IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

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

Respondents.

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

JURISDICTIONAL 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 jurisdictional 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 collectively as Respondents.

STATEMENT OF THE CASE AND OF THE FACTS

In their original petition to DOAH, the Bennetts described Tristan's condition at birth as: "By the time of her birth by caesarian section, Tristan Bennett had suffered a hypoxic ischemic event that caused permanent brain damage." *St. Vincent's Medical Center v. Bennett*, 34 Fla. L. Weekly D1716 (Fla. 1st DCA Aug. 21, 2009), 2009 WL 2602286, *1.

At the DOAH hearing, there was no dispute that Tristan had sustained a neurological injury, i.e., an injury to the brain or spinal cord. *St. Vincent's*, 2009 WL 2602286, at *4. Petitioners and Respondents stipulated that Tristan "suffered oxygen deprivation/asphyxia before she was delivered" and that she was "permanently and substantially mentally and physically impaired." *Id.*

Also at the DOAH hearing, Respondents presented the unrebutted expert testimony of Gary Hankins, M.D., a board certified obstetrician, specializing in high risk pregnancies. *St. Vincent's*, 2009 WL 2602286, at *2. Dr. Hankins is also an expert in neonatal encephalopathy and cerebral palsy. *Id*. Dr. Hankins' testimony supported Respondents' position that Tristan's pH level, sodium level, and blood gases at the time of delivery showed that after the auto accident, but prior to and during the time of delivery, Tristan suffered oxygen deprivation and

neurological injury as a result of damage to her mother's placenta. *Id.* Dr. Hankins' testimony also supported Respondents' position that Tristan suffered multi-organ damage as a result of the oxygen deprivation, which in turn caused the acute pulmonary arrest suffered on October 3, 2001. *Id.*

The ALJ's final order contained the following conclusion, in part:

> The record developed in this case compels the conclusion that, more likely than not, Tristan suffered multi-system failure as a consequence of the oxygen deprivation she suffered between 12:47 p.m. (when the fetal monitor was disconnected and Mrs. Bennett was moved to the operating room) and 1:22 p.m. (when Tristan was delivered), that likely continued during the immediate postdelivery resuscitative period. . . .

St. Vincent's, 2009 WL 2602286, at *2.

Despite the factual findings and the parties' stipulations, the ALJ refused to apply the required rebuttable presumption of Section 766.309(1)(a), Florida Statutes. *St. Vincent's*, 2009 WL 2602286, at *2. On appeal, the First District reversed, holding: "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*, 2009 WL 2602286 at *4.

SUMMARY OF THE ARGUMENT

There is no direct and express conflict among the First District's decision

here and the decisions in *Florida Birth-Related Neurological Injury Comp. Ass'n v. Dep't of Admin. Hearings*, 35 Fla. L. Weekly S40 (Fla. Jan. 14, 2010), 2010 WL 114510 (hereinafter *"Bayfront"*); and *Nagy v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 813 So.2d 155 (Fla. 4th DCA 2002), as the questions of law addressed by the courts in each of the cases are completely different.

Petitioners' assertion of conflict between the First District and both *Bayfront* and *Nagy* in interpreting the NICA plan is without merit. The First District's analysis is consistent with the analyses used in *Bayfront* and *Nagy* because it adheres 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. Further, the First District did not specifically mention the strict construction requirement in its opinion. As such, Petitioners cannot assert a conflict where there is no showing in the First District's opinion that the court refused to consider or apply strict construction. Conflict must be express and direct and appear within the four corners of the majority decision.

The First District did not hold that the timing of Tristan's injury was irrelevant. On the contrary, the First District correctly pointed out that the NICA plan requires that the injury to the infant's brain or spinal cord, caused by oxygen

deprivation or mechanical injury, must occur "in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital." This is completely consistent with the language used in *Nagy*.

The First District Court's decision 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 cites to *Orlando Reg'l*, in dicta, for the proposition that the phrase "immediate postdelivery period" has been construed in certain circumstances to mean an extended period of days.

ARGUMENT

I. THE DECISION OF THE FIRST DISTRICT IS NOT IN EXPRESS AND DIRECT CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR A DECISION OF THE SUPREME COURT ON THE SAME QUESTION OF LAW.

In order for this Court to invoke discretionary jurisdiction under the state constitution and Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, the "conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986). Further, the Florida Constitution requires that the conflict be "on the same question of law." Art. V, §3(b)(3), Fla. Const.

A. The First District is not in direct and express conflict with the *Nagy* and *Bayfront* cases with regard to its interpretation of the NICA plan.

There is no direct and express conflict among the First District's decision in this case and the decisions in *Bayfront* and *Nagy* because the questions of law presented and addressed in each of the cases are completely different. The issue before the First District in this case was whether the ALJ erred as a matter of law in failing to apply the statutory presumption of compensability of Section 766.309(1)(a), based on the parties' stipulations and the ALJ's findings of fact. *See St. Vincent's*, 2009 WL 2602286, at *2, 4. In contrast, the issue before the Florida Supreme Court in *Bayfront* was whether a physician's notice of participation in the NICA plan satisfied the notice requirements of Section 766.316, Florida Statutes, if the hospital where the infant's delivery occurred failed to provide any notice.[1] *See Bayfront*, 2010 WL 114510, at *1. The issue before the Fourth District in *Nagy* was whether the "injury," which under Section 766.302(2), Florida Statutes, must occur during labor, delivery, or resuscitation, can be a non-neurological mechanical injury, eventually leading to an injury to the brain. *Nagy*, 813 So.2d at 159-160.

