

**IN THE SUPREME COURT  
STATE OF FLORIDA**

Case Number: SC10-390  
Lower Tribunal Case Nos.: 1D07-5561, 1D07-5557 (Consolidated)

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**FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY  
COMPENSATION ASSOCIATION**

*Petitioner,*

v.

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

*Respondents.*

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**PETITIONER FLORIDA BIRTH-RELATED NEUROLOGICAL  
INJURY COMPENSATION ASSOCIATION'S  
INITIAL BRIEF ON THE MERITS**

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

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## **PRELIMINARY STATEMENT**

In this Initial Brief, the following terms and abbreviations will be utilized:

Respondent, ST. VINCENT’S MEDICAL CENTER, INC., will be referred to as “ST. VINCENT’S.” Respondents, Robert and Tammy Bennett, as parents and natural guardians of Tristan Bennett, will be referred to as “the Bennetts” and/or “Claimants.” Respondents, WILLIAM H. LONG, M.D., and NORTH FLORIDA OBSTETRICS AND GYNECOLOGY, P.A., will be collectively referred to as “the Participating Physician” or as “Dr. Long.”

Petitioner, FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, will be referred to as “NICA.”

The First District Court of Appeal will be referred to as the “First District.” Administrative Law Judge Kendrick shall be referred to as the “ALJ.” The Division of Administrative Hearings will be referred to as “DOAH.”

Sections 766.301, et seq., Florida Statutes, will be referred to as “the NICA Statute” or the “NICA Plan.”

The record cites will be cited as “R:” followed by the appropriate page number(s). The exhibits introduced into evidence will be cited by the exhibit number, followed by “p.” and the appropriate page number(s). The transcript of the hearing will be cited as “Tr:” followed by the appropriate page number(s).

## **STATEMENT OF THE CASE AND FACTS**

Based on this Court's discretionary jurisdiction to review decisions which conflict with decisions of the district courts of appeal and opinions of this Court, the Florida Birth-Related Neurological Injury Compensation Association ("NICA") seeks review by this Court of the First District Court of Appeal's decision in St. Vincent's Medical Center, Inc. v. Bennett, 27 So. 3d 65 (Fla. 1st DCA 2009), *rehearing denied* February 4, 2010, with respect to the proper interpretation of the definition of "birth-related neurological injury," as that term is defined in Section 766.302(2), Florida Statutes. The First District reversed the ALJ's determination in the Final Order that the claim was not compensable, in part, because the First District found that the ALJ failed to apply the presumption in favor of the health care providers and also because the First District found that the immediate postdelivery period includes cases where the child is born with a life threatening condition requiring close supervision, regardless of whether there is an ongoing need for "resuscitation." Bennett at 70; Order dated Feb. 4, 2010. [A, Tabs 1,2]

On September 26, 2001, at approximately 7:05 a.m., Tammy Bennett was in a motor vehicle accident in MacClenny, Florida. [R: 1056] At the time of the accident, Mrs. Bennett was 38+ weeks pregnant and scheduled to have a Caesarean section delivery with Dr. Long on October 3, 2001, at St. Vincent's Medical

Center, Inc. [R: 1056] Shortly after the accident, Mrs. Bennett was transported by ambulance to Ed Fraser Hospital in MacClenny. [R: 1056-57]. She was evaluated and treated at Ed Fraser Hospital for approximately two hours. [R: 1057-60] At 9:41 a.m., Mrs. Bennett was transported by LifeFlight from Ed Fraser Hospital to St. Vincent's in Jacksonville, Florida. [R: 1060] She arrived at St. Vincent's at approximately 9:59 a.m. and admitted to the labor and delivery department under the care of Dr. Long. [R: 1062]

While at St. Vincent's Medical Center, Mrs. Bennett's contraction pattern was consistent with a placental abruption, the severity of which was unknown at the time. [R: 1062] Dr. Long decided to perform an emergency Caesarean section. [R: 1063-64] At 12:47 p.m., the monitors were turned off and Mrs. Bennett was taken to the operating room for the Caesarean section. Tristan was delivered at 1:22 p.m. [R: 1062, 1064] Dr. Long noted evidence of a partial abruption upon examination of the placenta after delivery. [R: 1064]

Tristan did not cry upon delivery. [R: 1064] She had minimal respiratory effort and required resuscitation, with bulb free flow oxygen, mechanical suction, and ambu bag and mask to which she rapidly responded. [R: 1064, 1077-78] Tristan's APGAR scores were 6 and 8 at one minute and five minutes, respectively. [R: 1064] Tristan was transferred to the newborn nursery. [R: 1065] The initial assessment noted slight wetness throughout lung fields, bilateral chest

rise, tachypnea, no nasal flaring, occasional expiratory grunting, no retractions, pale pink color with slight acrocyanosis, and improving tone. [R: 1065] Tristan was transferred to the special care nursery for further management, due to moderate respiratory distress and metabolic acidosis. [R: 1065] In the special care nursery, Tristan received respiratory support (NS bolus, free flow oxygen, and O<sub>2</sub> via nc) and bicarbonate therapy. [R: 1065]. Her respiratory distress and metabolic acidosis resolved quickly and by 9:30 p.m., her respiration was noted as unlabored and she was sleeping quietly. [R: 1065]

