IN THE SUPREME COURT
STATE OF FLORIDA

Case Number: SC10-390

Lower Tribunal Case Nos.: 1D07-5561, 1D07-5557 (Consolidated)

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION

Petitioner,

v.

ST. VINCENT'S MEDICAL CENTER, INC., ET AL.

Respondents.

PETITIONER'S BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

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TABLE OF CONTENTS

TABLE OF CITATIONS

CONSTITUTIONAL PROVISIONS **PAGE**

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The Florida Birth-Related Neurological Injury Compensation Association ("NICA") seeks review by this Court of the First District Court of Appeal's ("First DCA") decision in St. Vincent's Medical Center, Inc. v. Bennett, -- So. 3d --, 2009 WL 2602286 (Fla. 1st DCA 2009) with respect to the definition of "birth-related neurological injury" as that term is defined in Section 766.302(2), Florida Statutes.

Tristan Bennett ("Tristan") was born on September 26, 2001. On delivery, Tristan required manual resuscitation to which she quickly responded. Her APGARs at birth and within minutes of birth were within the normal range. Tristan suffered renal distress and liver damage and was transferred to the special care nursery. Id. at *1. Her neurological examinations for the first seven days of life were normal. Id. at *3. On October 3, 2001, seven days after delivery, Tristan "experienced pulmonary bleeding and the pulmonary arrest leading to multi-organ failure and seizure activity." Id. at *1.

The circuit court suit filed by the Bennetts against St. Vincent's Medical Center, Inc., William H. Long, M.D., and North Florida Obstetrics and Gynecology, P.A. (the "Health Care Providers"), was abated for an Administrative Law Judge ("ALJ") to determine whether the injury was compensable under Sections 766.301, *et seq.*, Florida Statutes ("NICA Statute"), relative to whether the Health Care Providers might be entitled to immunity under the NICA Statute.

The Bennetts did not want benefits under the Plan. Id. at *4.

At issue before the ALJ was whether the injury occurred during labor, delivery or resuscitation in the immediate postdelivery period. Id. at *1-2. The Bennetts and NICA argued that the neurological injury did not occur during the mandated time frame. The Bennetts further argued that it was not until October 3 that an injury occurred which rendered Tristan both permanently and substantially mentally and physically impaired. Id. at *4. The Health Care Providers argued the oxygen deprivation and neurological injury occurred before or at the time of delivery and that the multi-organ damage Tristan suffered as a result of the oxygen deprivation "caused the acute pulmonary arrest suffered several days later." Id. at *2. The Health Care Providers requested that the ALJ apply the presumption in Section 766.309(1)(a), Florida Statutes, to find the claim compensable. Id.

Based on the record evidence, which includes extensive medical records and expert testimony, the ALJ determined the infant did not suffer a "birth-related neurological injury" as that term is defined in Section 766.302(2), Florida Statutes, concluding that:

> 41. The medical records, as well as the testimony of the physicians and other witnesses, have been thoroughly reviewed. Having done so, it must be resolved that the record developed in this case compels the conclusion that, more likely than not, **Tristan suffered multi-system failure as a consequence of the oxygen deprivation she suffered between 12:47 p.m. (when the fetal monitor was disconnected and Mrs. Bennett was moved to the operating room) and 1:22 p.m.**

> **(when Tristan was delivered), that likely continued during the immediate postdelivery resuscitative period.** However, 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, following the onset of pulmonary hemorrhaging and pulmonary arrest.
>
> 42. . . . Given the proof, 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. . . . [Bold emphasis in original; underlined emphasis added.]

Id. at *2.

The Health Care Providers appealed the Final Order asserting, in pertinent part, that the ALJ erred in not applying the presumption. The First DCA agreed that the ALJ erred in not applying the presumption to find the claim compensable as the application of the presumption "best serves the Legislature's intent." Id. at *5. The First DCA refused to allow the Bennetts to waive the application of the presumption.

In its interpretation of the statutory presumption, the First DCA also interpreted the requirements set forth in the definition of "birth-related neurological injury." Id. at * 4. The First DCA found:

> Importantly 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." It is "oxygen deprivation or mechanical injury" which must occur during '"labor, delivery, or resuscitation in the immediate postdelivery period" under

the statutory scheme.

Id. The First DCA also held that even if the "neurological damage" must "manifest" itself during labor, delivery or resuscitation in the immediate postdelivery period, the claim is still compensable because 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." Id. at *5.

