IN THE 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

REPLY BRIEF OF PETITIONERS

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I. THE FIRST DISTRICT ERRS IN INTERPRETING SECTION 766.309(1)(A).

A. **The First District's interpretation conflicts with established principles of statutory construction.**

This case concerns the First District's interpretation of the statutory presumption of a "birth-related neurological injury," as set forth in section 733.309(1)(a), Florida Statutes. The Health Care Providers emphasize the stipulated facts and the ALJ's findings of fact in arguing that the First District correctly applied the statutory presumption. Respectfully, this Court should decide whether the First District's Opinion correctly interprets the plain language of section 766.309(1)(a) before considering whether the statutory presumption arises.

The First District errs in concluding that the statutory presumption "arises upon the presentation of evidence demonstrating the required injury." *St. Vincent's Med. Center, Inc. v. Bennett*, 27 So. 3d 65, 70-71 (Fla. 1st DCA 2009). Its interpretation contradicts the plain language of section 766.309(1)(a), which establishes that the presumption arises only "[i]f 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 . . . and that the infant was thereby rendered permanently and substantially mentally and physically impaired."

The First District does not consider the plain language of the statute along with legislative intent. Instead, the First District emphasizes legislative intent to the detriment of the plain language of the statutory presumption. *See St. Vincent's*, 27 So. 3d at 71 & n.2. The First District applies this "presumption of compensability" to serve the Legislature's intent "to reduce malpractice claims under traditional tort law." *Id*. Nowhere does the First District interpret the express language adopted by the Legislature – which should always be where an interpreting court first looks to discern legislative intent. *See BellSouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003); *accord St. Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071, 1073 (Fla. 1982).

The Plan modifies the Parents' common-law rights to sue the infant's Health Care Providers under traditional tort principles of negligence. The statutory language must be strictly construed, and the Plan narrowly applied. *See Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings*, 686 So. 2d 1349, 1354 (Fla. 1997); *Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 813 So. 2d 155, 159 (Fla. 4th DCA 2002). For the Health Care Providers to suggest that this principle of strict construction is arguably not implicated evidences a misapprehension of Florida law.

Because the First District fails to strictly construe the plain language of section 766.309(1)(a), its Opinion conflicts with established precedent. *See Fla.*

Birth-Related Neurological, 686 So. 2d at 1354; *Nagy*, 813 So. 2d at 159; *Fla. Birth-Related Neurological Injury Comp. Ass'n v. Dep't of Admin. Hearings*, 29 So. 2d 992 (Fla. 2010). Conflict jurisdiction was not improvidently granted.

B. **The First District improperly applies the statutory presumption to the facts of this case.**

Next, the Health Care Providers contend that because the Parents alleged that by the time of her birth, Tristan "suffered a hypoxic ischemic event that caused brain damage" – and stipulated that she suffered an "injury to her brain that rendered [her] permanently and substantially, mentally and physically impaired" – the Parents "demonstrated" the requisite elements of the statutory presumption. The facts stipulated by the parties should not control whether the presumption arises.

Importantly, the Parents stipulated only that "Tristan is permanently and substantially mentally and physically impaired *today*." (R-835; *accord* R-841.) Although the Parents alleged that Tristan "suffered a hypoxic ischemic event that caused brain damage" (R-6; R-835), they did not stipulate that this injury to her brain "thereby rendered [her] permanently and substantially mentally and physically impaired." § 766.309(1)(a), Fla. Stat. Instead, the Parents specifically stated that

> while Tristan suffered from multi-organ system failure due to that oxygen deprivation/asphyxia [before her delivery], . . . [the Hospital's] chart states that Tristan did

> not have permanent and substantial neurological impairment . . . until suffering from . . . pulmonary arrest, hours of resuscitation, and profound metabolic acidosis on October 3, 2001.

(R-835.) Her current condition, according to the Parents, occurred "outside of labor, delivery, and immediate post-delivery resuscitation." (*Id*.)

