IN THE SUPREME COURT OF FLORIDA

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY
COMPENSATION ASSOCIATION

Petitioners,

CASE NO.: SC10-390
L.C. Nos.: 1D07-5557

vs.

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

Respondents.
_____/

ANSWER BRIEF OF RESPONDENT, ST. VINCENT'S MEDICAL CENTER, INC.

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

SCOTT A. TACKTILL, ESQUIRE
Florida Bar No.: 092827
THE UNGER LAW GROUP, P.L.
Amherst Building
3203 Lawton Rd., Suite 200
Orlando, Florida 32803
Phone: 407-425-6880
Fax: 407-425-0595

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

FLORIDA RULES

PRELIMINARY STATEMENT

Throughout this brief, Respondent St. Vincent's Medical Center, Inc., will be referred to as SVMC. Respondents William H. Long, M.D., and North Florida Obstetrics and Gynecology, P.A., will be referred to both individually and collectively as Dr. Long or Respondents. Petitioners Robert and Tammy Bennett will be referred to individually or collectively as the Bennetts. The minor child, Tristan Bennett, will be referred to as Tristan. Petitioner Florida Birth-Related Neurological Compensation Association will be referred to as NICA, or as Petitioner (singular).

Citations to the record in the District Court of Appeal, First District, will be designated as "R.," followed by the page number, e.g., R. 1-2. Citations to the transcript of the DOAH hearing will designated as "T.," followed by the page number, e.g., T. 3-4. Citations to the exhibits jointly submitted and received during the DOAH hearing will be designated as "Exhib.," followed by the exhibit number and the page number within that exhibit, if available, e.g., Exhib. 5. Citations to the record of the Florida Supreme Court will be designated as "SCR.," followed by the page number, e.g., SCR. 17.

STATEMENT OF THE CASE AND OF THE FACTS

At approximately 7:05 a.m. on September 26, 2001, Tammy Bennett was

involved in a one-car motor vehicle accident near her home in Macclenny, Florida. R. 1056. At that time Mrs. Bennett was 38+ weeks pregnant with Tristan Bennett, and already was scheduled for a Caesarean section delivery to be performed by William H. Long, M.D., of North Florida Obstetrics and Gynecology, P.A. on October 3, 2001 at SVMC. Id. After the accident, Mrs. Bennett was transported by ambulance to Ed Fraser Hospital in Macclenny, where she received her initial medical care. R. 1056-57. She remained at Ed Fraser Hospital for approximately two hours during which time she was evaluated and treated. At 9:41 a.m., Mrs. Bennett was transported by LifeFlight from Ed Fraser to SVMC in Jacksonville, Florida. She arrived at SVMC at approximately 9:59 a.m. R. 1060. Mrs. Bennett was admitted to the labor and delivery department under the care of Dr. Long. R. 1062.

While at SVMC, Mrs. Bennett developed and demonstrated a contraction pattern consistent with placental abruption. R. 1062. At approximately 12:45 p.m., Dr. Long determined that Mrs. Bennett was in renal failure. Exhib. 7. Given this development, Dr. Long made the decision to perform an emergency C-section delivery of the baby. R. 1062. The various monitors were turned off at 12:47 p.m. so that Mrs. Bennett could be taken to the operating room for the C-section. Tristan was ultimately delivered at 1:22 p.m. R. 1062-64. During a post-delivery

examination of the placenta, Dr. Long found indications and evidence of a partial abruption. R. 1064.

Subsequent to her delivery, Tristan did not cry. R. 1064. She had minimal respiratory effort. She required resuscitation with bulb suction, free flow oxygen, mechanical suction and ambu bag and mask. Id. Apgar scores of 6 and 8 were obtained at one minute and five minutes, respectively. Id. Arterial umbilical cord blood was obtained at delivery, revealing blood gases with a pH of 6.76, PCO^2 of 51.2, PO^2 of 17, and a base excess (BE) of -28. These findings establish that Tristan was suffering with a severe metabolic acidosis.[1] A second set of arterial blood gasses were obtained at 1:47 p.m. with the following results: pH of 7.14, PCO^2 of 31.7, PO^2 of 90 and a BE of -16.4. R. 1065. Although these blood gas results were improved, they still demonstrated the presence of a severe metabolic acidema. T.83-84.

