SUPREME COURT OF FLORIDA

CASE NO. SC10-364

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

Petitioners,

v.

L.T. No. 1D07-5557
L.T. No. 1D07-5561

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

Respondents.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

INITIAL BRIEF OF PETITIONERS

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STATEMENT OF THE CASE AND FACTS

This case is before the Court to resolve questions of express and direct conflict between the First District Court of Appeal's decision and the decisions of this Court and other district courts of appeal. The questions of law concern the First District's interpretation of the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan"), sections 766.301 through 766.316, Florida Statutes (2001). Petitioners/Appellees, Robert and Tammy Bennett, individually and as parents and guardians of Tristan Bennett, a minor (the "Parents"), ask this Court to reject the First District's interpretation of the statutory provisions of the Plan governing the compensability of a "birth-related neurological injury."

Facts and Procedural Background

On the morning of September 26, 2001, Petitioner Tammy Bennett ("Mrs. Bennett") was in an automobile accident near Macclenny, Florida. (Opinion, A-2, at 2.) Mrs. Bennett was more than thirty-eight weeks pregnant. (A-1, at 5.) She was transported to a nearby hospital. (A-1, at 6.) She remained there for approximately two hours, and was then transported by helicopter to St. Vincent's Hospital in Jacksonville. (A-1, at 8.) That same day, after declining into kidney failure, Mrs. Bennett underwent a caesarean section. (A-2, at 2.) Petitioners' infant, Tristan Bennett, was delivered by Dr. Long at 1:22 p.m. on September 26, 2001. (A-1, at 13.) Evidence of a partial placental abruption was noted. (*Id.*)

Although Tristan required manual resuscitation after delivery, she responded rapidly, and her Apgar scores at birth and within minutes of birth were in the normal range. (A-2, at 2-3.)[1] After delivery, she was admitted to the newborn nursery. (A-1, at 14.) She was referred to the special care nursery for additional management, due to respiratory distress and metabolic acidosis. (*Id*.)

At 2:10 p.m. on September 26, 2001, Tristan was admitted to the special care nursery. (*Id*.) After treatment, "her respiratory distress and metabolic acidosis resolved fairly quickly; and by 9:30 p.m., her respiration was noted as unlabored, skin remained pale/pink, and she was sleeping quietly." (*Id*.)

Tristan did suffer from renal distress and liver damage after delivery. (A-2, at 3.) Yet her neurologic exams during the first seven days of life were normal. (A-2, at 2-3, 5; *see also* Exh. 9 (cited at A-1, at 15-16).) Her hospital medical records described her as "alert" and "active," with "[n]euro grossly intact" and no evidence of any central nervous system disfunction or neurological abnormalities noted. (Exh. 9 (cited at A-1, at 15-16).)

On October 3, 2001, while in the special care nursery, Tristan experienced pulmonary bleeding and pulmonary arrest. (A-2, at 3.) She was intubated, placed on a ventilator, and given CPR. (A-1, at 16-17.) She remained "critically unstable

[1] An Apgar score is "a numerical expression of the condition of the newborn at birth and at short intervals thereafter and reflects the sum total points gained on an assessment of the heart rate, respiratory effort, muscle tone, reflex irritability and color." (A-2, at 3, n.3.)

throughout the rest of the day and evening of October 3, 2001." (A-1, at 18.) Late that evening, the medical records reflected the likely onset of seizure activity and "neurologic abnormalities." (*Id*.) Only then was she examined by a pediatric neurologist. (A-2, at 3.) She has since been diagnosed with cerebral palsy. (A-2, at 3, 5-6.)

The Parents, individually and on Tristan's behalf, sued St. Vincent's Medical Center, Inc., William H. Long, M.D., and North Florida Obstetrics and Gynecology, P.A. (referred to collectively as the "Health Care Providers"). The circuit court proceedings were abated, pending an administrative determination as to whether the infant's injuries were compensable under the Plan. (A-2, at 3.)

Proceedings Before the ALJ

The Parents filed a petition with the Division of Administrative Hearings (DOAH) to determine compensation under the Plan. (A-2, at 3.) In the petition, the Parents described the infant's condition at birth, stating:

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

(A-2, at 4.)

The Parents asserted that although the infant sustained a brain injury caused by oxygen deprivation by the time of her birth, this injury only rendered her

physically impaired. (A-2, at 5, 8-9.) Only after the events of October 3 did the infant suffer permanent and substantial *mental* (or "neurologic") impairment. (A-2, at 3, 4-5, 8-9.)

The Parents did not seek benefits under the Plan. (A-2, at 9.) While the Parents stipulated that currently Tristan is permanently and substantially mentally and physically impaired, they asserted that her current condition "occurred outside of labor, delivery, and immediate post-delivery resuscitation, and as such does not constitute a 'birth-related neurological injury.'" (R-835.) Further, the Parents stipulated that

> while Tristan suffered from multi-organ system failure due to that oxygen deprivation/asphyxia, which manifested in renal failure, hepatic injury, respiratory complications, and hematologic complications, [the child's medical records from St. Vincent's Medical Center] state Tristan did not have permanent and substantial neurological impairment . . . until suffering from severe hyponatremia, pulmonary arrest, hours of resuscitation, and profound metabolic acidosis on October 3, 2001.

(A-2, at 8-9.)

In contrast, the Health Care Providers asked the ALJ to determine the infant's injuries compensable under the Plan. (A-2, at 4-5.) A finding of compensability allows the Health Care Providers to invoke the Plan's exclusive remedies. The Health Care Providers asked the ALJ to apply the presumption of

compensability for a "birth-related neurological injury" under section 766.309(1)(a), Florida Statutes.

At the administrative hearing, extensive medical records were introduced. The question as to the timing of Tristan's neurological injury was a matter of dispute. (A-2, at 3, 4.) The ALJ clearly understood that he was to determine whether the infant suffered an injury to her brain from oxygen deprivation in the course of labor, delivery, or resuscitation in the immediate postdelivery period, which rendered her both physically and mentally impaired. (A-1, at 21, 25; T-4-5.)

The ALJ ruled for the Parents. (A-1, at 23-27.) The ALJ refused to apply the presumption of compensability for the benefit of the Health Care Providers, ruling instead that the presumption arises only for the benefit of claimants like the Parents. (A-2, at 5.)

The ALJ found that the record compelled the conclusion that the infant's neurologic impairment resulted from a brain injury caused by oxygen deprivation that occurred on October 3 – "and not during labor, delivery, or resuscitation in the immediate postdelivery period in the hospital." (A-1, at 27.) The "multi-system failure" suffered by Tristan as a result of oxygen deprivation during and immediately after delivery did not result in a brain injury or substantial neurologic impairment. (A-1, at 26; *see also* A-1, at 15 (finding that notwithstanding evidence of a hypoxic ischemic insult (oxygen deprivation) before, during and

likely after delivery, Tristan's medical records in the days thereafter "repeatedly document the absence of neurologic impairment or neurological damage").) The ALJ instead ruled that

> it is unlikely Tristan suffered 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.

(*Id*. (emphasis added).) In support of his findings, the ALJ cited the undisputed record evidence showing that

> Tristan was delivered atraumatically, she responded rapidly to resuscitation immediately after delivery, her neurologic examinations during the first seven days of life were normal, she suffered prolonged and severe decreases in fetal heart rate and saturations on October 3, 2001, . . . and she evidenced seizure activity and neurologic decline thereafter.

(A-1, at 27.)

The ALJ concluded that the proof established, more likely than not, that "Tristan's profound neurologic impairments resulted from a brain injury caused by oxygen deprivation that occurred October 3, 2001, and not during labor, delivery, or resuscitation in the immediate postdelivery period in the hospital." (*Id*.) Because the infant did not suffer a "birth-related neurological injury," the ALJ ruled that claim was not compensable under the Plan. (*Id*.)

