

IN THE SUPREME COURT OF FLORIDA

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION

Petitioners,

CASE NO.: SC10-390

L.C. Nos.: 1D07-5557

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

Respondents.

**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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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF CITATIONS.....ii, iii

PRELIMINARY STATEMENT.....iv

STATEMENT OF THE CASE AND OF THE FACTS.....1

SUMMARY OF ARGUMENT.....2

ARGUMENT.....4

**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.....4**

**A. The First District is not in direct and express conflict with
Nagy with respect to the term “birth-related neurological
injury.”5**

**B. The First District is not in direct and express conflict with
Orlando Reg’l with respect to the phrase “resuscitation in the
immediate postdelivery period.”8**

CONCLUSION.....10

CERTIFICATE OF SERVICE.....11

CERTIFICATE OF COMPLIANCE.....12

TABLE OF CITATIONS

CASES
PAGE

Florida Birth-Related Neurological Injury Comp. Ass'n v. Florida Div. of Admin. Hearings, 686 So.2d 1349 (Fla. 1997)3,7, 8

Nagy v. Florida Birth-Related Neurological Injury Comp. Ass'n, 813 So. 2d 155 (Fla. 4th DCA 2002).....2, 3, 5, 6, 7, 8

Orlando Reg'l Healthcare Sys., Inc. v. Florida Birth-Related Neurological, 997 So.2d 426 (Fla. 5th DCA 2008).....3, 4, 8, 9, 10

Reaves v. State, 485 So.2d 829 (Fla. 1986).....4, 7

St. Vincent's Medical Center v. Bennett, 34 Fla. L. Weekly D1716 (Fla. 1st DCA Aug. 21, 2009), 2009 WL 2602286.....1, 2, 5, 6, 7, 8, 9, 10

Wainwright v. Taylor, 476 So.2d 669 (Fla. 1985).....6

STATUTES
PAGE

§766.302(2), Fla. Stat.....2, 5, 6

§766.309(1)(a), Fla. Stat.....2, 5

FLORIDA CONSTITUTION

PAGE

Art. V, §3(b)(3), Fla. Const.....5

FLORIDA RULES

PAGE

9.030(a)(2)(A)(iv), Fla. R. App. P.....4

OTHER AUTHORITY

PAGE

Harry Lee Anstead, et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431 (2005).....6

PRELIMINARY STATEMENT

In this jurisdictional brief, Petitioner Florida Birth-Related Neurological Injury Compensation Association, will be referred to as NICA. Petitioners in Case Number: SC10-364, Robert and Tammy Bennett, will be referred to collectively as the Bennetts. Tristan Bennett will be referred to as Tristan. 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. NICA 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 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.* Tristan was not examined by a pediatric neurologist until after the October 3, episode. *Id.* at *1.

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 between the First District's decision in this case and the decision in *Nagy v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 813 So.2d 155 (Fla. 4th DCA 2002), because the questions of law presented and addressed are completely different.

The First District is not in direct and express conflict with *Nagy* with respect to its interpretation of the term "birth-related neurological injury." On the contrary, the First District correctly stated 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 postdelivery period in a hospital” This language is consistent with the language used in *Nagy*.

NICA’s assertion of conflict appears to rely on a single sentence plucked from the First District’s opinion, without giving the context of that sentence. The statement NICA references is part of the First District’s analysis, distinguishing the timing of an infant’s neurological injury from the timing of the manifestation of that injury. The conclusion drawn by the court, i.e., that it is the oxygen deprivation or mechanical injury causing neurological damage that must occur during labor, delivery, or resuscitation in the immediate postdelivery period, is consistent with *Nagy*.

The First District’s analysis is not in conflict with *Florida Birth-Related Neurological Injury Comp. Ass’n v. Florida Div. of Admin. Hearings*, 686 So.2d 1349, 1354 (Fla. 1997)(hereinafter “*Birnie*”) and *Nagy*. The First District did not specifically mention the strict construction requirement in its majority opinion. Thus, there is no express and direct conflict appearing within the four corners of the majority decision. Further, the First District, like *Birnie* and *Nagy*, 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.

The First District is not in conflict with *Orlando Reg'l Healthcare Sys., Inc. v. Florida Birth-Related Neurological*, 997 So.2d 426 (Fla. 5th DCA 2008), with respect to the phrase “resuscitation in the 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 to include an extended period of days under certain factual circumstances. The facts pertaining to the “immediate postdelivery period” in *Orlando Reg'l* can certainly be described as “an extended period of days when a baby is delivered with a life-threatening condition and requires close supervision.”

