

IN THE SUPREME COURT OF FLORIDA

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CASE NUMBER: SC10-364

Lower Tribunal Case Number(s): 1D07-5557, 1D07-5561, 06-2422N

ROBERT AND TAMMY BENNETT, etc., et al.,

Petitioners,

vs.

ST. VINCENT'S MEDICAL CENTER, INC.,  
et al.,

Respondents.

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**RESPONDENT, ST. VINCENT'S MEDICAL CENTER, INC.'S  
RESPONSE TO JURISDICTIONAL BRIEF OF PETITIONERS,  
ROBERT BENNETT AND TAMMY BENNETT**

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

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## STATEMENT OF THE CASE AND FACTS

On September 26, 2001, Tristan Bennett was born at St. Vincent's Medical Center in Jacksonville following her mother's automobile accident. St. Vincent's Medical Center, Inc. v. Bennett, 27 So. 3d 65, 66 (Fla. 1st DCA 2009). "On October 3, 2001, while still in the special care nursery, the infant experienced pulmonary bleeding and then pulmonary arrest leading to multi-organ failure and seizure activity. She was later diagnosed with a neurological injury, cerebral palsy . . ." Id. at 67.

In 2006, Petitioners filed a civil action for medical negligence against, *inter alia*, Respondents and Co-Respondents, William H. Long, M.D., and his professional association. Id. Petitioners

had already filed a petition with DOAH [the Division of Administrative Hearings] to determine compensation under the [Florida Birth-Related Neurological Injury Compensation Association ("NICA")] Plan. In their petition, [Petitioners] described the child's condition at birth as follows:

By the time of her birth by cesarean 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.

Id.

At the administrative hearing, Gary Hankins, M.D., a board certified obstetrician, with expertise in neonatal encephalopathy and cerebral palsy and

whose practice specializes in high risk pregnancies, testified. His unrebutted testimony supported Respondent's position that, after the accident but prior to and during the time of delivery, Tristan suffered oxygen deprivation as a result of damage to the mother's placenta and that this was reflected in the pH level, sodium level and blood gases of the infant just prior to and at the time of delivery. Id.

Notwithstanding the evidence offered at the hearing and stipulations of the parties, the Administrative Law Judge declined to apply the rebuttable presumption of compensability found in Section 766.309(1)(a), Florida Statutes, and found the infant's injuries to be non-compensable by NICA. The First District reversed, stating that, "[g]iven 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. Id. at 70.

### SUMMARY OF ARGUMENT

The First District's interpretation of the NICA plan is not in express and direct conflict with the Bayfront and Nagy decisions. Florida Birth-Related Neurological Injury Compensation Association v. Department of Administrative Hearings, 2010 WL 114510 (Fla. Jan. 14, 2010) ("Bayfront"); Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 813 So.2d 155 (Fla. 4th DCA 2002). Petitioners differ with the First District's interpretation of the application of the NICA plan's presumption of compensability. Neither Bayfront nor Nagy address

that presumption, and therefore cannot conflict with the First District's interpretation.

Neither is there an express and direct conflict between the First District's opinion in the instant case and the Fourth District Court of Appeal's decision in Nagy as to the timing of a compensable injury. Petitioners contend that Nagy held that neurological damage based on oxygen deprivation which occurred within the NICA statutory period is only compensable if the damage manifests during that same statutory period. However, Nagy included no such holding. The issue in Nagy was whether there was a sufficient causal link between a mechanical injury which occurred during the statutory period, and a later injury to the brain. In the instant case, the First District was faced with a situation in which the causal link was clear, and therefore its holding as to compensability is consistent with the analysis in Nagy.