The ALJ understood that he was to determine the timing of Tristan's injury. (T-4; R-1072.) In questioning counsel, the ALJ noted that the Parents "didn't stipulate as to the brain injury of the child." (T-4.) The question as to whether Tristan's injuries were qualifying injuries under the Plan was one of fact for the ALJ. (R-834, 841.)

The ALJ eventually found that "it is undisputed that Tristan suffered brain injury, caused by oxygen deprivation, which rendered her permanently and substantially mentally and physically impaired." (R-1072.) Notwithstanding that the Parents stipulated that Tristan is "permanently and substantially mentally and physically impaired today," they did not seek a determination of compensability. Because the Parents never invoked the presumption, the precondition ("If the claimant has demonstrated") did not arise. *See St. Vincent's*, 27 So. 3d at 72 (Kahn, J., dissenting). The presumption, adopted to aid claimants, should not be invoked to eliminate claimants' common-law tort remedies. *See id*. The First District errs in ruling otherwise.

II. IN FINDING THE CLAIM COMPENSABLE, THE FIRST DISTRICT DISREGARDS THE ALJ'S CONCLUSIVE FINDINGS OF FACT, WHICH ARE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

Even if the statutory presumption arises, the First District erroneously treats the statutory presumption as a conclusive finding of compensability. The Health Care Providers concede that section 766.309(1)(a) establishes a rebuttable presumption, which shifts only the burden of producing evidence. In an effort to persuade this Court to uphold the Opinion, the Health Care Providers have no choice but to argue that the First District tacitly found that the Parents failed to rebut this presumption.

Yet the First District does not rule – whether expressly or implicitly – that the Parents failed to present credible evidence sufficient to rebut the presumption of a "birth-related neurological injury" under section 766.309(1)(a). The First District simply orders the ALJ, on remand, to find the claim compensable. (SC10-364-R-17.) Only by disregarding the ALJ's findings of fact – and the competent, substantial evidence in the record that supports those findings – could the First District rule the Parents' claim compensable under the Plan.

The Plan authorizes the ALJ to determine the compensability of a claim. §766.309, Fla. Stat. The ALJ shall determine, "based upon all available evidence," the following: (1) "[w]hether the injury claimed is a birth-related neurological injury"; (2) "[w]hether obstetrical services were delivered by a participating

physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital"; and (3) "[h]ow much compensation, if any, is awardable . . . ." § 766.309(1)(a) – (c), Fla. Stat. The ALJ's determination of the claim for purposes of compensability "shall be conclusive and binding as to all questions of fact." § 766.311. Only in the absence of competent, substantial evidence in the record to support those findings may the court overturn the ALJ's determination of compensability. *See Nagy*, 813 So. 2d at 159; *see also* § 120.68(10), Fla. Stat. (judicial review under the Administrative Procedure Act); *Doyle v. Fla. Unemployment Appeals Comm'n*, 635 So. 2d 1028, 1030 (Fla. 2d DCA 1994) (interpreting § 120.68(10), Fla. Stat.).

Here, the ALJ considered whether any party other than the Parents may claim the presumption. (T-1074.) If so, the ALJ continued, "it must then be resolved whether there was credible evidence produced to support a contrary conclusion and, if so, whether absent the aid of such presumption the record demonstrates, more likely than not, that Tristan's injury occurred during labor, delivery, or resuscitation." (T-1074-75.)

The ALJ relied on the clear and unambiguous language of the Plan to find that the statutory presumption is for the benefit of the Parents, and "is not available to aid other parties in satisfying their burden to establish that Tristan's brain injury occurred in the course of labor, delivery, or resuscitation." (R-1075-76.)

Moreover, the ALJ continued, "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 [statutory] presumption." (R-1076.)

This credible evidence, according to the ALJ, established 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 . . . ." (R-1077.) "Given the proof," the ALJ concluded, "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." (R-1078.) Because Tristan's injury did not occur during labor, delivery, or resuscitation, the ALJ determined – without regard to the presumption – that the claim is not compensable under the Plan as a "birth-related neurological injury." (R-1078.)