Proceedings Before the First District Court of Appeal

The Health Care Providers appealed the Final Order. On appeal, the First District reversed, ruling that the ALJ erred as a matter of law in not applying the presumption of compensability. (A-2, at 9.) Emphasizing that its ultimate goal in construing a statute is to give effect to legislative intent, the court ruled that the presumption of compensability "arises upon the presentation of evidence demonstrating the required injury," without regard to whether the *claimant* demonstrated the requisite elements. The First District refused to allow claimants to waive the presumption. This, the court found, best served the Legislature's intent to "reduce malpractice claims brought under traditional tort law." (*Id*. at 12-13.)

Judge Kahn dissented, and relied instead on the Plan's express language. (A-2, at 14-16.) Finding that the rebuttable presumption was adopted by the Legislature to aid claimants in seeking benefits, Judge Kahn disagreed with the majority's decision authorizing the Health Care Providers to invoke the presumption. (*Id*. at 14-16.)

The First District further interpreted the Plan to find that "neither section 766.302(2) nor section 766.309(1)(a) requires that neurological damage be manifest during 'labor, delivery, or resuscitation in the immediate postdelivery period.'" (*Id*. at 10.) According to the court, only "oxygen deprivation or

mechanical injury" must occur during "labor, delivery, or resuscitation in the immediate postdelivery period." (*Id*.) Alternatively, even if the statutory scheme requires manifestation of neurological damage during labor, delivery, and the postdelivery period, the First District concluded that the infant's injuries were compensable. The court found that the "immediate postdelivery period in a hospital" may include "an extended period of days when a baby is delivered with a life-threatening condition and requires close supervision." (*Id*. at 11.)

The Parents timely filed a motion for rehearing, rehearing en banc, clarification, and certification. On February 4, 2010, the First District granted only the request for clarification, ruling that the ALJ must find the Parents' claim compensable under the Plan. (A-3.) Judge Kahn dissented from the majority's decision to deny certification, noting that he would certify a question of great public importance. The Parents timely filed a Notice to Invoke Discretionary Jurisdiction with the First District on March 1, 2010.

SUMMARY OF THE ARGUMENT

The First District's Opinion conflicts with decisions of this Court and other district courts of appeal in interpreting the statutory provisions of the Plan related to a "birth-related neurological injury." Contrary to the First District's ruling, the ALJ correctly interpreted the plain and unambiguous language of the Plan in determining that Tristan did not suffer a compensable "birth-related neurological injury" under the Plan. For the reasons set forth below, the First District's Opinion must be quashed, and the ALJ's Final Order affirmed.

First, the First District erred in ruling that the statutory presumption of a "birth-related neurological injury" under section 766.309(1)(a), Florida Statutes, benefits health-care providers and claimants alike. The First District emphasizes legislative intent to the detriment of the statute's plain and unambiguous language, contrary to the decisions of this Court in *Florida Birth-Related Neurological Injury Compensation Association v. Department of Administrative Hearings*, 29 So. 3d 992 (Fla. 2010), and the Fourth District Court of Appeal in *Nagy v. Fla. Birth-Related Neurological Injury Compensation Association*, 813 So. 2d 155 (Fla. 4th DCA 2002). The First District's construction of the statutory presumption contradicts the plain language of the statute, and the Legislature's intent.

Even if the statutory presumption arises here, the presumption does not conclusively establish the compensability of a claim under the Plan. In instructing

the ALJ to find the Parents' claim compensable on remand, the First District impermissibly reweighs the evidence. The ALJ has already determined that, even if the statutory presumption arose for the benefit of the Health Care Providers, the Parents adequately rebutted that presumption. Competent, substantial evidence supports the ALJ's finding that Tristan's injury was not compensable as a "birth-related neurological injury."

Next, in finding that the question of when an infant suffers a neurological injury is irrelevant, the First District renders an opinion that expressly and directly conflicts with the Fourth District's decision in *Nagy*. *Nagy* did not limit the question of compensability to the occurrence of oxygen deprivation or mechanical injury alone. Instead, consistent with the definition of "birth-related neurological injury," the Fourth District ruled that both the oxygen deprivation *and* the injury to the brain must occur during labor, delivery, or the immediate post-delivery resuscitative period. The timing of the injury to the brain (or "neurological damage") that results in permanent and substantial mental and physical impairment is relevant. The applicable statutes – which must be narrowly construed and strictly applied – only compensate a claimant for a "birth-related neurological injury" that occurs during the course of labor, delivery, or immediate post-delivery resuscitation. Neurological damage that "manifests" after the relevant statutory time period is not covered under the Plan.

Finally, the First District's interpretation of a "birth-related neurological injury" expressly and directly conflicts with the Fifth District's interpretation of the same statutory definition in *Orlando Regional Healthcare System, Inc. v. Florida Birth-Related Neurological*, 997 So. 2d 426 (Fla. 5th DCA 2008). The plain language of the statutory definition of a "birth-related neurological injury," as interpreted by the Fifth District in *Orlando Regional Healthcare*, illustrates the First District's error. To construe the seven days between September 26 (when Tristan was delivered) and October 3 (when she suffered a pulmonary arrest) as "resuscitation in the immediate postdelivery period" defies the plain and ordinary meaning of "resuscitation" and "immediate," and the facts of this case. *See Orlando Regional Healthcare*, 997 So. 2d at 431, 432.

For all these reasons, the Parents ask this Court to quash the Opinion of the First District, and affirm the ALJ's Final Order. Because the Parents' infant did not suffer a "birth-related neurological injury," within the meaning of the relevant statutory provisions, her claim is not compensable under the Plan.

ARGUMENT

Standard of Review

The standard of review of an ALJ's interpretation of the Plan is *de novo*. *Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 813 So. 2d 155, 159 (Fla. 4th DCA 2002). The ALJ's findings of fact related to compensability of a claim under the Plan are conclusive and binding. § 766.311(1), Fla. Stat. An ALJ's findings of fact are reversible on appeal only when they are not supported by competent substantial evidence in the record. *See Nagy*, 813 So. 2d at 159; § 120.68(7) & (10), Fla. Stat.

I. THE FIRST DISTRICT'S INTERPRETATION OF THE STATUTORY PRESUMPTION OF A "BIRTH-RELATED NEUROLOGICAL INJURY" CONFLICTS WITH ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION.

A. The First District disregards the plain language of the statutory presumption in a misguided effort to "give effect to legislative intent."

The Plan is a statutory substitute for the Parents' common law rights and liabilities. *See Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings*, 686 So. 2d 1349, 1354 (Fla. 1997). Because the Plan is in derogation of the common law, it must be strictly construed and narrowly applied. *Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 813 So. 2d 155, 159 (Fla. 4th DCA 2002); *accord Fla. Birth-Related Neurological Injury Comp. Ass'n*, 686 So. 2d at 1354. Statutory interpretation of the Plan begins with its plain

language. *Fla. Birth-Related Neurological Injury Comp. Ass'n v. Dep't of Admin. Hearings*, 29 So. 3d 992, 997 (Fla. 2010) (hereinafter referred to as "*Bayfront*").

The plain language of the Plan's statutory presumption provides:

> *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. (2001) (emphasis added). The First District does not address the Legislature's use of the conditional clause, "[i]f the claimant has demonstrated," to determine when the presumption arises. Instead, the First District finds that "the presumption arises upon the presentation of evidence demonstrating the required injury." (A-2, at 12.)