There is no express and direct conflict between the First District in the instant case and the Fifth District's decision in Orlando Regional Healthcare System, Inc. v. Florida Birth-Related Neurological, 997 So. 2d 426 (Fla. 5th DCA 2008) as to the phrase "immediate postdelivery period." The First District's observation concerning that phrase was merely that it has been construed to include "an extended period of days when a baby is delivered with a life-threatening condition and requires close supervision." Id. The First District

correctly cited to Orlando Regional as an example of such a situation. The interpretation of the phrase “immediate postdelivery period” must be determined on a case-by-case basis, and nothing in Orlando Regional mandated a particular conclusion by the First District in the instant case.

### ARGUMENT

I. The First District’s interpretation of the NICA plan is not in express and direct conflict with the Bayfront and Nagy decisions.

The First District’s interpretation of the NICA plan is not in express and direct conflict with the Bayfront and Nagy decisions. Florida Birth-Related Neurological Injury Compensation Association v. Department of Administrative Hearings, 2010 WL 114510 (Fla. Jan. 14, 2010) (“Bayfront”); Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass’n, 813 So.2d 155 (Fla. 4th DCA 2002).

Indeed, Petitioners do not identify any portion of Bayfront or Nagy where either of those decisions addressed any portion of the NICA plan which was also addressed by the First District in the instant case. This is because they cannot.

Bayfront analyzes the requirement of notice of NICA participation by a hospital. Nagy analyzes whether certain injuries fall within the NICA definitions when the causal link between the initial mechanical injury and the eventual oxygen deprivation is remote.

However, Petitioners’ purported basis for conflict jurisdiction is based on the

First District's analysis of applicability of the NICA plan's presumption of compensability found in Section 766.309(1)(a), Florida Statutes. Significantly, neither Bayfront nor Nagy addresses that presumption in any way. Given that, there can be no conflict between the First District's opinion and those two cases, much less one that is express and direct.

Lacking an actual conflict, Petitioners seek to give the impression of one by pointing to principles of statutory construction which they claim Bayfront and Nagy followed, and asserting that those principles should have led the First District to reach a different conclusion than it did about a distinct issue. Essentially, this is a disguised argument on the merits of the First District's analysis of the application of the presumption of compensability. It neither belongs in a jurisdictional brief, nor provides a basis for conflict jurisdiction.

II. The First District is not in express and direct conflict with Nagy as to the timing of a compensable injury.

There is no express and direct conflict between the First District in the instant case and the Fourth District Court of Appeal's decision in Nagy v. Florida Birth-Related Neurological Injury Compensation Ass'n, 813 So.2d 155 (Fla. 4th DCA 2002) as to the timing of a compensable injury. Petitioners' argument hinges on the idea that the Nagy court's interpretation of Section 766.302(2), Florida Statutes, was based on an appropriately narrow view of the statute, while the First



District's opinion was based on one inappropriately broad. This idea is without foundation. As co-Respondents discuss in detail in their brief, the facts in Nagy differed materially from those in the instant case, and mandated a correspondingly different analysis and result.

The analysis in Nagy and in the instant case both include a determination as to whether the subject injury meets the statutory definition of "birth-related neurological injury" articulated in Section 766.302(2), which, in pertinent part, reads as follows:

"Birth-related neurological injury" means injury to the 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 in a hospital, which renders the infant permanently and substantially mentally and physically impaired.

§766.302(2), Fla. Stat.

Petitioners assert that the Nagy court rejected the idea that neurological damage could manifest at some point later than the time when the injury occurred. This is incorrect. The holding in Nagy was not based on an interpretation, narrow or otherwise, of the relative timing of events articulated in Section 766.302(2). Rather, it was based on a narrow interpretation of the phrase "caused by" in that same statutory definition.

In Nagy, it was established that the infant suffered a mechanical injury during the statutory period. However, that injury did not directly cause an injury to

the infant's brain or spinal cord during that period. Instead, the mechanical injury led to bleeding between the skull and the scalp. That bleeding in turn eventually led to oxygen deprivation to the brain and therefore brain injury. Thus, the Nagy court held that that brain injury did not meet the statutory definition of "birth-related neurological injury."