Tristan was subsequently transferred from the Newborn Nursery to the Special Care Nursery for further monitoring and treatment. Id. During her first few days after delivery, Tristan is described in the nursery records as lethargic, irritable and noted on multiple occasions to have difficulty sucking. Exhib. 9. The

[1] Arterial umbilical blood reflects the condition of the baby, while the venous blood reflects more the condition of the placenta than the condition of the baby. T. 75.

nursery note for 8:00 a.m. on September 30, 2001, reflects that Tristan had "continued flailing of arms" and that one arm was restrained. Id. A progress note on October 1, 2001, describes Tristan as a "critically ill female newborn." Id. Progress notes from October 2, 2001, describe Tristan as a "critically ill infant w/renal failure," and "Asphyxia! Multiorgan failure." Exhib. 9, (emphasis in original).

In the period from her delivery to October 3, 2001, Tristan suffered from the following conditions: severe metabolic acidosis, renal failure, acute tubular necrosis (ATN), disseminated intravascular coagulation (DIC), oliguria, fluid retention, hyponatremia, respiratory distress and elevated liver enzymes. R. 1066. She was also placed on antibiotics for possible sepsis. Id. During this post-delivery period, no pediatric neurologist saw or was asked to consult on Tristan.

On the morning of October 3, 2001, Tristan experienced a pulmonary hemorrhage, with frank blood noted orally. R. 1067. She was found to be apneic, with a heart rate below 80 and decreasing oxygen saturation to the 40% range. R. 1067-68. She was intubated and given a blood transfusion. R. 1068. Later that day, Tristan's heart rate fell to 53 and her oxygen saturations decreased to 23%. Id. CPR was initiated and stopped after her heart rate returned to 77 and was observed to be increasing. Id. Oxygen saturations increased to 65%. Id. However,

moments later, Tristan had another episode of low heart rate and decreased oxygen saturations. Id. Tristan recovered, but she remained unstable throughout the rest of the day and evening of October 3, 2001. R. 1068-69.

On October 4, 2001, the physician progress notes document: "possible seizure last night ... #10 CNS: Had no obvious CNS dysfunction till last night." R. 1069. On October 5, 2001, Tristan was seen for the first time by a pediatric neurologist, Dr. Carlos Gama. R. 1069-70. Dr. Gama's consultation report from his examination that day describes Tristan's condition at delivery as follows:

> The baby was floppy with some gasping efforts but unable to sustain respirations ... The initial blood gases demonstrated pH 7.14, PO2 80, PCO2 32, base excess of -16.4 ...[2] [she] was continued to be monitored in the intensive care unit where she was noted to have initially appropriate urine output which declined progressively within the first day or two of life to the point that she was oliguric. With this the BUN and creatine have increased which suggest acute tubular necrosis.

Exhib. 10.

Tristan was also seen and examined by neonatologist Dr. Ronald Carzoli. In his discharge summary, Dr. Carzoli made the following the findings and conclusions:

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[2] These "initial blood gasses" are, in reality, the second set obtained at 1:47 p.m. in the special care nursery (although the PO^2 was "90" and not "80" as stated by Dr. Gama).

> Hospital Course: "[I]n brief, this infant suffered **significant birth asphyxia**, it is suspected at the time of the motor vehicle accident. Overall, the infant had a very unstable hospital course which involved **clear signs of asphyxia with acute renal failure, liver damage, seizures, and obvious neurologic damage**. She also had pulmonary hemorrhages during the hospitalization as well as thrombocytopenia and coagulopathy, **all consistent with asphyxia**."
>
> Respiratory: that the "initial metabolic acidosis and mild respiratory distress" were treated and "**appeared** to resolve fairly quickly."
>
> Renal: that Tristan showed signs of "acute renal failure shortly after delivery [and] decreased urine output and increased fluid retention, leading to hyponatremia and other electrolyte abnormalities."

Exhib. 9 (emphasis added).