On appeal, the First District should have looked only to see whether competent, substantial evidence supported the ALJ's determination. *See Adventist Health Sys./Sunbelt, Inc. v. Fla. Birth-Related Neurological Injury*, 865 So. 2d 561, 569 (Fla. 5th DCA 2004). To rule otherwise – even implicitly – is to ignore the standard of review. *See, e.g., Declet v. Dep't of Children & Families*, 776 So. 2d 1000, 1001 (Fla. 5th DCA 2001). The First District impermissibly shifts the

burden of proof and ignores competent, substantial evidence that supports the ALJ's determination. *See Tabb v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 880 So. 2d 1253, 1259-60 (Fla. 1st DCA 2004).

Nonetheless, the Health Care Providers urge this Court to affirm the First District's tacit rejection of the ALJ's findings of fact. They devote pages of their answer briefs to the medical evidence, emphasizing the testimony of their own medical experts while asserting that the ALJ should not have relied on the Hospital's records. Essentially, the Health Care Providers ask this Court to reweigh the evidence and reject the ALJ's findings of fact. This, of course, the Court cannot do. *See* § 120.68(10), Fla. Stat.; *see also Adventist*, 865 So. 2d at 569 (emphasizing appellate court's limited scope of review in affirming ALJ's determination that an infant did not suffer a substantial mental impairment).

In any event, the Health Care Providers fail to show a complete absence of competent, substantial evidence supporting the ALJ's findings of fact. The Plan does not require expert medical testimony of proximate cause, as the Health Care Providers suggest. Instead, the Plan allows the ALJ to make his determination of compensability "based upon all available evidence." § 766.309(1), Fla. Stat. Thus, the ALJ properly considered Tristan's medical records.[1]

[1] The Health Care Providers emphasize that "[t]here is no record of any neurologist or pediatric neurologist having seen Tristan from the time of birth to October 3, 2001." (Dr. Long Ans. Br., at 37.) The Hospital elected not to consult

And, the ALJ did not err in rejecting the testimony of the "only qualified medical expert," as the Health Care Providers contend. (SVMC Ans. Br., at 31; Dr. Long Ans. Br., at 39.) The Health Care Providers' expert, Dr. Hankins, essentially conceded at the administrative hearing that he was not qualified to testify as to the timing or cause of Tristan's profound neurologic impairment. (T-106, 109, 110.) Even if Dr. Hankins was qualified to render an opinion as to the timing of the infant's mental impairment, he certainly was not the *only* expert.

The Parents' expert pediatric nephrologist, Dr. Pryor, testified that Tristan suffered oxygen deprivation before birth that damaged her kidneys and liver. (Exh. 29, at 33-36.) According to Dr. Pryor, not every infant who suffers a hypoxic ischemic injury before birth suffers a brain injury. (*Id*. at 32-33.) Based on his review of the medical records in this case, and his education, training and experience, Dr. Pryor testified that Tristan did not suffer any significant neurological damage before October 3, 2001. (*Id*. at 46.) Instead, he testified that in his opinion, Tristan suffered a brain or neurologic injury as a result of the October 3, 2001 cardiopulmonary arrest. (*Id*. at 44-47.) The testimony of Dr.

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with a pediatric neurologist until Tristan was more than a week old. Given that the decision to call in a consulting pediatric neurologist was for the Hospital – not the Parents – to make, the Health Care Providers cannot refute the implication: there was no need for consultation with a pediatric neurologist – and no evidence of profound neurologic impairment – until *after* October 3, 2001. (R-1066-67, 1069-1071, 1077-78.)

Pryor alone is sufficient to refute the testimony of Dr. Hankins as to the timing of the neurological injury.