Nagy does not hold that both the triggering event and the ultimate brain or spinal cord injury necessarily must both occur within a particular period. Nagy directly addresses the timing only of the initial triggering event, the oxygen deprivation or mechanical injury:

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.

Nagy, 813 So.2d 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.

Although under the facts in Nagy the ultimate injury to the infant's brain occurred after the statutory period, the timing of that event was not dispositive. As the following makes clear, the Nagy court was unwilling to find that infant's

ultimate injury was birth-related when it occurred outside the statutory period *and* was not directly “caused by” a qualifying event during that period:

The appellees would have us hold that the Plan applies, 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. (emphasis added).

In short, the ultimate injury did not meet the statutory definition because it was not “caused by” the initial mechanical injury, but instead was caused by a sequela of that injury. The Nagy court narrowly construed the causation requirement to reach its conclusion on the facts before it, but did not address a scenario in which the causal link between a triggering event and the ultimate injury was not “remote.”

In the instant case, the First District was faced with a very different scenario. It is clearly established – through findings by the ALJ, stipulation by the parties, and a petition filed by the Bennetts themselves – that Tristan Bennett suffered oxygen deprivation during the statutory period and that such deprivation led directly to the ultimate neurological injury which simply manifested later. As such, the lower court’s holding that Tristan suffered a birth-related neurological injury is not in conflict with Nagy.

III. The First District is not in express and direct conflict with Orlando Regional as to the phrase “immediate postdelivery period.”

There is no express and direct conflict between the First District in the instant case and the Fifth District’s decision in Orlando Regional Healthcare System, Inc. v. Florida Birth-Related Neurological, 997 So. 2d 426 (Fla. 5th DCA 2008) as to the phrase “immediate postdelivery period.” As a preliminary matter, it is important to note that the First District’s opinion in the instant case did not depend upon an interpretation of that phrase. As Petitioners note in their argument regarding an alleged conflict with Nagy, the First District held that the NICA plan does not require that neurological damage manifest during the statutory period provided that it was caused by an injury that occurred during that period. St. Vincent’s Med. Ctr., Inc. v. Bennett, 27 So. 3d 65, 70 (Fla. 1st 2009). The only discussion of the phrase “immediate postdelivery period” was a single-paragraph in which the First District noted that the result would have been the same even had it held differently as to when neurological damage must manifest. Id.

The First District’s observation concerning that phrase was merely that it has been construed to include “an extended period of days when a baby is delivered with a life-threatening condition and requires close supervision.” Id. The First District correctly cited to Orlando Regional as an example of such a situation. Id.

Petitioners attempt to create a conflict by arguing that “unlike the facts of

Orlando Regional, there is no evidence that the Parents’ infant required uninterrupted resuscitation from her delivery until her pulmonary arrest.” (Petitioners’ Jurisdictional Brief at 10). Respondent does not suggest that the postdelivery medical condition of the child in Orlando Regional was the same as that of Tristan Bennett. Significantly, however, neither did the First District. More importantly, for purposes of determining if there is a legitimate basis for conflict jurisdiction, the Orlando Regional court never held that “uninterrupted resuscitation” is the sole measure of whether an injury occurred during the “immediate postdelivery period.” Far from setting a minimum standard based on one infant’s circumstances, the Orlando Regional court emphasized that “the application of this definition in determining plan compensability must be applied on a case-by-case basis.” Orlando Reg’l, 997 So. 2d at 430. In the instant case, the First District did just that. As such, the First District is not in express and direct conflict with Orlando Regional.

### **CONCLUSION**

Based on the foregoing, Respondent requests that the Court deny discretionary review of the instant case.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via United States Mail this 31st day of March, 2010, to the parties listed on the attached Service List.

/s/Scott A. Tacktil

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**CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)**

I HEREBY CERTIFY that this Brief complies with the font requirement of Rule 9.210(a)(2), Florida Rules of Appellate Procedure, as it is a computer generated brief submitted in Times New Roman 14-Point font.

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