation cases).

Moreover, there was no competent substantial evidence in the medical records, from the Bennetts' experts, or from any other expert, that could support the finding that Tristan had not suffered a brain injury caused by oxygen deprivation in the course of labor, delivery or resuscitation in the immediate postdelivery period. There is no record of any neurologist or pediatric neurologist having seen Tristan from the time of birth to October 3, 2001. In addition, neither of the Bennetts' experts, Richard Fields, M.D., or Norman Pryor, M.D., provided credible and sufficient evidence rebutting the presumption that Tristan's injury was birth-related neurological injury as defined by section 766.302(2).

Dr. Fields is a board certified obstetrician/gynecologist. The crux of his testimony was that Mrs. Bennett was never in labor, that she had a partial placental abruption, and that she would have died before she went into labor had the c-section not been performed. *R. 835; Exhib. 23, pp. 18, 25, 31*. On the specific question of exactly when Tristan's brain injury occurred, Dr. Fields either had no opinion or deferred to others. *Exhib. 23, pp.* 25, 30. He could only provide a window of time when Tristan's neurological injury occurred, and that was from the time Tristan's monitor was removed at 12:47 p.m., until the time of her delivery. *Exhib. 23, pp.* 45-46. In short, Dr. Fields' testimony actually supports

the presumption. Dr. Pryor is b

delivery, which caused multiorgan system failure, specifically to her kidneys. *R. 835; Exhib. 29, pp.* 33-35. He opined "based on his education training, and experience as a board certified pediatrician and pediatric nephrologist" that he did not think that Tristan had suffered "any significant neurological damage before the October 3, 2001, arrest." *Exhib. 29, p.* 46. Finally, Dr. Pryor opined that Tristan's arrest on October 3, 2001, caused brain damage as shown by her neurological status documented in the medical chart after that date. *Exhib. 29, pp.* 41-43, 46-47.

Dr. Pryor was not, however, qualified to give expert opinion testimony about the timing of Tristan's neurological injury. Dr. Pryor is a pediatric **nephrologist,** not a pediatric **neurologist**. *Exhib. 29, pp. 5, 9-10.49*. The Bennetts elicited testimony and opinions from him, over objection, as if he were a pediatric neurologist. *See Exhib. 29, pp. 36-47.* Dr. Pryor's "neurological opinions" amounted to nothing more than reading selected entries from the St. Vincent's records. Further, Dr Pryor admitted on cross-examination that he had no special education or training in neurology or pediatric neurology, that he had never practiced neurology or pediatric neurology, that he was not qualified to render neurological opinions, and that he would defer to neurologists or pediatric

neurologists on neurology issues. *Id., pp. 49-51; 64-65.*

Finally, Dr. Pryor did not testify that Tristan had not suffered **any**, as opposed **to any significant**, neurological injury in the course of labor, delivery or resuscitation in the immediate post-delivery period. Thus, like Dr. Fields, Dr. Pryor provided no credible expert testimony rebutting the presumed fact that Tristan's injury was a "birth-related neurological injury" compensable under NICA.

The only qualified medical expert who testified about the timing of Tristan's neurological injury was Dr. Long's expert, Gary Hankins, M.D. As noted by the First District, Dr. Hankins was the expert with experience pertinent to the timing of hypoxic ischemic events occurring during the period surrounding delivery. *See St. Vincent's*, 27 So.3d at 67.

Dr. Hankins' testimony relating to Tristan's condition in the immediate post-delivery period shows that her condition at birth was dire. *T. 74-76*. Dr. Hankins described the base deficit value received within minutes of delivery as "profound," and at a level "likely to be injurious or lethal."[7] *Id.* Tristan was severely acidotic at birth, which he explained in the following exchange at the

[7] The Bennetts' expert, Dr. Fields, basically agreed, regarding the severity of Tristan's condition at birth, stating that a baby born with a pH of 6.76, would be

hearing:

> Q: And how does this metabolic acidemia impact on Tristan's organs?
>
> A: Well, the acidemia is there as a result of deprivation of oxygen. You cannot make energy in any cells without oxygen and fuel, glucose. So absent either one of them, you make no energy. If you don't [have] glucose, you can't do it, if you don't have oxygen, you can't do it. So what this is showing is the tissues have had to go into what's called anaerobic or nonoxygen metabolism and all the tissues are susceptible to being injured, not just the brain, but all tissues.
>
> If you shut down the energy capacity to cells to pump water out and sodium in and potassium, you shut down all those mechanisms, there's going to be cells everywhere. That's why when we talk about intrapartum hypoxic ischemia and encephalopathy, if you're going to have this happen to the baby in his brain, you're almost always going to have other working systems that are affected.
>
> It doesn't have to be all of them, but almost always you'll get at least the kidney or the liver or nuclear rib cells or the baby will develop a coagulopathy. Or the baby will have things like syndrome inappropriate ADH which is a central nervous system injury. It's a brain injury from the hypoxia and it's going to manifest through inappropriate ADH at the level of the kidney and the inability to retain sodium and in turn the baby develops hyponatremia . . . it's really more of a brain injury to the system responding to what the brain is doing wrong.

T. 77-78.

On the question of a causal relationship between Tristan's condition at birth

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unable to survive for more than "five minutes or so." *Exhib. 23., p. 52.*

and her neurological injury, Dr. Hankin's opined Tristan's cerebral palsy was consistent with the type of intrapartum hypoxic ischemic event or insult that had been described at the hearing. *T. 80-81*. Dr. Hankins added that Tristan's metabolic condition at birth was "absolutely consistent with what we see when babies have long-term neurologic injuries, specifically cerebral palsy of a spastic . . . type, plus or minus mental retardation, developmental delays, wheelchair bound, the need of feeding tubes. . . ." *T.* 110-11.

The First District correctly held that there was no credible and sufficient evidence presented, i.e., competent substantial evidence, supporting a finding that the Bennetts rebutted the presumption of section 766.309(1)(a) or that could support a finding that Tristan's birth-related neurological injury did not fit within section 766.302(2).

III. THE FIRST DISTRICT OPINION DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH *NAGY* WITH RESPECT TO THE TIMING OF AN INFANT'S NEUROLOGICAL INJURY

(A) The First District did not hold that NICA provides coverage for an infant's injury "so long as oxygen deprivation occurs during the course of labor, delivery or resuscitation in the immediate postdelivery period - no matter how remote the causal link between the oxygen deprivation, the injury to the brain, and subsequent damage." *Init. Brief at 32*. On the contrary, the First District read

the plain language of section 766.302(2), and correctly pointed out that NICA coverage requires the injury to an infant's brain or spinal cord caused by oxygen deprivation or mechanical injury occur "in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital . . . . " *St. Vincent's*, 27 So.3d at 70. This statement is completely consistent with the analysis used in *Nagy*, in addressing the timing of an injury. *See* 813 So.2d at 160 (Holding that "According to the plain meaning of the words as written, the oxygen deprivation or mechanical injury to the brain must take place during labor or delivery, or immediately afterward.").

Reading the plain language of the statutes at issue, the First District also correctly pointed out that neither section 766.302(2), nor section 766.309(1)(a), require that the neurological damage "be manifest during labor, delivery, or resuscitation in the immediate post-delivery period in a hospital . . . . " *St. Vincent's*, 27 So.3d at 70. The court continued: "It is 'oxygen deprivation or mechanical injury which must occur during labor, delivery, or resuscitation in the immediate postdelivery period' under the statutory scheme. The applicable statutes do not preclude coverage if neurological damage becomes manifest at a later date." This statement of the law is accurate and not in conflict with *Nagy*. *See* 813 So.2d at 160 In arguing th

traction, one must assume that the First District intended the word "manifest" to mean "the occurrence of the neurological injury." Clearly, the First District did not intend to use the word "manifest" in that way. "Manifest" means "clearly apparent to the sight or understanding; obvious . . . . To show or demonstrate plainly; reveal." *The American Heritage Dictionary*, 763 (Second College Ed. 1991).