The First District disregards the plain language of the statute, instead interpreting the statutory presumption to serve the Legislature's presumed intent. The "ultimate goal in construing [this] statutory provision," according to the First District, is "to give effect to legislative intent." (*Id*. at 12-13.) The court concludes:

> 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.

(*Id*.)

The First District's ruling expressly and directly conflicts with this Court's opinion in *Bayfront*, and the Fourth District's decision in *Nagy*. When, as here, the language of a statute is plain and unambiguous, the "ultimate goal" is not – as the First District finds – "to give effect to legislative intent." Rather, the ultimate goal is to strictly construe the statute's clear language and give the statute its plain and obvious meaning. *See Bayfront*, 29 So. 3d at 997-98; *Nagy*, 813 So. 2d at 159-60 & n.4; *accord Fla. Birth-Related Neurological Injury Comp. Ass'n*, 686 So. 2d at 1354. "[E]ven where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the [statute], it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." *Bayfront*, 29 So. 3d at 997-98 (citations omitted).

This Court's ruling in *BellSouth Telecommunications* does not establish a contrary rule of statutory construction, as the First District suggests. (A-2, at 13 (citing *Bellsouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287 (Fla. 2003)). The Court does find in *BellSouth Telecommunications* that its purpose in construing a statute "is to give effect to the Legislature's intent." 863 So. 2d at 289. Yet the Court further emphasizes that in "attempting to discern legislative intent," courts must "first look to the actual language used in the statute." *Id*. Only if the

language of a statute is unclear may a court "apply rules of statutory construction and explore legislative history to determine legislative intent." *Id*.

Nowhere in its decision does the First District find the language of the statutory presumption ambiguous. The court had no reason, then, to disregard the actual language of the statute. Rather than interpret the statute to "best serve[] the Legislature's intent," the First District should have first looked to the statute's plain language.

B. The plain language of the statutory presumption, together with the statute's legislative history, intent, and the purpose of the Plan, establishes that the First District erred in interpreting section 766.309(1)(a).

The Parents urge this Court to reject the First District's interpretation of the statutory presumption found in section 766.309(1)(a). The First District interprets the statute to find that the presumption arises simply "upon the presentation of evidence demonstrating the required injury." (A-2, at 12.) Its interpretation contradicts the plain language of section 766.309(1)(a), the legislative history of the statutory presumption, and the purpose of the Plan. For the reasons set forth below, the ALJ correctly ruled that the presumption arises only when invoked by a claimant seeking to establish compensability for a "birth-related neurological injury" under the Plan.

1. The plain language of section 766.309(1)(a) allows the presumption to arise only for the benefit of the claimant.

The operative language of section 766.309(1)(a) is the Legislature's use of the conditional clause, "*[i]f the claimant has demonstrated,*" to determine when the rebuttable presumption arises. § 766.309(1)(a), Fla. Stat. (emphasis added). "If," as commonly defined, means "in the event that," "allowing that," or "on condition that." *Webster's New Collegiate Dict.* 564 (1980 ed.). The Legislature's use of the conditional "if" expresses the condition that must occur before the expected result ("a rebuttable presumption . . . that the injury is a birth-related neurological injury") follows. *See* J. Williams, *Style Second Edition*: *Ten Lessons in Clarity and Grace* 220 (1985 ed.) (defining adverbial subordinate clauses as those that "usually begin with some kind of subordinating conjunction" like "if"; the main, or independent, clause follows).[2]

Section 766.309(1)(a) specifically conditions the rebuttable presumption upon whether the *claimant* has demonstrated that the infant sustained a brain injury caused by oxygen deprivation. § 766.309(1)(a), Fla. Stat. The clear and unambiguous language of the statute "must be given its plain and ordinary

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[2] Examples of adverbial subordinate clauses include:

Unless *you leave*, I will take action.

Because *you have not left*, I've called the police.

J. Williams, *Style*, at 220.

meaning." *Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank*, 609 So. 2d 1315, 1317 (Fla. 1992). The presumption does not arise simply upon the "presentation of evidence demonstrating the required injury" – regardless of whether it is the claimant or the medical provider who has satisfied the statutory precondition.

To find that the rebuttable presumption arises "upon the presentation of evidence demonstrating the required injury" is to rewrite the statute's clear and unambiguous language. *See* § 766.309(1)(a), Fla. Stat. This the First District cannot do. *See State v. J.M.*, 824 So. 2d 105, 111 (Fla. 2002); *accord Univ. of Fla. Bd. of Trustees v. Andrew*, 961 So. 2d 375, 377 (Fla. 1st DCA 2007) (when "interpreting a statute, courts are not at liberty to add words to the statute that were not placed there by the legislature"). To give a statute a broader definition than its plain meaning or to add words not chosen by the legislature is to improperly abrogate legislative power. *Donato v. Am. Tele. & Tele. Co.*, 767 So. 2d 1146, 1150-51 & 1154 (Fla. 2000); *accord Andrew*, 961 So. 2d at 377.

2. The First District's interpretation impermissibly restores language already removed by the Legislature in its 1989 amendment to the statutory presumption.

The First District's interpretation of section 766.309(1)(a) contradicts not only the plain language of the statutory presumption, but also the statute's legislative intent and history. The construction of the Plan advocated by the

Parents, and adopted by the ALJ, is amply supported by the statute's legislative history.

In 1987, the Academic Task Force for Review of the Insurance and Tort Systems recommended that the Florida Legislature enact a no-fault compensation plan for birth-related injuries, similar to the plan recently adopted by the state of Virginia. *See Galen of Fla., Inc. v. Braniff*, 696 So. 2d 308, 310 (Fla. 1997) (citing the Academic Task Force for Review of the Insurance and Tort Systems, *Medical Malpractice Recommendations* 31 (Nov. 6, 1987) (the "Task Force Report")). Notably, in establishing a framework for the compensation of claimants who had suffered a birth-related neurological injury, the Virginia legislature had recognized the "difficulty of proving when, but not whether, such an injury was sustained." *Wolfe v. Va. Birth-Related Neurological Injury Comp. Program*, 580 S.E.2d 467, 473 (Va. Ct. App. 2003). Virginia thus "enacted a presumption to assist potential claimants in obtaining benefits." *Id*. (citing Va. Code § 38.2-5008(A)(1)). This statutory presumption provided, in relevant part:

> A rebuttable presumption shall arise that the injury alleged is a birth-related neurological injury *where it has been demonstrated*, to the satisfaction of the Virginia Workers' Compensation Commission, 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 . . . disabled . . . .
>
> If either party disagrees with such presumption, that party shall have the burden of proving that the injuries are not

> birth-related neurological injuries within the meaning of the chapter.

Va. Code § 38.2-5008(A)(1)(a) (emphasis added). By it plain language, Virginia's statutory presumption applies equally to claimants and medical providers. *See Cent. Va. Obstetrics & Gynecology Assocs. v. Va. Birth-Related Neurological Injury Comp. Program*, 590 S.E.2d 631, 636 (Va. Ct. App. 2004).

When Florida's Plan was first enacted in 1988, the Legislature adopted a statutory presumption *identical* to that of Virginia's Act. *Compare* Ch. 88-1, § 68(1)(a)1. & 2., Laws of Fla. *with* Va. Code § 38.2-5008(A)(1)(a). In 1989, however, the Florida Legislature amended the Plan. The Legislature deleted the language that allowed the rebuttable presumption to arise "where it has been demonstrated," instead rewriting the statute to expressly add the precondition: "If the claimant has demonstrated." *See* Ch. 89-186, § 4, Laws of Fla.; *see also* § 766.309, Fla. Stat. Ann. (2006), Amendment Notes (explaining the 1989 amendment). Consistent with this change, the Legislature also deleted former subparagraph (1)(a)2., which had provided that "[i]f either party disagrees with such presumption, that party shall have the burden of proving that the injury alleged is not a birth-related neurological injury." *See* Ch. 89-186, § 4, Laws of Fla.