Tristan was discharged home on November 14, 2001, with follow-up appointments scheduled with her primary care physician, a nephrologist, a neurologist, and physical and occupational therapists. R. 1071. Dr. Gama continued to see Tristan after her discharge from SVMC. In an office note for the visit of November 27, 2001, Dr. Gama described this child's condition at delivery as:

> [H]owever, at delivery, the baby had no respiratory effort and required to be bagged and ventilated.... Following this, she had moderate respiratory distress.... [S]he was noted to be acidotic. The baby had to be maintained on a respirator because of [her] respiratory distress syndrome and asphyxia. She was unstable initially and developed acute renal failure, liver damage and posteriorly seizure activity for which neurological consultation was performed.

R. 1071. In the same note, Dr. Gama's assessment of Tristan was as follows:

> In general, it is my opinion that Tristan is status post severe perinatal distress with hypoxic ischemic encephalopathy, metabolic acidosis, associated with coagulopathy and complicated with one cardiac arrest requiring resuscitation while at the special care nursery. The result of **all of these complications is culminated** with what appears to be a severe hypoxic ischemic encephalopathy with multi-cystic encephalomalacia and seizure disorder. The seizures seem to be stable. Family is aware of findings by CT scan and implications with regard to the baby's overall future development, seizure risk, cerebral palsy risk and neurological sequelae.

Id. (emphasis added).

On May 16, 2002, Tristan was seen for the first time by pediatric neurologist Dr. David Hammond. After reviewing the medical records and examining her, Dr. Hammond reported his findings in a letter to the referring pediatrician, stating as follows:

> Highly complex child with a number of problems.
>
> 1. Difficult neonatal course including birth asphyxia (suspected at the time of the motor vehicle accident), **other indications of asphyxia with acute renal failure, liver damage, seizures, neurologic damage**, and pulmonary hemorrhage. Thrombocytopenia and coagulopathy also noted consistent with asphyxia according to the available NICU records.

Exhib. 11 (emphasis added). In July 2006, Dr. Hammond's impression was static encephalopathy, quadriplegic cerebral palsy, complex-partial epilepsy, stable global developmental delay. Id.

On April 2, 2004, the Bennetts filed an Amended Complaint in Circuit Court

of the Fourth Judicial Circuit in and for Duval County, Florida. The complaint named as defendants Dr. Long, North Florida Ob/Gyn, SVMC and fourteen other defendants. The complaint alleged that the various defendants were negligent in their care and treatment of Mrs. Bennett and Tristan.

On July 30, 2004, Dr. Long and North Florida Ob/Gyn moved to abate the circuit court action pending a determination by the Division of Administrative Hearings ("DOAH"), regarding the compensability of the injuries under the Florida Birth-Related Neurological Injury Compensation Association Plan (NICA) and Section 766.301, *et seq.* Florida Statutes. On September 28, 2004, SVMC joined in this motion. On November 16, 2004, the circuit court entered an order abating the circuit action which further required that this matter be heard by an Administrative Law Judge ("ALJ").

On July 12, 2006, the Bennetts, individually and as parents and natural guardians of Tristan, filed a petition with DOAH, requesting a "determination of whether Tristan Bennett's injuries [were] qualifying injuries under the NICA Plan." R. 5-14, 11. The Bennetts requested, *inter alia*, that neither SVMC nor any other health care provider be entitled to NICA immunity for any injuries or damages that Tristan suffered that did not occur during labor, delivery, or the immediate post-delivery resuscitative period. R. 12. In addition, the Bennetts requested that

if the injuries were determined to be qualifying injuries, that the ALJ also determine that Dr. Long and SVMC did not have NICA immunity either because of their failure to provide pre-delivery notice to the Petitioners or because their pre-delivery notice was inadequate. R. 11-12.

On July 12, 2006, DOAH served NICA with a copy of the Bennetts' petition. R. 1054. NICA responded to the petition, giving notice that it was of the view that Tristan did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes. Id. NICA requested a hearing be held to resolve the issue. Id. Dr. Long and SVMC were given leave to intervene in the DOAH proceeding on August 1, 2006 and October 4, 2006, respectively. R. 36-37, 79-80, 1054. North Florida Ob/Gyn, was subsequently given leave to intervene on January 10, 2007. R. 246-48, 1054. A hearing was scheduled before Administrative Law Judge William J. Kendrick. R. 1055.