NICA filed a Motion for Clarification, or, in the Alternative, Rehearing and the Bennetts filed a Motion for Clarification, Rehearing, Rehearing En Banc and Certification, all of which were denied except for the requested clarification. The First DCA clarified that, on remand, the ALJ must enter an order finding the claim compensable. Subsequently, NICA and the Bennetts filed separate notices of invoking this Court's discretionary jurisdiction.[1]

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review the First DCA's decision as the decision expressly and directly conflicts with the decision of another district court of appeal on the same point of law. See Art. V, 3(b)(3), Fla. Const.; Rule 9.030(a)(2)(A)(iv), Fla. R. App. P.

[1] The cases are currently separate. Upon acceptance of jurisdiction, a motion to consolidate will likely be filed. The Bennetts' appeal is case number SC10-364.

SUMMARY OF THE ARGUMENT

The First DCA's decision expressly and directly conflicts with the Fourth District Court of Appeal's ("Fourth DCA") decision in Nagy v. Fla. Birth-Related Neuro. Injury Comp. Ass'n, 813 So. 2d 155 (Fla. 4th DCA 2002) and the Fifth District Court of Appeal's ("Fifth DCA") decision in Orlando Regional Healthcare System, Inc. v. Fla. Birth-Related Neuro., 997 So. 2d 426, 430 (Fla. 5th DCA 2008) relative to the proper interpretation of the definition of a "birth-related neurological injury." The First DCA's interpretation of what constitutes a "birth-related neurological injury" is not narrowly construed to include only claims which are clearly embraced within the terms of the statute, and operates as an expansion of the definition afforded to that term by other district courts in conflict with this Court's decision in Fla. Birth-Related Neuro. Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349, 1354 (Fla. 1997) requiring that the Plan be strictly construed.

ARGUMENT

A. The First DCA's Opinion Expressly and Directly Conflicts with the Fourth DCA's Decision in Nagy v. Fla. Birth-Related Neuro. Injury Comp. Ass'n as to the Proper Interpretation of "Birth-Related Neurological Injury"

The First DCA's decision expressly and directly conflicts with the rule of law set forth by the Fourth DCA's decision in Nagy, supra, with respect to the

proper interpretation of the term "birth-related neurological injury" as defined in Section 766.302(2), Florida Statutes. In Bennett, while addressing the issue relative to whether the ALJ erred in not applying the presumption in Section 766.309(1)(a), Florida Statutes, the First DCA interpreted the definition of "birth-related neurological injury" as requiring that only oxygen deprivation or mechanical injury must occur during "'labor, delivery, or resuscitation in the immediate postdelivery period' under the statutory scheme." Id. at *5. The First DCA held that the applicable statutes do not preclude coverage if neurological damage manifests itself at a later date. Id. This interpretation is contrary to Nagy that for an injury to be compensable under the Plan, both the injury to the brain or spinal cord and the oxygen deprivation or mechanical injury had to occur during the operative time frame. Nagy at 160.

In Nagy, the issue was the "appropriate reading that should be accorded the definition of 'birth-related neurological injury."' Id. at 158-59. The child in that case suffered from "a mechanical injury (a subgaleal hemorrhage, resulting from the traumatic application of the vacuum extractor) during the course of delivery." Nagy at 158. The hemorrhage continued unabated over a period of fourteen hours ultimately leading to deprivation of oxygen to the brain and ultimate death. Id. The ALJ concluded the Nagy claim was compensable because only the oxygen deprivation or mechanical injury must occur during labor, delivery or resuscitation

in the immediate postdelivery period, "not the ultimate consequences of that injury (i.e., 'an injury to the brain . . . which renders the infant permanently and substantially mentally and physically impaired')." Nagy at 159. On appeal, the Fourth DCA rejected the ALJ's interpretation holding:

> 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.
>
> To read the statute as broadly as advocated by appellees is to depart from the clearly expressed intention of the legislature that the Plan be limited to a narrow class of catastrophic injuries. The appellees would have us hold that the Plan applies, as long as oxygen deprivation or a 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.
>
> We decline to read the statute that broadly. Ava did not suffer a brain injury upon the application of the vacuum extractor. It was the failure to prevent Ava's continuous blood loss between the skull and scalp that led to the shutdown of her organs and brain death from insufficient blood circulating through her body.
>
> There are many non-cranial, mechanical injuries which, if undetected could lead to undiscovered bleeding that will rob the brain of oxygenated blood. Such an expansive reading of the statute does not comport with the expressed legislative intent to limit the Plan's scope.