Since 1989, the language of Florida's rebuttable presumption has remained unchanged. *Compare* Ch. 89-186, § 4, Laws of Fla. *with* § 766.309(1)(a), Fla. Stat.

(2009). As the statutory presumption now reads, whether the injury claimed is presumed a "birth-related neurological injury" under the Plan depends on "[i]f the claimant has demonstrated, to the satisfaction of the administrative law judge, that the infant has sustained" the requisite elements for such injury. § 766.309(1)(a), Fla. Stat.

In deleting the original language, the Florida Legislature must have "intended [the statute] to have a different meaning than that accorded it before the amendment." *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 364 (Fla. 1977) (quoting *Arnold v. Shumpert*, 217 So. 2d 116, 119 (Fla. 1968)). "Certainly, by enacting a material amendment to a statute, the legislature is presumed to have intended to alter the law unless the contrary is made clear." *Sam's Club v. Bair*, 678 So. 2d 902, 903 (Fla. 1st DCA 1996); *accord Carlile*, 354 So. 2d at 364. The Legislature is presumed to "understand[] the meaning of the language it uses and the implications of [that language's] placement in a statute." *Ward v. State*, 963 So. 2d 1143, 1146 (Fla. 3d DCA 2006) (citations omitted).

Here, the Legislature removed the language giving rise to a statutory presumption that arises for the benefit of claimants and medical providers alike, and instead substituted the current language, which allows the presumption to arise only "[i]f the claimant has demonstrated" the elements for injury. Nonetheless, the First District interprets the presumption to arise simply "upon the presentation of

evidence demonstrating the required injury" – without regard to whether it is the claimant or a medical provider who seeks to invoke the presumption. (A-2, at 12.)

The Legislature has already rejected the First District's interpretation of the statutory presumption. *Cf. Don King Prods., Inc. v. Chavez*, 717 So. 2d 1094, 1095 (Fla. 4th DCA 1998) (noting that "the deletion of the language specifically supporting [appellant's] construction of the statute is one of the surest signs of its rejection by the legislature"). The Legislature clearly and intentionally removed the language of the statute allowing the presumption to arise equally for the benefit of claimants and medical providers, simply upon a showing that the required injury "has been demonstrated." The First District may not "contravene the legislature's obvious intentions by restoring the excluded language." *Don King Prods., Inc.*, 717 So. 2d at 1095. In refusing to give effect to this legislative amendment, the First District has improperly rewritten the statute. *See Carlile*, 354 So. 2d at 364-65 (finding that "where it is apparent that substantial portions of a statute have been omitted by . . . amendment, the courts have no express or implied authority to supply omissions that are material and substantive").

3. The First District's interpretation of the statutory presumption to reduce malpractice claims ignores another purpose for the Plan, which is to provide compensation for the benefit of claimants.

The First District's interpretation also contradicts the Legislature's purpose in establishing the Plan. In construing the statutory language, the First District

should have considered "not only . . . the literal and useful meaning of the words, but also . . . their meaning and effect on the objectives and purpose of the statute's enactment." *Fla. Birth-Related Neurological injury Comp. Ass'n v. Fla. Div. of Admin. Hearings*, 686 So. 2d 1349, 1354 (Fla. 1997).

The Florida Legislature enacted the Plan to "provide no-fault compensation for birth-related neurological injuries to infants." *Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 813 So. 2d 155, 159 (Fla. 4th DCA 2002) (citing *Fla. Birth-Related Neurological Injury Comp. Ass'n v. McKaughan*, 668 So. 2d 974, 978 (Fla. 1996)); *accord* § 766.301(2), Fla. Stat. The Legislature sought 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.

§ 766.301(2), Fla. Stat.

The First District recognizes that the Legislature enacted the Plan to provide no-fault compensation for a limited class of catastrophic injuries, but fails to construe the statutory presumption consistent with this intent. (A-2, at 12-13.) Instead, the First District interprets the statutory presumption to serve only one purpose: to "reduce malpractice claims brought under traditional tort law." (A-12.) Citing observations from commentators, the First District notes that the Plan "has only been partially successful in reducing malpractice claims involving birth-related injuries." (A-2, at 12, n.2 (citing David M. Studdert, Lori A. Fritz, and

Troyen A. Brennan, "The Jury Is Still In: Florida's Birth-Related Neurological Injury Compensation Plan After a Decade," 25 *J. Health Pol. Pol'y & L.* 499, 523 (2000).) The First District adopts the reasoning of the commentators, emphasizing that "[m]any claimants apparently hope that their injury will not meet the definition of a birth-related neurological injury, thus releasing them from the Plan's jurisdiction to pursue malpractice actions" and "more lucrative compensation in the tort arena." (*Id*. (citing Studdert, Fritz & Brennan).)

Regardless of the First District's perception of claimants' motives, the statutory presumption – adopted as a rebuttable presumption to aid claimants in seeking compensation under the Plan – should not be applied to eviscerate those claimants' common-law tort remedies. (A-2, at 15 (Kahn, J., dissenting).) To so find ignores the other, equally persuasive aspect of the Legislature's intent: to limit compensation under the Plan to a narrow class of catastrophic injuries. § 766.301(2), Fla. Stat.

The statutory interpretation advocated by the Parents – and accepted by the ALJ – results in a narrower application of coverage under the Plan than that proposed by the Health Care Providers. This narrow interpretation is consistent with the requirement that "statutes which are in derogation of the common law be strictly construed and narrowly applied." *Nagy*, 813 So. 2d at 159. To accept the broader statutory interpretation advocated by the First District is to afford medical

providers an opportunity for greater immunity under the Plan, while further limiting claimants' common-law rights. Such an expansive reading of the statute contradicts not only the rules of statutory interpretation, but also the "clearly expressed intention of the legislature that the Plan be limited to a narrow class of catastrophic injuries." *Nagy*, 813 So. 2d at 160; *see also Fla. Birth-Related Neurological Injury Comp. Ass'n*, 686 So. 2d at 1354-55 (emphasizing that "a legal representative of an infant should be free to pursue common law remedies for damages resulting in an injury not encompassed within the express provisions of the Plan").

II. ALTERNATIVELY, EVEN IF THE FIRST DISTRICT CORRECTLY FINDS THAT THE STATUTORY PRESUMPTION ARISES FOR THE BENEFIT OF THE HEALTH CARE PROVIDERS, THE PRESUMPTION DOES NOT REQUIRE A FINDING OF COMPENSABILITY.

Even if the statutory presumption arises under section 766.309(1)(a), the presumption does not conclusively establish that a claim is compensable under the Plan. In ruling otherwise, the First District contravenes well-settled law and the facts of this case. Regardless of whether the ALJ correctly interpreted the presumption, competent, substantial evidence supports his finding that Tristan did not suffer a birth-related neurological injury for purposes of the Plan. The First District should not be permitted to reweigh the evidence to find the claim compensable.

A. Section 766.309(1)(a) creates a rebuttable presumption that affects only the burden of producing evidence.

The First District first misapprehends the nature of the statutory presumption. Section 766.309(1)(a) was established primarily to assist claimants in seeking benefits under the Plan. *See* § 766.301(2), Fla. Stat. (expressing legislative intent to "provide compensation, on a no-fault basis, for a limited class of catastrophic injuries"). According to its plain language, section 766.309(1)(a) gives rise only to a "rebuttable presumption . . . that the injury is a birth-related neurological injury." Indeed, as a statutory presumption established primarily to "facilitate the determination of the particular action in which the presumption is applied," section 766.309(1)(a) must be classified as a rebuttable presumption that affects only the burden of producing evidence. § 90.303, Fla. Stat.; *accord Berwick v. Prudential Property & Cas. Ins. Co.*, 436 So. 2d 239, 240 (Fla. 3d DCA 1983); C. Ehrhardt, 1 *Fla. Prac. Evidence* § 303.1 (2009 ed.); *cf.* § 90.304, Fla. Stat. (establishing that "[i]n civil actions, all rebuttable presumptions which are not defined in s. 90.303 are presumptions affecting the burden of proof").