Prior to the hearing, the parties entered into a Pre-Hearing Stipulation in which, among other things, it was stipulated and agreed that Tristan had suffered an injury to the brain "caused by oxygen deprivation, which rendered [Tristan] permanently and substantially mentally and physically impaired." R. 833-48, 1072. Thus, the only issues before the ALJ were: (1) whether Tristan's brain injury occurred in the course of labor, delivery, or resuscitation in the immediate

postdelivery period and (2) whether Dr. Long, North Florida Ob/Gyn, and SVMC provided sufficient notice to the Bennetts of their NICA participation. T. 4-5; R. 1072, 1078.

On July 5, 2007 the parties also filed a stipulated record, which was subsequently received into evidence. R.857-60, 861-64, 1055; T. 7. Dr. Long submitted three additional exhibits at the hearing and SVMC submitted one. R. 868, 1055. The record included, *inter alia*, medical records of Mrs. Bennett and Tristan, depositions of the parties, depositions of Mrs. Bennett's and Tristan's medical providers, and depositions of each parties' experts.

The DOAH hearing was held on July 9, 2007. At the outset, the ALJ confirmed the parties' stipulation that Tristan had suffered "an injury to the brain caused by oxygen deprivation that rendered Tristan permanently and substantially, mentally and physically impaired." T. 4-5. The ALJ also confirmed that the only issues to be determined were the timing of the neurological injury and whether Dr. Long, North Florida Ob/Gyn, and SVMC gave adequate notice to the Bennetts. Id.

Only two witnesses testified live at the hearing: Tammy Bennett, for the Petitioners, and Gary Hankins, M.D., for Dr. Long, North Florida Ob/Gyn and SVMC. Neither the Bennetts nor NICA presented any live expert testimony at the hearing.

On the issue of the timing of Tristan's neurological injury, Dr. Long and SVMC took the position and argued that the statutory presumption of Section 766.309(1)(a), Florida Statutes, applied in this case. That statute provides, in effect, that when it is demonstrated that the infant suffered a permanent and substantial mental and physical impairment, the injury is "presumed" to be birth-related neurological injury. T. 215-16, 238; R. 930-31, 1035-36, 1074. In support of this argument, SVMC cited to Orlando Reg'l Healthcare Sys., Inc. v. Alexander, 909 So. 2d 582 (Fla. 5th DCA 2005).

At the hearing, Dr. Long and SVMC offered Dr. Hankins as their medical expert. Dr. Hankins is double board-certified in obstetrics and gynecology as well as in maternal fetal medicine. T. 40. He is a member of the American College of Obstetricians and Gynecologists ("ACOG"). T. 42. Dr. Hankins has chaired many ACOG committees including a task force on neonatal encephalopathy and cerebral palsy ("NECP"). T. 42-43. One of the issues the NECP task force examined was the timing of hypoxic ischemic events occurring during the intrapartum period (i.e., the period surrounding delivery). T. 45.

Dr. Hankins testified that Tristan suffered a hypoxic ischemic event on September 26, 2001, between 12:47 p.m., when the monitors were turned off, and delivery at 1:22 p.m. According to Dr. Hankins, this hypoxic ischemic event

caused Tristan to be born in a condition of severe metabolic acidosis, as demonstrated by the cord blood gasses, in particular, a pH of 6.76 and BE of -28.[3] T. 79; Exhib. 27, pp. 84-86; Exhib. 23, p. 67.

In discussing the Apgar scores, Dr. Hankins explained and opined that they were "assisted" in that Tristan was given oxygen during the immediate post-delivery period. T. 81. Dr. Hankins noted that the second Apgars were comparatively better than the first, but still confirmed that Tristan continued to suffer from severe metabolic acidemia. T. 83-84. He also testified that there is a poor correlation between Apgar scores and ultimate neurological outcomes. Exhib. 27, pp. 84-86. According to Dr. Hankins, Tristan's condition at delivery, in combination with her subsequent hospital course and an ultimate diagnosis of cerebral palsy, established that she had suffered oxygen deprivation and injury to her brain shortly before delivery. T. 79-80.