The timing of the occurrence of Tristan's neurological injury and the "manifestation" of that injury are distinct concepts that arose because of the arguments made by the Bennetts and the factual context of those arguments in the lower court. Specifically, the Bennetts asserted in the First District that although they stipulated that Tristan had suffered an injury to the brain caused by oxygen deprivation that rendered her permanently and substantially mentally and physically impaired, they effectively rebutted the presumption of section 766.309(1)(a), with Tristan's medical records, which allegedly had no description of any neurological injury until after the events of October 3, 2001.

In rejecting that argument, the First District correctly stated that the NICA Plan does not require that the neurological damage, i.e., injury to the brain or spinal cord, **be manifest** during "labor, delivery, or resuscitation in the immediate

postdelivery period." *St. Vincent's*, 27 So.3d at 70. Under the NICA Plan, it is the oxygen deprivation or mechanical injury causing neurological damage that must occur during "labor, delivery, or resuscitation in the immediate postdelivery period." *Id.*

(B) The Bennetts further claim that the NICA Plan precludes coverage of neurological impairment that manifests at a later date, and that the Fist District erred in holding the contrary to be true. This argument is also without merit.

Section 90.302(2) does not have a provision limiting coverage for neurological injuries shown or revealed only "during labor, delivery, or resuscitation in the immediate postdelivery period." The Bennetts' reading of the NICA statutes improperly injects an additional requirement that the "permanent and substantial mental and physical impairment" be manifested "during labor, delivery, or resuscitation in the immediate postdelivery period." Section 766.302(2) simply does not have that requirement. Again, the clause "occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital" applies to the occurrence of the "oxygen deprivation or mechanical injury," not the revelation of the neurological injury.

This plain reading of section 766.302(2), facilitates the goals of the statute

to provide no fault compensation for "birth-related neurological injuries" to a limited class of catastrophically injured infants. It is no stretch in logic to believe that the legislature was aware that infants may not show or manifest injuries to either the brain or spinal cord in the limited statutorily prescribed period. Indeed, some neurological deficits will be hidden in the first few days, weeks, months and even years of life and may not be revealed until the child is older, more mobile, and better able to communicate and understand commands. This idea is supported by the legislature's decision to provide a longer statute of limitations for a NICA claim vis-a-vis a standard medical malpractice claim. *Compare* §766.313 Fla. Stat. (Establishing a 5 year statute of limitations.); *with* 95.11(4)(b), Fla. Stat. (Establishing a 2 year statute of limitations.).[8]

(C) The Bennetts additionally argue that the ALJ's order should be affirmed because the ALJ determined that Tristan did not suffer a "birth-related neurological injury" where she suffered only a physical "multi-system failure"

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[8] The NICA Plan originally had 7 year statute of limitations. No legislative history was found regarding the reason for the original limitations period. However, when the legislature reduced the limitations period from 7 to 5 years in 1993, House of Representative Committee on Insurance, commented: "Because of the nature of the injuries covered by NICA (permanent and substantial mental and physical impairment), it seems reasonable to expect that all such injuries can be discovered within the 5 years following the birth." *House of Representatives, Committee on Ins., Final Bill Analysis and Econ. Impact,* CS/HB 1199, (May 15, 1993).

before during and immediately following delivery. Again, as argued *supra* the presumption that Tristan's injury was a birth-related neurological injury as defined under section 766.302(2), arose as result of the parties' stipulations of fact. At that point, the Bennetts had the obligation to present credible evidence sufficient to sustain a finding that Tristan's injury was not birth-related neurological injury. The First District Court correctly determined that they failed to meet that obligation.

IV. THE FIRST DISTRICT IS NOT IN DIRECT AND EXPRESS CONFLICT WITH *ORLANDO REG'L* WITH RESPECT TO THE PHRASE "IMMEDIATE POSTDELIVERY PERIOD."

The First District is not in direct and express conflict with *Orlando Reg'l*, in applying the phrase "immediate postdelivery period." The First District did not "rule" or hold that the Bennetts' claim, or any other claim, is NICA compensable merely because the "immediate postdelivery period" can include "an extended period of days when a baby is delivered with a life threatening condition that requires close supervision." *See St. Vincent's*, 27 so.3d at 70.