Because the presumption is rebuttable, only the burden of producing evidence shifts. *See* § 90.302(1), Fla. Stat. As Professor Ehrhardt has explained:

> These so-called "bursting bubble" presumptions are recognized when the underlying facts are proved and they remain in effect until credible evidence is introduced to disprove the presumed fact. Once the evidence of the

> nonexistence of the presumed fact is offered, the presumption disappears and the jury is not told of it.

Ehrhardt, 1 *Fla. Prac. Evidence* § 303.1 (2009 ed.).

The presumption does not otherwise alter the burden of proof. Once credible evidence is introduced to show that an infant did *not* suffer an injury to her brain that rendered her permanently and substantially mentally impaired during the course of labor, delivery, or resuscitation in the immediate post-delivery period, the benefit of the statutory presumption disappears. *See* § 90.302(1), Fla. Stat.; § 766.302(2), Fla. Stat. The existence or nonexistence of the presumed fact – specifically, whether the infant suffered a "birth-related neurological injury" – must be determined from the evidence "without regard to the presumption." § 90.302(1), Fla. Stat.; *accord Tabb v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 880 So. 2d 1253, 1259 (Fla. 1st DCA 2004) (ruling that the ALJ "should have weighed and considered the evidence as any other type of evidence").

Section 766.309(1)(a) thus does not create a conclusive presumption of compensability under the Plan. *See* § 90.301(2), Fla. Stat. (establishing that "[e]xcept for presumptions that are conclusive under the law from which they arise, a presumption is rebuttable"); *see also* § 90.303, Fla. Stat. (defining presumptions that affect the burden of producing evidence). Instead, section 766.309(1)(a) is an evidentiary presumption that affects only the burden of producing evidence.

Nor does the presumption shift the burden of proof. The Plan contemplates that typically claimants will seek to establish compensability. Yet when an intervening hospital or physician invokes the exclusivity of remedies and immunity from tort liability afforded under the Plan, the burden of proof rests on the intervening medical provider, as the proponent of the issue. *See Galen of Fla., Inc. v. Braniff*, 696 So. 2d 308, 311 (Fla. 1997) ("the assertion of NICA exclusivity is an affirmative defense"); *see also Tabb*, 880 So. 2d at 1260 (citing *Fla. Birth-Related Neurological Injury Comp. Ass'n v. McKaughan*, 668 So. 2d 974 (Fla. 1996), to find that the assertion of NICA exclusivity is an affirmative defense).

Here, the Health Care Providers – not the Parents – rely on the definition of a "birth-related neurological injury" in an effort to prove that Tristan's injury is compensable under the Plan. Because the Health Care Providers assert the affirmative defenses of NICA exclusivity and immunity, the burden rests on the Health Care Providers to prove, more likely than not, that Tristan suffered an injury to her brain from oxygen deprivation occurring during the course of labor, delivery, or resuscitation in the immediate post-delivery period that thereby rendered her permanently and substantially mentally and physically impaired. *See* § 766.302(2), Fla. Stat. (defining a "birth-related neurological injury"); § 766.303(2), Fla. Stat. (establishing that the rights and remedies under the Plan for a birth-related neurological injury exclude all other rights and remedies "against any

person or entity directly involved with the labor, delivery, or immediate postdelivery resuscitation during which such injury occurs").

No longer does section 766.309(1)(a) require the Parents, as the parties who disagree with the statutory presumption, to bear the burden of "proving that the injury alleged is *not* a birth-related neurological injury." *See* Ch. 89-186, § 4, Laws of Fla. (deleting former section 766.309(1)(a)2., Fla. Stat. (1988), which provided that "[i]f either party disagrees with such presumption, that party shall have the burden of proving that the injury alleged is not a birth-related neurological injury"). Instead, it is the Health Care Providers who must prove that the exclusive rights and remedies of the Plan protect them from tort liability for a "birth-related neurological injury."

B. Competent, substantial evidence supports the ALJ's alternative finding that the Parents adequately rebutted any presumption of a "birth-related neurological injury."

Notwithstanding the statute's plain language, the First District essentially treats the rebuttable presumption as a conclusive presumption of compensability under the Plan. (A-2, at 12-13.) The First District does not acknowledge the existence of competent, substantial evidence, relied upon by the ALJ, to rebut any presumption of a "birth-related neurological injury." Instead, the First District concludes that its interpretation of the statutory presumption renders the remaining issues on appeal moot (A-2, at 13) and instructs the parties, on remand, that "the

administrative law judge is to enter an order finding that the claim filed by the [Parents] is subject to compensation under the NICA Plan" (A-3).

Rather than interpret the statutory presumption as conclusive, the First District should have affirmed the ALJ's alternative ruling. The ALJ ruled that even if the statutory presumption arose for the Health Care Providers' benefit,

> 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.

(A-1, at 25.) The ALJ properly interpreted the statutory presumption as a rebuttable one and, after considering all the evidence, determined that the injury to Tristan was not compensable as a "birth-related neurological injury" under the Plan.

Competent, substantial evidence supports the ALJ's determination as to compensability. The record establishes that the Parents presented sufficient evidence to rebut any presumption of a "birth-related neurological injury." (A-1, at 25.) The Parents proved that although Tristan suffered "multi-system failure as a consequence of the oxygen deprivation" (in other words, *physical* impairment) as a consequence of the oxygen deprivation during labor, delivery, or the immediate post-delivery resuscitation, she did not thereby suffer substantial neurologic impairment. Instead, it was only after Tristan experienced profound episodes of oxygen deprivation on October 3 – seven days after labor, delivery, and the

immediate postdelivery resuscitation – that her medical records evidenced an injury to her brain that rendered her permanently and substantially *mentally* impaired. (A-1, at 26-27.)

The Parents stipulated that currently Tristan "is presently permanently and substantially mentally and physically impaired." (A-2, at 9.) This does not amount to a concession, as the First District apparently finds, that Tristan suffered a compensable injury under the Plan. The court overlooks the Parents' emphasis on Tristan's *current* impairment. The ALJ clearly understood that he was to decide the question of when the injury to Tristan's brain, and resulting mental impairment, occurred. (*See* T-4-5.)

Under the Plan, an injury is compensable only if the injury to the infant's brain caused by oxygen deprivation in the course of labor, delivery, or resuscitation renders the infant permanently and substantially mentally and physically impaired. § 766.302(2), Fla. Stat. Indeed, the exclusive rights and remedies afforded by the Plan preclude the Parents from bringing a medical negligence claim against any person "directly involved with the labor, delivery, or immediate postdelivery resuscitation during which such injury occurs." § 766.303(2), Fla. Stat. Because competent, substantial evidence, as found by the ALJ, shows that Tristan's neurologic impairment "resulted from a brain injury caused by oxygen deprivation that occurred October 3, 2001 [seven days after her

birth], and not during labor, delivery, or resuscitation in the immediate postdelivery period in the hospital," Tristan did not suffer a "birth-related neurological injury" within the meaning of section 766.302(2). (A-2, at 27.)