The ALJ issued his Final Order on October 3, 2007, denying NICA compensability. R. 1052-99. Regarding the statutory presumption contained in Section 766.309(1)(a), the ALJ rejected SVMC's argument, concluding, without

[3] The Bennett's Ob/Gyn expert, Dr. Richard Fields, testified by deposition to the severity of Tristan's condition at birth, stating that a baby born with a pH of 6.76 would be unable to survive for more than "five minutes or so." *Exhib. 23, pp. 43-46, 52.*

citation to any authority, that: "The presumption is for Petitioners' (Claimants') benefit, 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. The ALJ added that there was credible evidence produced to "support a contrary conclusion, and to require resolution of the issue without regard to the presumption." R. 1076.

On the issue of the timing of Tristan's brain injury, the ALJ found that although Tristan suffered a multi-system failure as a result of oxygen deprivation between 12:47 p.m., and the time of birth, she did "not suffer 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." R. 1077. Accordingly, the ALJ concluded that Tristan's injuries did not qualify for coverage under the NICA Plan.[4]

Dr. Long and SVMC appealed the ALJ's ruling to the District Court of Appeal for the First District. On appeal, the First District reversed, holding that the ALJ erred as a matter of law in failing to apply the rebuttable presumption provided by section 766.309(1)(a). St. Vincent's Medical Center v. Bennett, 27 So. 3d 65, 66

[4] As to the notice issue, which is not involved in this appeal, the ALJ concluded that Dr. Long and SVMC had demonstrated and established compliance with the notice provisions of the NICA Plan. R. 1092-93.

(Fla. 1st DCA 2009). Specifically, the First District held:

> As noted, the parties stipulated that Tristan is permanently and substantially mentally and physically impaired. Further, the ALJ found that the injury was a neurological one; that is, it involved the brain or the spinal cord. There was no dispute below concerning whether Tristan has sustained a neurological injury. 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.

Id. at 70.

The Bennetts moved for rehearing, rehearing en banc, clarification and certification. SCR. 18-81. The First District denied the Bennetts' motion. SCR. 135. The First District clarified, however, that the ALJ was "to enter an order finding that the claim filed by the Bennetts is subject to compensation under the NICA Plan." Id.

The Bennetts sought discretionary jurisdiction in this Court based on alleged direct and express conflict with another district court of appeal under Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. The Court accepted jurisdiction of the case by order dated May 11, 2010.

SUMMARY OF THE ARGUMENT

The First District correctly found that the birth-related injury to the infant's brain was compensable regardless of when the damages manifested. There is no 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 v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 813 So.2d 155 (Fla. 4th DCA 2002) 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.

Additionally, the First District correctly interpreted the phrase "immediate postdelivery period," and there is no conflict with the Fifth District in Orlando Regional Healthcare System, Inc. v. Florida Birth-Related Neurological, 997 So. 2d 426 (Fla. 5th DCA 2008) as to the interpretation of that phrase. 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 that the First District reach the conclusion urged by Petitioners.

STANDARD OF REVIEW

The standard of review for an ALJ's interpretation of the NICA statutes is de novo. Orlando Reg'l Healthcare Sys., Inc. v. Alexander, 909 So. 2d 582, 586 (Fla. 5th DCA 2005). An ALJ's order will be reversed by the appellate court when the ALJ's interpretation of the law is clearly erroneous. See Schur v. Florida Birth-Related Neurological Injury Comp. Ass'n, 832 So. 2d 188, 191 (Fla. 1st DCA 2002). The Florida Supreme Court reviews the district courts' interpretation of a statute de novo. See Fla. Birth-Related Neurological Injury Comp. Ass'n v. Dep't of Admin. Hearings, 29 So. 3d 992 (Fla. 2010)

ARGUMENT

I. The First District correctly found that the birth-related injury to the infant's brain was compensable regardless of when the damages manifested.

Petitioner argues that there is an express and direct conflict between the First District in the instant case and the Fourth District Court of Appeal's decision in Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 813 So. 2d 155 (Fla. 4th DCA 2002) as to the timing of a compensable injury. Petitioner's argument hinges on the idea that the Nagy court's interpretation of Section 766.302(2), Florida

Statues, 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.

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.

Petitioner asserts 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.