The First District merely cites to *Orlando Reg'l*, in dicta, for the proposition that the phrase "immediate postdelivery period" has been construed to include an

extended period of days under certain factual circumstances. *St. Vincent's*, 27 So.3d at 70. Indeed, *Orlando Reg'l*, holds that the application of the phrase "immediate postdelivery period" must be made on a case-by-case basis, i.e., on the facts of each case. 997 So.2d at 430.

The comments by the First District that the Bennetts take exception to are clearly not holdings of the case. Indeed, these statements are prefaced by the statement: "Further, **even if the statutory scheme did require** manifestation of neurological damage during labor, delivery, and the postdelivery period, Tristan's injury is still compensable under the plan." *St. Vincent's*, 27 So.3d at 70 (emphasis added). One must not forget that in the previous paragraph of the opinion, the First District noted that the sections 766.302(2), and 766.309(1)(a), do not require "that neurological damage be manifest during 'labor, delivery or resuscitation in the immediate postdelivery period.'" *Id.* The comments that followed are clearly dicta.

Petitioners also take issue with the First District's alleged failure to consider the term "resuscitation." Again, the First District cited to the *Orlando Reg'l* when addressing the application of the phrase "immediate postdelivery period in a hospital." *St. Vincent's*, 27 So.3d at 70. *Orlando Reg'l* thoroughly analyzed

that phrase and the meaning of "resuscitation," when it applied them to the facts of that case. The First District obviously considered the term "resuscitation" as evidenced by its citation to the ALJ's finding that the injury "likely continued during the immediate postdelivery resuscitive period." *St. Vincent's*, 27 So.3d at 70.

In support of the dicta, the record evidence shows that Tristan's condition from birth to the arrest on October 3, 2001, was serious and declining. At delivery, Tristan did not cry, she had minimal respiratory effort, and required resuscitation by a variety of methods. Although she was sent to the newborn nursery, poor blood gases taken two minutes after her arrival caused her to be transferred to the special care nursery for further management. She was in moderate respiratory distress and metabolic acidosis. Although, treatment in the special care nursery was effective in resolving her respiratory distress and metabolic acidosis, she remained critically ill, requiring close supervision.

Nursery records in the days after delivery and prior to the October 3, 2001, arrest, described Tristan as lethargic, irritable, having difficulty sucking, and flailing her arms. Progress notes from October 1 and 2, 2001, described Tristan as "critically ill" with renal and other organ failure. During this period, Tristan

suffered from a variety of serious ailments, including severe metabolic acidosis, renal failure, tubular necrosis, disseminated intravascular coagulation, oliguria, fluid retention, hyponatremia, respiratory distress, elevated liver enzymes, thrombocytopenia, and possible sepsis. On October 3, she arrested and had several bouts of low heart rate, low oxygen saturations, and poor blood gas results. In short, Tristan was an ill child whose neurological injury had "manifested" in the course of resuscitation in the immediate postdelivery period.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed where jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, has been improvidently granted. In the alternative, this court should affirm the First District's decision and order, requiring the ALJ to enter an order finding that the claim of the Bennetts is subject to compensation under NICA Plan.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by U.S. Mail to Rebecca Bowen Creed, Esquire, Creed & Gowdy, P.A., 865 May Street, Jacksonville, Florida 32204, Wilbur E. Brewton, Esquire, Brewton Plante, P.A**.,** 225 South Adams, Suite 250, Tallahassee, Florida 32301, Scott A. Tacktill, Esquire, Unger Law Group, PL, P.O. Box 4909, Orlando, FL 32802-4909, and James W. Gustafson, Jr, Esquire, Searcy, Denny, Scarola, Barnhart & Shipley, PA, 517 North Calhoun Street, Tallahassee, FL 32301 on this 18th day of August, 2010.

DENNIS, JACKSON, MARTIN
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CERTIFICATE OF COMPLIANCE PURSUANT TO
Fla. R. App. P. 9.210(a)(2); 9.100(1)

Counsel for Respondents certifies the following: Pursuant to Fla. R. App. P.9.210(a)(2); 9.100(1), the attached brief for Appellants is printed using a proportionally spaced 14 point Times New Roman typeface.

Dated: August _____, 2010

_____
William T. Jackson FL BA