IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-364

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

Petitioners,

v.

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

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

Respondents.

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

JURISDICTIONAL BRIEF OF PETITIONERS ROBERT AND TAMMY BENNETT

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STATEMENT OF THE CASE AND FACTS

Petitioners/Appellees, Robert and Tammy Bennett, individually and as parents and guardians of Tristan Bennett, a minor (the "Parents"), ask this Court to review the First District's interpretation of the statutory presumption of compensability for a "birth-related neurological injury" under the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan"), sections 766.301 – 766.316, Florida Statutes (2001).

The Parents' daughter, Tristan Bennett, was born on September 26, 2001, at St. Vincent's Hospital in Jacksonville. (Opinion, at 2.) Although she required manual resuscitation, she responded rapidly, and her Apgar scores at birth and within minutes of birth were in the normal range. The infant suffered renal distress and liver damage. Her neurologic exams during the first seven days of life were normal. (*Id*. at 2-3, 5.) On October 3, 2001, however, while in the special care nursery, the infant experienced pulmonary bleeding and pulmonary arrest. Thereafter, she evidenced "seizure activity and neurologic decline." Only then was she examined by a pediatric neurologist. She has since been diagnosed with cerebral palsy. (*Id*. at 3, 5-6.)

The Parents originally filed suit in circuit court against Respondents/Appellants, St. Vincent's Medical Center, Inc., William H. Long, M.D., and North Florida Obstetrics and Gynecology, P.A. (the "Health Care

Providers”). The circuit court proceedings were abated for an administrative determination as to whether the infant’s injuries were compensable under the Plan. (Opinion, at 3.)

At the administrative hearing, extensive medical records were introduced. The question as to the timing of the infant’s neurological injury was a matter of dispute. (*Id*. at 3, 4.) The Parents argued 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. (*Id*. at 5, 8-9.) Only after the events of October 3 did the infant suffer permanent and substantial *mental* (or “neurologic”) impairment. (*Id*. at 3, 4-5, 8-9.)

The Parents did not seek benefits under the Plan. (*Id*. at 9.) While the Parents stipulated that **currently**, the infant is permanently and substantially mentally and physically impaired, they asserted that her current condition did not occur in the course of labor, delivery, or resuscitation in the immediate post-delivery period. (*Id*.)

In contrast, the Health Care Providers asked the ALJ to determine the infant’s injuries compensable under the Plan. (*Id*. 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. The ALJ refused, ruling that the presumption arises only for the benefit of claimants like the Parents. (Opinion, at 5.)

The ALJ ruled for the Parents. In his final order, 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." Because the infant did not suffer a "birth-related neurological injury," as defined by section 766.302(2), the ALJ concluded that the Parents' claim was not compensable. (Opinion, at 5-6.)

The Health Care Providers appealed. The First District reversed the final order, ruling that the ALJ erred as a matter of law in not applying the presumption of compensability. (Opinion, 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 court 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. 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. 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

This Court should exercise its discretionary jurisdiction to review the First District's 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 Comp. Ass'n v. Dep't of Admin. Hearings*, -- So. 3d --, 2010 WL 114510 (Fla., Jan. 14, 2010) ("*Bayfront*"), and the Fourth District Court of Appeal in *Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 813 So. 2d 155 (Fla. 4th DCA 2002).

Further, 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.

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 First District neglects to consider the "resuscitation" requirement of the Plan, which the Fifth District found to be an important qualifier in determining compensability.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point of law. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

This Court should exercise its conflict jurisdiction to resolve three different conflicts:

I. THE FIRST DISTRICT FAILS TO STRICTLY INTERPRET THE PLAN'S PLAIN LANGUAGE TO RESTRICT COVERAGE, CONTRARY TO *BAYFRONT* AND *NAGY*.

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*, 813 So. 2d at 159. Statutory interpretation of the Plan begins with its plain language. *Bayfront*, 2010 WL 114510, *3.