The First District did not ignore the term “resuscitation,” as evidenced by its citation to *Orlando Reg'l*, which thoroughly analyzed the meanings of “immediate postdelivery period in a hospital” and “resuscitation,” and its citation to the ALJ’s finding that Tristan’s injury “likely continued during the immediate postdelivery resuscitative period.”

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 *Nagy* with respect to the term “birth-related neurological injury.”

There is no direct and express conflict between the First District’s decision in this case and the decision in *Nagy* because the questions of law presented and addressed are completely different. The issue before the First District in the case *sub judice* 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 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, that eventually leads to an injury to the brain. *Nagy*, 813 So.2d at 159-160.

Because the question of law presented and resolved in *Nagy* is not in conflict with the question of law presented and resolved in the case *sub judice*, discretionary review is not available. Indeed, discretionary review of this case 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).

Further, the First District is not in direct and express conflict with *Nagy* with respect to its interpretation of the term "birth-related neurological injury." On the contrary, the First District correctly states 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 postdelivery period in a hospital" *St. Vincent's*, 2009 WL 2602286, at *4. This language is completely consistent with that used in *Nagy*. *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.").

NICA's assertion of conflict appears to be based on one sentence of the

First District's opinion, without giving the context of that sentence. The sentence NICA references is part of the First District's analysis, distinguishing the timing of an infant's neurological injury from the timing of the manifestation of that injury. These distinct concepts were addressed by the First District because 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, the First District confirmed that 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*.

Finally, NICA's assertion that the First District is in conflict with *Birnie* and *Nagy* because the First District failed to narrowly construe the NICA plan "to include only those claims which are clearly embraced within the terms of the Plan," is without merit. *See* Pet'r's Brief, at 8. The First District did not specifically mention the strict construction requirement in its majority opinion. Accordingly, NICA cannot assert a conflict where there is no indication from the opinion that the First District refused to utilize 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. *Id.* (Holding that “Neither a dissenting opinion nor the records itself can be used to establish jurisdiction.”).

Also, the First District’s analysis is consistent with the analyses used in *Birnie* 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. *See Birnie*, 686 So.2d at 1354; *Nagy*, 813 So.2d at 159-160. Indeed, the First District properly cited to the legislative intent of the NICA plan in its analysis. *See St. Vincent’s*, 2009 WL 2602286, at *5, (Stating that the intent of the plan is to “provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation.” (emphasis added)) .

B. The First District is not in direct and express conflict with *Orlando Reg’l* with respect to the phrase “resuscitation in the immediate postdelivery period.”

The First District is not in conflict with *Orlando Reg’l*, with respect to the phrase “resuscitation in the 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 to include an extended period of days under certain factual circumstances. *St. Vincent's*, 2009 WL 2602286, at *5; see *Orlando Reg'l*, 997 So.2d at 430 (Holding that the application of the phrase “immediate postdelivery period” must be made on a case-by-case basis.). Specifically, the First District described *Orlando Reg'l*, as construing the “immediate postdelivery period” to include “an extended period of days when a baby is delivered with a life-threatening condition and requires close supervision.” *St. Vincent's*, 2009 WL 2602286, at *5

The First District’s description of *Orlando Reg'l*’s holding does not conflict with that decision. Indeed, *Orlando Reg'l* held that the “immediate postdelivery period” of resuscitation began from the infant’s birth to the time he was stabilized by being placed on an extracorporeal membrane oxygenation bypass machine at another hospital. 997 So.2d at 429, 431-432. During that period, the infant was closely and continuously treated for respiratory failure, low blood pressure, metabolic acidosis, hypoglycemia, pallor, hypotonia, and depressed activity. 997 So.2d at 428, 431. These facts establishing the “immediate postdelivery period” in *Orlando Reg'l* can easily be described as “an extended period of days when a baby is delivered with a life-threatening condition and requires close supervision.”

NICA also takes issue with the First District's alleged failure to consider the term "resuscitation." Again, the First District cited to *Orlando Reg'l* when addressing the application of the phrase "immediate postdelivery period in a hospital." *St. Vincent's*, 2009 WL 2602286, at *5. There is no dispute that *Orlando Reg'l* thoroughly analyzed the meanings of "immediate postdelivery period in a hospital" and "resuscitation," when it applied that terminology to the facts of that case.

Moreover, the First District obviously considered the term "resuscitation" as shown by its citation to the ALJ's finding that Tristan's injury "likely continued during the immediate postdelivery **resuscitive** period." *St. Vincent's*, 2009 WL 2602286, at *4 (emphasis added). Also significant is the First District's use of the phrases "life-threatening condition," "requires close supervision," and placement in a "special care nursery," when describing Tristan's status during this period. In short, there is no conflict with *Orlando Reg'l*.

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. Tackill, 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 5th day of April, 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: 4/5/2010

William T. Jackson
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