II. The First District correctly interpreted the phrase "immediate postdelivery period."

Petitioner is incorrect in its assertion that the First District's opinion in the instant case conflicts with that of the Fifth District 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." (Petitioner refers to the case in its brief as "Stever.") 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 Petitioner notes in its 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. Given this qualification, the analysis of the phrase is merely dicta.

Nonetheless, 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.

Petitioner attempts to create a conflict by arguing that, unlike the infant involved in Orlando Regional, Tristan was not on continuous artificial respiration. 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 truly is a conflict between the opinions, 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.

During her first few days after delivery, Tristan is described in the nursery records as lethargic, irritable and noted on multiple occasions to have difficulty sucking. Exhib. 9. The nursery note for 8:00 a.m. on September 30, 2001, reflects that Tristan had "continued flailing of arms" and that one arm was restrained. Id. A progress note on October 1, 2001, describes Tristan as a "critically ill female

newborn." Id. Progress notes from October 2, 2001, describe Tristan as a "critically ill infant w/renal failure," and "Asphyxia! Multiorgan failure." Exhib. 9, (emphasis in original).

In the period from her delivery to October 3, 2001, Tristan suffered from the following conditions: severe metabolic acidosis, renal failure, acute tubular necrosis (ATN), disseminated intravascular coagulation (DIC), oliguria, fluid retention, hyponatremia, respiratory distress and elevated liver enzymes. R. 1066. She was also placed on antibiotics for possible sepsis. Simply put, Tristan was seriously ill from her birth up through and including the date that even Petitioner acknowledges her condition included a sufficient neurological component. The First District made a case-specific determination that, in this particular child, the "immediate postdelivery period," which began at the time of her delivery, was still ongoing on October 3, 2001.

As such, the First District analysis is consistent with that of Orlando Regional. Moreover, given that the First District correctly found that Tristan's injuries fell within the statutory time period even without resort to determination of what constitutes "the immediate postdelivery period," the result below would be the same irrespective of that determination.

CONCLUSION

For the foregoing reasons, this court should affirm the First District's decision and order, thus requiring the ALJ to enter an order finding that the claim of the Bennetts is subject to compensation under the NICA Plan.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via United States Mail this 18th day of August 2010, to the parties listed on the attached Service List.

/s/ Scott A. Tacktill, Esquire
SCOTT A. TACKTILL, ESQUIRE
Florida Bar No.: 092827
DANIEL A. TRESSLER, II, ESQUIRE
Florida Bar No.: 175285
THE UNGER LAW GROUP, P.L.
Amherst Building
3203 Lawton Rd., Suite 200
Orlando, Florida 32803
Phone: 407-425-6880
Fax: 407-425-0595

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.

/s/ Scott A. Tacktill, Esquire
SCOTT A. TACKTILL, ESQUIRE
Florida Bar No.: 092827
DANIEL A. TRESSLER, II, ESQUIRE
Florida Bar No.: 175285

CASE NUMBER: SC10-390
SERVICE LIST

William Peter Martin, Esquire
Craig Ashley Dennis, Esquire
Dennis, Jackson, Martin & Fontela, P.A.
P.O. Box 15589
Tallahassee, FL 32317-5589
Attorneys for Dr. Long and North
Florida Obstetrics and Gynecology, P.A.

Mousa Mark Bajalia, Esquire
Brenna, Manna & Diamond, LLC
76 South Laura Street, Suite 2110
Jacksonville, FL 32202
Attorneys for Florida Birth-Related
Neurological Injury Compensation Association

Kelly Brewton Plante, Esquire
Wilbur E. Brewton, Esquire
Tana D. Storey, Esquire
Brewton Plante, P.A.
225 South Adams, Suite 250
Tallahassee, FL 32301
Attorneys for NICA

John Stewart Mills, Esquire
Rebecca Bowen Creed, Esquire
Mills,Creed & Gowdy, P.A.
865 May Street
Jacksonville, Florida 32204
Co-counsel for Robert and Tammy Bennett

James W. Gustafson, Jr., Esquire
Searcy, Denney, Scarola, Barnhard & Shipley, P.A.
P.O. Drawer 1230
Tallahassee, FL 32302
Co-counsel for Robert and Tammy Bennett