To find that the injury is compensable is to disregard the ALJ's findings of fact, which are "conclusive and binding." § 766.311(1), Fla. Stat. Only if there is no competent, substantial evidence to support the ALJ's findings may the court reverse the determination as to compensability. *See Nagy*, 813 So. 2d at 159. Absent such a showing, the ALJ's determination must be upheld – even if, as the First District finds, the statutory presumption applies equally for the benefit of claimants and health care providers. The Parents ask that this Court quash the First District's Opinion, which finds Tristan's claim compensable under the Plan, and instead affirm the ALJ's Final Order.

III. THE PLAN DOES NOT PROVIDE COVERAGE FOR ANY INJURY TO AN INFANT'S BRAIN CAUSED BY OXYGEN DEPRIVATION DURING LABOR, DELIVERY, OR RESUSCITATION, WITHOUT REGARD TO WHEN THAT "NEUROLOGICAL DAMAGE" MANIFESTS.

Next, the First District's Opinion expressly and directly conflicts with the statutory definition of a "birth-related neurological injury," as construed by the Fourth District Court of Appeal in *Nagy v. Florida Birth-Related Neurological Injury Compensation Association*, 813 So. 2d 155 (Fla. 4th DCA 2002). The First

District broadly interprets the Plan to find Tristan's claim compensable, ruling that "neither section 766.302(2) [defining a "birth-related neurological injury] nor section 766.309(1)(a) [establishing the rebuttable presumption] requires that neurological damage be manifest during 'labor, delivery, or resuscitation in the immediate postdelivery period.'" (A-2, at 10.) Instead, the First District finds that the Plan requires only that "oxygen deprivation or mechanical injury" must occur "during labor, delivery, or resuscitation in the immediate postdelivery period." (*Id*.) According to the First District, "The applicable statutes do not preclude coverage if neurological damage becomes manifest at a later date." (*Id*.)

Essentially, the First District concludes that the Plan 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 the subsequent "neurological damage." The First District suggests that the question of *when* the injury to the infant's brain or spinal cord occurs is irrelevant.

The Parents ask this Court to resolve the conflict and adopt the reasoning of the Fourth District in *Nagy*. The interpretation of the First District contradicts the statutory language and intent of the Plan, for the following reasons:

A. The Opinion conflicts with *Nagy* in finding that only oxygen deprivation must occur during the relevant statutory time period.

The First District's interpretation contradicts the plain language of section 766.302(2), as interpreted by the Fourth District. In *Nagy*, the Fourth District strictly construed the statutory definition of a "birth-related neurological injury," ruling that "both the mechanical injury [or oxygen deprivation] *and* the injury to the brain, must occur during labor, delivery or resuscitation in the immediate post delivery period for the injury to be a 'birth-related neurological injury.'" 813 So. 2d at 159 (interpreting § 766.302(2), Fla. Stat.) (emphasis added). *Nagy* did not limit the question of compensability to the occurrence of oxygen deprivation or mechanical injury alone.

In fact, *Nagy* rejected the same sort of proximate cause argument relied upon by the First District. *See id*. at 160. The infant in *Nagy* suffered a subgaleal hemorrhage (bleeding between the skull and scalp) from a mechanical injury, caused by the use of a vacuum extractor during delivery. *Id*. at 158. The hemorrhage continued unabated, eventually resulting in the deprivation of oxygen to the infant's brain, systemic collapse, and death. *Id*. Although the effects of the hemorrhage did not produce a significant brain injury during labor or resuscitation in the immediate postdelivery period, the infant's injury before her death was so profound that the resulting mental and physical impairment could be characterized as permanent and substantial. *Id*.

The parents of the infant alleged that because the infant did not suffer an injury to her brain during labor, delivery, or the immediate post-delivery resuscitative period, the Plan did not apply. *Id*. at 157. The medical providers disagreed, arguing that the injury was compensable because the process that eventually caused the infant's death began during delivery. *Id*. at 158. The ALJ agreed with the medical providers' interpretation, ruling that

> it is the mechanical injury and not the ultimate consequences of that injury (i.e.: "an injury to the brain . . . which renders the infant permanently and substantially mentally and physically impaired"), which must occur during labor, delivery or resuscitation for the claim to be compensable.

Id. at 158. The ALJ determined that the infant suffered a "birth-related neurological injury," and found her injury compensable under the Plan. *Id*. at 159.

On appeal, the Fourth District reversed. *Id*. at 160. The *Nagy* court strictly construed the Plan to find that an injury is compensable as a "birth-related neurological injury" only if both the mechanical injury *and* the injury to the brain occur during labor, delivery, or resuscitation in the immediate postdelivery period for. *Id*. at 159.

The infant in *Nagy* did not suffer an injury to her brain during labor, delivery, or immediately after delivery. *Id*. at 159-60. Instead, the infant initially suffered an injury to an area outside her brain. *Id*. at 160. "The fact that the subgaleal bleeding ultimately led to cerebral hypoxia and hypovelemia, and this

loss of oxygenated blood in turn damaged the brain sometime before death" did not establish that the oxygen deprivation or injury to the brain occurred during labor, delivery or resuscitation in the immediate postdelivery period. *Id*. at 160.

> The fact that a brain injury from oxygen deprivation could be traced back to a mechanical injury outside the brain resulting in subgaleal hemorrhaging does not satisfy the requirement that the oxygen deprivation or mechanical injury to the brain occur during labor or delivery.

Id.

Thus, the Fourth District in *Nagy* rejected the medical providers' attempt to require compensation under the Plan "as long as oxygen deprivation or mechanical injury occurs during the prescribed time period – no matter how remote the causal link between the oxygen deprivation or mechanical injury and the brain injury or spinal cord injury." *Id*. at 160. The court "decline[d] to read the statute that broadly." As it found:

> There are many non-cranial, mechanical injuries which, if undetected could lead to undiscovered bleeding that will rob the brain of oxygenated blood. Such an expansive reading of the statute does not comport with the expressed legislative intent to limit the Plan's scope.

Id.

The Parents urge this Court to follow *Nagy*, and to reject the First District's overly broad interpretation of a compensable "birth-related neurological injury." It is not enough, as the First District suggests, that an infant eventually suffers

neurological damage as a consequence of oxygen deprivation that occurred during labor, delivery, or resuscitation immediately after delivery – no matter how remote the causal link between the oxygen deprivation and the injury to the brain. *See Nagy*, 813 So. 2d at 160. For an injury to be compensable, the Plan requires that both the oxygen deprivation and the injury to the brain (which renders the infant permanently and substantially impaired) occur during labor, delivery, or resuscitation in the immediate postdelivery period. § 766.302(2), Fla. Stat.; *Nagy*, 813 So. 2d at 159-60.

B. The Plan does not allow for coverage of neurological damage that "manifests" at a later date.

And, contrary to the First District's opinion, the applicable statutes *do* preclude coverage "if neurological damage becomes manifest at a later date." (A-2, at 10.) The timing of the neurological damage is relevant.

An injury is compensable as a "birth-related neurological injury" only upon proof that an injury to the infant's brain or spinal cord "caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period" rendered the infant permanently and substantially mentally and physically impaired. § 766.302(2), Fla. Stat.; *see also* § 766.309(1)(a), Fla. Stat. (requiring that the oxygen deprivation "thereby rendered" the infant permanently and substantially mentally and physically impaired).

To "render" is commonly understood to mean "to cause or to become." *Webster's New Collegiate Dict*. 971 (1980 ed.); *see also Black's Law Dict.* 1487 (7th ed. 1999) (defining "thereby" as "[b]y that means; in that way"). Plainly stated, an infant suffers a compensable "birth-related neurological injury" under the Plan only if she becomes "permanently and substantially mentally and physically impaired" because of an injury to her brain, caused by oxygen deprivation, which occurs in the course of labor, delivery, or the immediate post-delivery resuscitative period. *See* § 766.302(2), Fla. Stat.; § 766.309(1)(a), Fla. Stat. Because the Plan requires a showing of both physical and mental impairment,[3] the "neurological damage" necessarily must be "manifest."