Id. at 160. In Bennett, the First District's interpretation of the definition of "birth-related neurological injury" as only requiring the "oxygen deprivation or mechanical injury occur during labor, delivery or resuscitation in the immediate

postdelivery period," not that actual injury occur during the operative time frame is in direct conflict with the holding of Fourth DCA in Nagy. That the injury to the brain or spinal cord is required to occur during the operative time frame has been controlling since 2002. See also Orlando Regional Healthcare System, Inc. at 430 (citing to Section 766.302(3), Fla. Stat., stating "Here, the ALJ was required to determine whether Harper suffered a brain injury due to oxygen deprivation or mechanical injury 'in the course of labor, delivery, or *resuscitation in the immediate postdelivery period in a hospital'* that rendered him permanently and substantially mentally and physically impaired.")(emphasis in original.) Such conflicting decisions warrant review by this Court.

The First DCA's expanded definition of the term "birth-related neurological injury" conflicts with both the Nagy decision and this Court's opinion in Fla. Birth-Related Neuro. Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, supra, which require that the Plan be narrowly construed to include only those claims which are clearly embraced within the terms of the Plan. It is vital to the proper and efficient administration of the Plan for a clear and consistent interpretation of the definition of a "birth-related neurological injury."

B. The First DCA's Opinion Expressly and Directly Conflicts with the Fifth DCA's Decision in Orlando Regional Healthcare System, Inc. v. Fla. Birth-Related Neuro., 997 So. 2d 426 (Fla. 5th DCA 2008), as to the definition of "resuscitation in the immediate postdelivery period."

The First DCA's decision expressly and directly conflicts with the definition of "resuscitation in the immediate postdelivery period" as established by the Fifth DCA's decision in Orlando Regional Healthcare System, Inc. v. Fla. Birth-Related Neuro., 997 So. 2d 426, 430 (Fla. 5th DCA 2008). Section 766.302(2), Florida Statutes, defines the term "birth-related neurological injury," in pertinent part, as: "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." (Emphasis added.) In Orlando Regional, the Fifth DCA directly addressed the definition of the phrase "resuscitation in the immediate postdelivery period." The Fifth DCA applied the common dictionary meaning of the terms "resuscitate" and "immediate" to determine what constituted the operative time period. The Fifth DCA concluded, based on the common meanings of those terms, that such period was a period of on-going resuscitative efforts from birth, without interruption, operated to establish "one time period – the 'immediate postdelivery period."' See Orlando Regional, at 432.

In Bennett, the First DCA, although citing to Orlando Regional for support, redefined the phrase "immediate postdelivery period in a hospital for purposes of the NICA Plan," as including an instance where the infant is born with a "life-threatening condition" and, as such, "requires close supervision." The First DCA in Bennett, states:

> The "immediate postdelivery period in a hospital" has been construed to include an extended period of days when a baby is delivered with a life-threatening condition and requires close supervision. [citation omitted]. . . Under these facts, the time between Tristan's delivery by caesarean section and the events through October 3 constituted the "immediate postdelivery period in the hospital" for purposes of the NICA Plan.

Id. at *5-6. Further, the First DCA's interpretation wholly ignores the Fifth DCA's reliance on the fact that the statute labels the operative time period as "resuscitation in the immediate postdelivery period." The exclusion of the term resuscitation and the redefinition of the phrase "in the immediate postdelivery period" directly conflicts with the definition afforded that phrase by the Fifth DCA and the clear words of the statute. Such definition is in direct conflict with the definition explained in Orlando Regional and also directly conflicts with Nagy and this Court's decision in Fla. Birth-Related Neuro. Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings with respect to requiring that the Plan be narrowly construed to include only those claims clearly embraced within the terms of the Plan.

CONCLUSION

The First DCA's interpretation of the definition of a "birth-related neurological injury" and what constitutes "the immediate postdelivery period" cannot be reconciled with decisions of other district courts of appeal. NICA submits that it is appropriate and necessary to continued uniform interpretation of the Plan for this Court to accept jurisdiction to review this case.

Respectfully submitted,

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