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 interprets the statutory presumption to serve the Legislature's presumed intent.

The First District's ruling expressly and directly conflicts with the rulings of this Court in *Bayfront*, and with the Fourth District's decision in *Nagy*. When 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 court's ultimate goal is to strictly construe the statute's clear language and to give the statute its plain and obvious meaning. *Bayfront*, 2010 WL 114510, at *4; *Nagy*, 813 So. 2d at 159-60.

The presumption – adopted as a rebuttable presumption to aid claimants in seeking compensation under the Plan – should not be applied to eviscerate the Parents' common-law tort remedies. To accept the First District's broader statutory interpretation is to afford the Health Care Providers greater immunity under the

Plan, while limiting the Parents' 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.

II. THE OPINION CONFLICTS WITH *NAGY* IN FINDING THAT THE TIMING OF THE INFANT'S NEUROLOGICAL INJURY IS IRRELEVANT.

Next, the First District's Opinion expressly and directly conflicts with the Fourth District's ruling in *Nagy*. The First District rules that only "oxygen deprivation or mechanical injury" must occur "during labor, delivery, or resuscitation in the immediate postdelivery period." The court finds 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.'"

In *Nagy*, the Fourth District rejected this interpretation. *Nagy* did not limit the question of compensability to the occurrence of oxygen deprivation or mechanical injury alone. Instead, *Nagy* strictly construed the language of section 766.302(2), agreeing with the claimants 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 (emphasis added). The Fourth District narrowly interpreted the Plan. *Id*.

In contrast to *Nagy*, the First District's ruling allows coverage to arise under the Plan "if neurological damage becomes manifest at a later date." The First District impermissibly broadens the scope of the Plan. Its decision conflicts both with *Nagy* and the established law of this Court. *E.g.*, *Fla. Birth-Related*, 686 So. 2d at 1354.

III. THE OPINION CONFLICTS WITH *ORLANDO REGIONAL* IN INTERPRETING THE "IMMEDIATE POSTDELIVERY PERIOD."

The First District's interpretation of a "birth-related neurological injury" under section 766.302(2) also conflicts with the Fifth District's decision in *Orlando Regional*. The Plan defines a "birth-related neurological injury" to mean an injury to the infant's brain, "caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital." § 766.302(2), Fla. Stat. Ruling that the "immediate postdelivery period in a hospital" includes "an extended period of days when a baby is delivered with a life-threatening condition and requires close supervision," the First District finds the Parents' claim compensable.

The First District's ruling expressly and directly conflicts with the Fifth District's decision in *Orlando Regional*. Nowhere in its analysis does the First District consider the statutory requirement of "resuscitation." In comparison, in

Orlando Regional the Fifth District interpreted the statute's plain language, finding that the statutory terms "resuscitation" and "immediate" are "important qualifiers to determining . . . compensability." 997 So. 2d at 431. The infant in *Orlando Regional* was not simply "delivered with a life-threatening condition" that required "close supervision"; instead, he required continuous artificial respiration from his birth until his placement on the ECMO bypass. *Id*. at 432. Here, unlike the facts of *Orlando Regional*, there is no evidence that the Parents' infant required uninterrupted resuscitation from her delivery until her pulmonary arrest. The seven days between the infant's delivery and the events of October 3 do not constitute "resuscitation" in the "immediate postdelivery period," as the Fifth District defined those terms.

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. 997 So. 2d at 431, 432. Again, the First District impermissibly broadens the scope of coverage under the Plan.

CONCLUSION

This Court has discretionary jurisdiction to review the First District's Opinion. Respectfully, the Court should exercise that jurisdiction to consider the merits of the Parents' arguments.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY certify that I have delivered a copy of the foregoing to **W. Cleveland Acree, II** and **Scott A. Tacktill,** Unger Acree Gilbert, et al., 3203 Lawton Rd., Ste. 200, Orlando, FL 32803; **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 March, 2010.

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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.

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