Aside from its reliance on language not used by the Legislature ("manifest"), the First District confuses the language of the statutory presumption with the language of the statutory definition. (A-2, at 10.) While the statutory presumption does not require proof as to when the injury to the brain caused by oxygen deprivation occurred, the statutory definition of a "birth-related neurological injury" does. *Compare* § 766.309(1)(a), Fla. Stat. *with* § 766.302, Fla. Stat.

Again, an injury is not compensable simply upon a showing that "oxygen deprivation or mechanical injury" occurred "during 'labor, delivery, or resuscitation in the immediate postdelivery period.'" (A-2, at 10.) The infant also

[3] *See Fla. Birth-Related Neurological*, 686 So. 2d at 1353.

must be shown to have suffered an injury to her brain caused by that oxygen deprivation, which thereby rendered her mentally and physically impaired. *See* §§ 766.302(2), 766.309(1)(a), Fla. Stat. Only then is the injury to the infant compensable as a "birth-related neurological injury" under the Plan.

Moreover, the relevant statutory provisions defining a "birth-related neurological injury" must be construed together with section 766.303, which establishes the Plan's exclusive rights and remedies. *See Fla. Dep't of State v. Martin*, 916 So. 2d 763, 768 (Fla. 2005) (construing related statutory provisions *in pari materia*). Section 766.303(2), Florida Statutes, provides:

> The rights and remedies granted by the Plan on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant . . . against any person or entity directly involved with the labor, delivery, or immediate postdelivery resuscitation *during which such injury occurs* . . . .

§ 766.303(2), Fla. Stat. (emphasis added).

Under section 766.303, the Plan's exclusive remedies are available to a claimant only if that "birth-related neurological injury" occurs in the course of labor, delivery, or resuscitation in the immediate postdelivery period. *See id*. When read together, the related statutory provisions establish that the timing of the brain injury that renders the infant mentally and physically impaired is relevant for purposes of determining compensability under the Plan. *See id.*; *see also Weeks v. Fla. Birth-Related Neurological*, 977 So. 2d 616, 626 (Fla. 5th DCA 2008)

(construing related statutory provisions *in pari materia* to determine legislative intent); *Andrew v. Shands at Lake Shore, Inc.*, 970 So. 2d 887, 889-90 (Fla. 1st DCA 2007) (considering the meaning of a statutory phrase in the context of the entire statute).

Contrary to the First District's suggestion, coverage under the Plan does not arise no matter when the neurological damage becomes "manifest." The First District's interpretation impermissibly broadens the scope of the Plan. *See McKaughan*, 668 So. 2d at 979.

C. This Court should affirm the ALJ's Final Order, which correctly determines that Tristan did not suffer a "birth-related neurological injury."

In contrast to the First District's Opinion, the ALJ correctly applied the statute's plain language to find that Tristan's injury is not compensable under the Plan as a "birth-related neurological injury." Notwithstanding that Tristan suffered "multi-system failure as a consequence of . . . oxygen deprivation" before, during, and immediately following delivery, she did not suffer an injury to her brain that rendered her permanently and substantially *mentally* impaired until days after her delivery.

Any oxygen deprivation suffered by Tristan during her labor, delivery, or the immediate postdelivery resuscitation period resulted only in her physical impairment. (A-1, at 15-16, 26-27; *see also* A-2, at 8 (quoting language of

stipulation describing the infant's "multi-system organ failure," which did not include "permanent and substantial neurologic impairment").) As the ALJ stated in his Final Order:

> [I]t is unlikely Tristan suffered 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.

(A-1, at 26.) Citing undisputed record evidence, the ALJ concluded:

> Given the proof, it is likely, more so than not, that Tristan's profound neurologic impairments resulted from a brain injury caused by oxygen deprivation that occurred October 3, 2001, and not during labor, delivery, or resuscitation in the immediate postdelivery period in the hospital.

(A-1, at 27.)

Therefore, the record establishes that the cause of Tristan's permanent and substantial neurologic impairments was a brain injury caused by oxygen deprivation that occurred *after* labor, delivery, and resuscitation in the immediate postdelivery period. Her injury is not compensable as a "birth-related neurological injury" under the Plan. In ruling otherwise, the First District disregards competent, substantial evidence that supports the ALJ's findings of fact. The First District impermissibly reweighs the evidence, in contravention of the established standard of review. *See, e.g., Declet v. Dep't of Children & Families*, 776 So. 2d 1000,

1001 (Fla. 5th DCA 2001). Its Opinion must be quashed, and the ALJ's Final Order affirmed.

IV. THE "IMMEDIATE POSTDELIVERY PERIOD" CANNOT BE CONSTRUED TO INCLUDE THE WEEK BETWEEN TRISTAN'S DELIVERY AND THE EVENTS OF OCTOBER 3.

Alternatively, the First District finds that "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." (A-2, at 11 (citing *Orlando Reg'l Healthcare Sys., Inc. v. Fla. Birth-Related Neurological*, 997 So. 2d 426 (Fla. 5th DCA 2008).) Its ruling once again contradicts the plain language of the Plan, as interpreted by the Fifth District in *Orlando Regional Healthcare*, and by this Court in *Bayfront*. Had the First District correctly interpreted the statute, it would have been required to affirm the ALJ's Final Order.

A. The First District's Opinion conflicts with the plain meaning of the statutory definition of a "birth-related neurological injury."

"Statutory interpretation begins with the plain meaning of the statute." *Bayfront*, 29 So. 3d at 997. When construing a statute, "courts must follow what the legislature has written and neither add, subtract, nor distort the words written." *State v. Byars*, 804 So. 2d 336, 338 (Fla. 4th DCA 2001) (citations omitted); *accord Bayfront*, 29 So. 3d at 997 (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)). As a statute in derogation of common law, the Plan must be "strictly construed to include only those subjects clearly embraced within its terms." *Fla.*

Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349, 1354 (Fla. 1997).

The language of the statutory definition is clear and unambiguous. Section 766.302(2), Florida Statutes, defines a "birth-related neurological injury" to mean

> injury to the brain or spinal cord of a live infant . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or *resuscitation in the immediate postdelivery period in a hospital*, which renders the infant permanently and substantially mentally and physically impaired.

§ 766.302(2), Fla. Stat. (emphasis added).

Nowhere in its Opinion does the First District consider the statutory requirement of "resuscitation" in the "immediate" post-delivery period. (A-2, at 11.) Instead, the First District finds that because Tristan was delivered with "a life-threatening condition" that required "close supervision" in the special care nursery, the seven days between her delivery and the events of October 3 constitute an "immediate postdelivery period in the hospital" for purposes of the Plan. (*Id*.)

Contrary to the First District's interpretation, "resuscitation" and "immediate" are "important qualifiers to determining the compensability of a claim" under the Plan. *Orlando Reg'l Healthcare*, 997 So. 2d at 431. Although neither term is defined by the statute itself, both words "have common and ordinary meanings that lead to clear and unambiguous results." *Univ. of Fla. Bd. of Trustees v. Andrew*, 961 So. 2d 375, 376 (Fla. 1st DCA 2007).