The record before this Court reflects that the ALJ properly relied upon Tristan's medical records, along with the testimony of the treating physicians and the medical experts, in concluding that Tristan did not suffer a compensable injury. (R-1076-78.) The ALJ's findings of fact are supported by competent, substantial evidence. The First District errs in substituting its judgment for that of the ALJ.

III. THE FIRST DISTRICT'S OPINION CONFLICTS WITH *NAGY*.

The Health Care Providers – like the First District – misapprehend the definition of a "birth-related neurological injury" under section 766.302(2). The First District quotes the statute in defining a "birth-related neurological injury," but then abandons the statute's plain language, ruling that the Plan does not "preclude coverage if neurological damage becomes manifest at a later date." 27 So. 3d at 70. The First District's interpretation emphasizes the timing of the "oxygen deprivation" alone. *See id*.

Contrary to the First District's reasoning, the Plan does not require only that "oxygen deprivation or mechanical injury" must occur during labor, delivery, or the immediate post-delivery resuscitation. *Id*. The question of compensability depends upon whether the infant suffers an "*injury to the brain* . . . caused by oxygen deprivation occurring in the course of labor, delivery or resuscitation in the

immediate postdelivery period," which thereby "renders the infant permanently and substantially mentally and physically impaired." §§ 766.302(2), 766.309(1)(a), Fla. Stat. (emphasis added).

Consequently, for an injury to be compensable as a "birth-related neurological injury," the infant must: (1) suffer oxygen deprivation or mechanical injury, (2) in the course of labor, delivery, or the immediate post-delivery resuscitative period, which (3) injures the infant's brain or spinal cord, and (4) renders the infant permanently and substantially physically and mentally impaired. § 766.302(2), Fla. Stat. Absent any one of the requisite elements, the injury is not compensable under the Plan. *See Nagy*, 813 So. 2d at 160. Where, as here, oxygen deprivation at birth causes an injury to the brain that renders the infant only *physically* impaired (R-1078), the injury is not a "birth-related neurological injury."

The First District's Opinion conflicts with *Nagy*. The Fourth District ruled in *Nagy* that both the "oxygen deprivation or mechanical injury" and the "injury to the brain" must occur during labor, delivery, or immediately thereafter. 813 So. 2d at 159-60. The First District finds, however, that because Tristan suffered oxygen deprivation at birth, and thereafter manifested neurological damage (seven days later, on October 3, 2001), her injuries must be compensable. *St. Vincent's*, 27 So. 3d at 70. The ruling of the First District fails to take into account the timing of the

brain injury that rendered Tristan permanently and substantially physically *and mentally* impaired. *See id*.

The Health Care Providers contend that clearly the First District does not intend the word "manifest" to mean "the occurrence of the neurological injury." (SVMC Ans. Br., at 43.) No matter the First District's intent, the consequence of its ruling is clear. The court finds Tristan's claim compensable under the Plan merely because she suffered oxygen deprivation at birth. *St. Vincent's*, 27 So. 3d at 70. Nowhere in its Opinion does the Court address the timing of the ultimate consequences of that oxygen deprivation, contrary to the requirements of the Plan. *See Nagy*, 813 So. 2d at 158-60.

Again, the Parents never stipulated that Tristan suffered a "brain-related neurological injury" as defined by section 766.302(2). (R-835.) Although the Parents stipulated that Tristan "is permanently and substantially mentally and physically impaired today," they asserted that "her current condition occurred outside of labor, delivery and immediate post-delivery resuscitation." (R-835.) Questions as to the compensability of the claim, and whether Tristan's injuries were qualifying injuries under the Plan, remained. (R-841, 842.) And, the parties agreed – and the ALJ understood – that the timing of the "injury to the brain" that rendered Tristan physically and mentally impaired was an issue of fact, to be proven at the administrative hearing. (T-4-5.)

The First District's interpretation impermissibly broadens the scope of the Plan. The Plan must be strictly construed and narrowly applied. *E.g.*, *Nagy*, 813 So. 2d at 159-60 & n.4. Notwithstanding that a claimant has five years within which to bring his claim, § 766.313, Fla. Stat., the Plan's exclusive remedies are available only if an infant suffers a "birth-related neurological injury," as defined by section 766.302(2). *See* § 766.303(2), Fla. Stat.