[1] Also at issue in *Bayfront* was whether coverage under NICA was severable among providers based on a provider's notice or non-notice. *See*, 2010 WL 114510, at *5.

Because the questions of law presented and resolved in *Bayfront* and *Nagy* are not in conflict with the question of law presented in the case *sub judice*, discretionary review is not available. Indeed, discretionary review of the case *sub judice* would not further the clear purpose of the constitution's conflict review, which is to eliminate inconsistent views within our State about the same question of law. *See e.g.,Wainwright v. Taylor*, 476 So.2d 669 (Fla. 1985); *see also* Harry Lee Anstead, et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 511-515 (2005).

In order to sidestep the obvious lack of conflict "on the same question of law," Petitioners assert that the analysis utilized by the First District in interpreting NICA's statutory scheme is in conflict with the analyses used in *Bayfront* and *Nagy*. Pet'rs' Brief, at 7. Petitioners' assertion is without merit.

The First District's analysis is actually consistent with the analyses used in both *Bayfront* and *Nagy*. The First District and the cases cited by Petitioners 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. *See Bayfront*, 2010 WL 114510, at *4 (Stating "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." (Citation omitted)); *St. Vincent's*, 2009 WL 2602286, at *5 (Stating "As the ALJ recognized, the ultimate goal in construing a statutory provision is to give effect to legislative intent."); *and*, *Nagy*, 813 So.2d at 159-160 (Stating, "In interpreting the [NICA] Plan, this court is guided by the plain language of its statutes and the Legislature's expressed intent.").

This view of statutory construction is nothing new to the case *sub judice* 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), the Florida Supreme 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).

Here, the First District, and both *Bayfront* and *Nagy*, followed this principle.

Petitioners further argue that the First District's reliance on this principle

trumped *Bayfront* and *Nagy's* alleged holdings that "the court's ultimate goal is to strictly construe the statute's clear language and to give the statute its plain and obvious meaning." Pet'rs' Brief, at 7. This argument is also without merit.

Admittedly, *Nagy* uses language and cites to the general requirement that courts should strictly construe those statutes in derogation of common law. *See Nagy*, 813 So.2d at 159-160, n. 4. (Interestingly, the *Bayfront* decision contains no such language.) However, *Nagy* does not hold or even suggest that a strict construction of NICA's statutes is, above all else, the court's "ultimate goal." Further, the principles that a court should look to the plain meaning of words in a statute and should also strictly construe statutes in derogation of common law are not mutually exclusive concepts. As explicitly shown in *Nagy*, and implicitly shown in other cases, these concepts can be considered together when interpreting the NICA statutory scheme.

Finally, the First District did not specifically mention the strict construction requirement in its majority opinion. As such, Petitioners cannot assert a conflict where there is no showing in the opinion that the First District refused to use or consider strict construction in its analysis. Again, conflict must be express and direct and appear within the four corners of the majority decision. *See Reaves*, 485

So.2d at 830. Any reliance on the recitation of law cited in Judge Kahn's dissent is insufficient to show conflict. As this Court held in *Reaves, supra,* "Neither a dissenting opinion nor the records itself can be used to establish jurisdiction." *Id.*

B. The First District is not in direct and express conflict with *Nagy* with respect to the timing of an infant's neurological injury.

The First District did not hold that the timing of an infant's injury is irrelevant. On the contrary, the First District simply and correctly pointed out that Section 766.302(2), requires that the injury to an infant's brain or spinal cord caused by oxygen deprivation or mechanical injury must occur "in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital . . . . " *St. Vincent's*, 2009 WL 2602286, at *4. This is completely consistent with the language used in *Nagy*, when that court addressed 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.").

Petitioners appear to confuse the timing of an infant's neurological injury with the timing of the manifestation of that injury. These are two distinct concepts that had to be addressed by the First District as a result of the unique stipulations and factual findings in this case. In clarifying the concepts, the First District correctly held that the NICA plan does not require that neurological **damage** be manifest during "labor, delivery, or resuscitation in the immediate

postdelivery period." *St. Vincent's*, 2009 WL 2602286, at *4. Rather, 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.* This holding is not in conflict with *Nagy*.

C. 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 conflict with *Orlando Reg'l*, on applying the phrase "immediate postdelivery period." The First District did not "rule" that Petitioners' 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." 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*, 2009 WL 2602286, at *5. 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.

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*, 2009 WL 2602286, at *5. *Orlando Reg'l* thoroughly analyzed that phrase and the meaning of "resuscitation," when it applied them to the facts of that case. Moreover, 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*, 2009 WL 2602286, at *4.

CONCLUSION

For the foregoing reasons, Respondents respectfully request the Court deny discretionary review of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by U.S. Mail to John S. Mills, Esquire, Mills & Creed, 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 30th day of March, 2010.

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

Counsel for the Appellants/Intervenors, 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: 3/30/2010

William T. Jackson
FL BAR ID#0928021