The common and ordinary meaning of both "resuscitation" and "immediate" "can be ascertained by reference to a dictionary." *Orlando Reg'l Healthcare*, 997 So. 2d at 431; *see also L.B. v. State*, 700 So. 2d 370, 372 (Fla. 1997) (noting that a "court may refer to a dictionary to ascertain the plain and ordinary meaning"). For example, to "resuscitate" means to "return to consciousness, vigor or life; revive." *Orlando Reg'l Healthcare*, 997 So. 2d at 431 (citation omitted). "Resuscitation" is defined as "the restoration to life or consciousness of one apparently dead; it includes such measures as artificial respiration and cardiac massage." *Id*. (quoting *Dorland's Illustrated Med. Dict.* 1145 (26th ed. 1981)). And "immediate" is usually understood to mean "[n]ext in line or relation," "[o]ccurring without delay," "of or near the present time"; [c]lose at hand; near" and "occurring, acting, or accomplished without loss or interval of time." *Id*. at 432 (citations omitted).

Interpretation of the common and ordinary meaning of the statutory definition of a "birth-related neurological injury" compels a different conclusion. Simply because an infant may have been "delivered with a life-threatening condition and requires close supervision" for "an extended period of days," as the First District finds, does not entitle that infant to compensation under the Plan for a "birth-related neurological injury." (A-2, at 11.) Aside from omitting any mention of the "resuscitation" requirement, the First District's description of the "immediate postdelivery period" to include an "extended period of days"

evidences its disregard for the statute's plain language. *Compare* A-2, at 11 *with Orlando Reg'l Healthcare*, 997 So. 2d at 431-32 (defining "resuscitation" and "immediate").

"Close supervision" of an infant for an "extended period of days" because of a "life-threatening condition," while serious, does not satisfy the statutory definition of a "birth-related neurological injury." Instead, the statutory definition requires evidence that injury to the brain caused by oxygen deprivation, which rendered the infant permanently and substantially mentally and physically impaired, must have occurred during efforts to *resuscitate* the infant in the immediate postdelivery period. § 766.302(2), Fla. Stat. Absent such evidence, the infant's injury is not compensable as a "birth-related neurological injury."

The First District's interpretation impermissibly broadens the scope of coverage under the Plan. This is contrary to legislative intent, which seeks to provide coverage only for "a limited class of catastrophic injuries" and to establish "a limited system of compensation irrespective of fault." § 766.301(1)(d) & (2), Fla. Stat.; *accord Nagy*, 813 So. 2d at 159-60.

B. The Fifth District's decision in *Orlando Regional Healthcare* does not support the First District's interpretation.

Although the First District cites *Orlando Regional Healthcare* as support, the Opinion actually conflicts with the Fifth District's decision. The Fifth District correctly interprets the relevant statutory definition.

The Fifth District's decision in *Orlando Regional Healthcare* "hinge[d] on the statutory phrase 'resuscitation in the immediate postdelivery period.'" 997 So. 2d at 430. Competent, substantial evidence in that case established that the infant required continuous respiratory support throughout his six days of life. *Id*. at 430. He did not breathe spontaneously at delivery. *Id*. at 428. After ongoing efforts at manual resuscitation and ventilation in the hours after his birth, the infant was placed on a heart/lung bypass machine (extracorporeal membrane oxygenation, or "ECMO" bypass). *Id*. The infant remained on ECMO bypass until his death, six days later. *Id*. at 429. He was never able to breathe on his own. *Id*. at 428-29.

The ALJ in *Orlando Regional Healthcare* found that although the infant received continuous respiratory support in his six days of life, his injury did not occur during the resuscitation in the immediate postdelivery period. *Id*. at 430. The ALJ interpreted the statutory phrase to include only the first resuscitation, when the code was called. *Id*. at 432.

On appeal, the Fifth District ruled that the ALJ erred as a matter of law in refusing to find the claim compensable under the Plan. *Id*. at 431. Based on the undisputed facts, expert testimony, and medical records, the Fifth District concluded that the infant suffered a brain injury as a result of oxygen deprivation in the course of resuscitation in the immediate postdelivery period. Even after the code ended, the Fifth District found, the infant "continued to suffer respiratory

failure that required artificial respiration." *Id*. at 432. "He could not breathe on his own and required active resuscitation continuously until he was placed on the ECMO bypass." *Id*. Because the infant "continued to need resuscitation, *without interruption*," the Fifth District considered that "ongoing need create[d] one time period – the 'immediate postdelivery period.'" *Id*.

Contrary to the First District's interpretation, the infant in *Orlando Regional Healthcare* was not simply "delivered with a life-threatening condition" that required "close supervision" over "an extended period of days." (A-2, at 11.) Instead, he required continuous artificial respiration, without interruption, from his birth until his placement on the heart/lung bypass. *Orlando Reg'l Healthcare*, 997 So. 2d at 432. His ongoing need for resuscitation created the "immediate postdelivery period" consisting of hours after his delivery – and not, as the First District suggests, an "extended period of days."

C. Tristan's injury did not occur during resuscitation in the immediate postdelivery period.

The First District mistakenly applies the statutory definition to find Tristan's injury compensable under the Plan. *See Pediatrix Med. Group of Fla., Inc. v. Falconer*, 31 So. 3d 310, 313 (Fla. 4th DCA 2010) ("Whether an injury occurred during resuscitation in the immediate postdelivery period requires a case-by-case analysis."). The record evidence establishes that Tristan was stabilized within hours, if not minutes, of her birth. (A-1, at 13-14.) There is no evidence that she

required continuous, ongoing resuscitation in the week after her delivery. Absent evidence of uninterrupted efforts to resuscitate Tristan, the seven days between her delivery and the events through October 3 necessarily cannot constitute "resuscitation in the immediate postdelivery period" for purposes of the Plan. By definition, she did not suffer a "birth-related neurological injury."

Nonetheless, the First District emphasizes that it is undisputed that Tristan "suffered multi-system failure" as a consequence of oxygen deprivation that "likely continued during the immediate postdelivery resuscitative period." (A-2, at 11.) This finding of fact does not compel the conclusion that Tristan's injury is compensable under the Plan. Before the events of October 3, Tristan sustained only permanent and substantial *physical* impairment, including damage to her liver and kidneys. (A-1, at 15, 26-27.) The ALJ expressly found that

> it is unlikely Tristan suffered 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.

(A-1, at 26.). Consequently, the ALJ ruled, Tristan "was not shown to have suffered a 'birth-related neurological injury' as defined by the Plan, and the claim is not compensable." (A-1, at 27.)

In finding ristan's injury compensable, the First District disregards the competent, substantial evidence that supports the ALJ's findings of fact. Its Opinion must be quashed, and the ALJ's Final Order affirmed.

CONCLUSION

For all the foregoing reasons, the Parents respectfully request that the Court quash the Opinion of the First District, which conflicts with the decisions of this Court and other district courts of appeal. The Parents ask that this Court affirm the Final Order in its entirety, including the ALJ's determination that the infant's injury is not compensable as a "birth-related neurological injury" under the Plan.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY certify that I have delivered a copy of the foregoing to **Scott A. Tacktill,** The Unger Law Group, 3203 Lawton Rd., Ste. 200, Orlando, FL 32803 (counsel for St. Vincent's Medical Center); **William Peter Martin** and **Craig A. Dennis,** Dennis, Jackson, Martin & Fontela, P.A., P.O. Box 15589, Tallahassee, FL 32317-5589; **M. Mark Bajalia,** Brenna, Manna & Diamond, LLC, 76 South Laura St., Ste. 2110, Jacksonville, FL 32202-5448; and **Kelly B. Plante, Wilbur E. Brewton,** and **Tana D. Storey,** Brewton Plante, P.A., 225 S. Adams, Ste. 250, Tallahassee, FL 32301, attorneys for NICA; by United States Mail, this _____ day of June, 2010.

_____
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

_____
Attorney