And, regardless of whether the Legislature considered that "some neurological deficits will be hidden in the first few days, weeks, months and even years of life" (SVMC Ans. Br., at 45), those are not the facts of this case. "Given the proof," the ALJ found that Tristan did not suffer an "injury to the brain" that rendered her "permanently and substantially physically and mentally impaired" until October 3, 2001. (R-1077, 1078.) Because this "injury to the brain" resulted from oxygen deprivation that occurred seven days after her birth – and not during labor, delivery, or immediate post-delivery resuscitation – Tristan did not suffer a "birth-related neurological injury." (R-1078.) *See* § 766.302(2), Fla. Stat. Even if Tristan's profound neurologic impairment on October 3 could be traced back to the oxygen deprivation she suffered at her birth, this does not satisfy the Plan's requirement that the injury to her brain, which rendered her permanently and substantially mentally and physically impaired, must have occurred during labor,

delivery, or in the immediate post-delivery resuscitative period. *See Nagy*, 813 So. 2d at 160.

IV. THE FIRST DISTRICT'S OPINION CONFLICTS WITH *ORLANDO REGIONAL.*

Finally, the Opinion conflicts with *Orlando Regional*. Unlike the Fifth District's interpretation of the same statutory phrase, "resuscitation in the immediate postdelivery period," nowhere in the Opinion does the First District address the meaning of "resuscitation" or "immediate." *St. Vincent's*, 27 So. 3d at 70. The First District omits the requirement of "resuscitation" entirely, finding instead that an "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." *Id*. Not only does the Opinion conflict with *Orlando Regional*, it conflicts with the plain language of the Plan. § 766.302(2), Fla. Stat.

The First District also errs in applying the phrase "resuscitation in the immediate postdelivery period" to the facts. The oxygen deprivation that Tristan suffered during birth, delivery, or resuscitation in the immediate postdelivery period did not cause the brain injury that rendered her permanently and substantially *physically and mentally* impaired. (R-1077-78.) Instead, that oxygen deprivation only rendered her physically impaired. This is not enough to satisfy the definition of a "birth-related neurological injury." *See Fla. Birth-Related Neurological*, 686 So. 2d at 1353.

The ALJ's findings of fact do not compel a contrary conclusion. Although Tristan was placed in the special care nursery shortly after delivery, 27 So. 3d at 70, the evidence is undisputed that her treatment there "was effective in resolving her respiratory distress and metabolic acidosis": a finding of fact that even the Health Care Providers concede. (Dr. Long Ans. Br., at 48; R-1065, 1077-78.)

Only after the events of October 3, 2001 did the ALJ find that Tristan suffered substantial neurologic impairment. (R-1077-78.) To find the claim compensable under its alternative theory, the First District must conclude that the seven days between Tristan's delivery and the events of October 3 "constituted the 'immediate postdelivery period in the hospital' for purposes of the NICA Plan." 27 So. 3d at 70. The First District impermissibly broadens the scope of the Plan, expanding the limited class of catastrophic birth-related neurological injuries to include babies "delivered with a life-threatening condition" who "require[] close supervision" for "an extended period of days." *Id*. This interpretation contradicts the Plan's plain language, which must be strictly construed. *Fla. Birth-Related Neurological*, 686 So. 2d at 1354.

CONCLUSION

For all the foregoing reasons, and for the reasons stated in the Initial Brief of Petitioners, the Parents ask this Court to quash the Opinion of the First District, and affirm the ALJ's Final Order in its entirety.

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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; **William T. Jackson and William Peter Martin,** 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 and Wilbur E. Brewton,** Brewton Plante, P.A., 225 S. Adams, Ste. 250, Tallahassee, FL 32301, attorneys for NICA; by United States Mail, this 4th day of October, 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.

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