In the first several days after delivery, nursery records describe Tristan as lethargic, irritable, and having difficulty sucking on multiple occasions. [Exhibit 9]. Her neurologic examinations during the first seven days of life were normal. [R: 1066-67, 1077-78]

From the time of delivery to October 3, 2001, Tristan suffered 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. [R: 1066] During this postdelivery period, no pediatric neurologist had seen or was asked to consult on Tristan. On October 3, 2001, seven days after delivery, Tristan “experienced pulmonary bleeding and the pulmonary arrest leading to multi-organ failure and seizure

activity.” [R: 1067-69]

The Bennetts filed a circuit court action against St. Vincent’s Medical Center, Inc., William H. Long, M.D., and North Florida Obstetrics and Gynecology, P.A. (the “Health Care Providers”), which 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 issue of fact to be resolved by the ALJ, other than the notice issue which is not an issue in this appeal, was whether the brain injury which rendered Tristan permanently and substantially mentally and physically impaired, occurred within the prescribed statutory time frame. The Bennetts and NICA argued that the neurological injury did not occur during the mandated time frame. [R: 1072-73] 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. [R: 1073] St. Vincent’s and Dr. Long 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.” [R:1073]. St. Vincent’s

and Dr. Long requested that the ALJ apply the presumption in Section 766.309(1)(a), Florida Statutes, to find the claim compensable. [R: 1073]

Ultimately, the ALJ did not apply the presumption. 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. In so concluding, it is noted that Tristan was delivered a traumatically, she responded rapidly to resuscitation immediately after delivery, her neurologic examinations during the first seven days of life were normal, she suffered prolonged and severe decreases in fetal heart rate and saturations on October 3, 2001, she manifested prolonged and severe acidosis following her arrest, and she evidenced seizure activity and neurologic decline thereafter. Given the proof, it is more 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: 1077-78]

The Health Care Providers appealed the Final Order asserting, in pertinent part, that the ALJ erred in not applying the presumption. The First District 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.”

Bennett at 71. The First District refused to allow the Bennetts to waive the application of the presumption. In its interpretation of the statutory presumption, the First District also interpreted the requirements set forth in the definition of “birth-related neurological injury.” Id. at 70. The First District 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 District 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. [A, Tab 1]

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 District clarified that, on remand, the ALJ must enter an order finding the claim compensable. [A, Tab 2] Subsequently, NICA and the Bennetts filed separate notices of invoking this Court’s discretionary jurisdiction.<sup>1</sup>

On May 11, 2010, this Court entered an Order exercising its discretionary jurisdiction pursuant to Article V, 3(b)(3), Florida Constitution, to accept jurisdiction to review this case with respect to the proper interpretation of Section 766.302(2), Florida Statutes, relative to the requisite timing of the injury and the phrase “resuscitation in the immediate postdelivery period.” Additionally, on April 28, 2010, this Court granted the Bennetts’ Motion for Review of Order Denying Motion to Stay Issuance of Mandate and for Entry of Order Directing Recall of Mandate.

### **SUMMARY OF THE ARGUMENT**

The First District erred in interpreting the requirements for compensability under the Plan by expanding the requirements set forth in statute. The First District misconstrued when the requisite brain injury must occur and also misconstrued what time period constitutes “resuscitation in the immediate postdelivery period.” As an alternative administrative remedy intended to serve as

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<sup>1</sup> The cases are currently separate. The Bennetts’ appeal is case number SC10-364.

a claimant's exclusive remedy in lieu of a circuit court action, the provisions of the Plan are required to be strictly construed. Existing law requires that both the oxygen deprivation and the resulting permanent and substantial neurological injury occur during labor, delivery, or resuscitation in the immediate postdelivery period. See §§766.301(2) and 766.303(2), Fla. Stat.; see also Nagy v. Florida Birth-Related Neurological Injury Comp. Ass'n, 813 So. 2d 155 (Fla. 4th DCA 2002).

Such interpretation is consistent with both the plain meaning of Sections 766.301(2) and 766.303(2), Florida Statutes, and with the legislative intent that the NICA Plan "provide compensation, on a no-fault basis, for a limited class of catastrophic injuries." The First District's broad interpretation of the definition of "birth-related neurological injury" to include a seven-day time period after delivery when resuscitation was not continuous from delivery, expands the phrase "resuscitation in the immediate postdelivery period," conflicts with existing case law, and will likely create confusion for pending and future cases with respect to what constitutes a "birth-related neurological injury" under the Plan.

## ARGUMENT

**The First District Court of Appeal erred in interpreting Section 766.302(2), Florida Statutes, with respect to the requirements for an injury to qualify as a “birth-related neurological injury.”**

**A. Standard of Review.**

This issue presents a question of law regarding the proper interpretation of the NICA Statute, specifically the definition of Section 766.302(2), Florida Statutes. The standard of review for pure questions of law is *de novo*. Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000).

**B. The First District Erred in Interpreting Section 766.302(2), Florida Statutes.**

At issue in this appeal is the First District’s erroneous interpretation of the requirements set forth in the definition of the term “birth-related neurological injury” as that term is defined in Section 766.302(2), Florida Statutes, for a claim to qualify for compensation under the Plan. Section 766.302(2), Florida Statutes, provides, in pertinent part:

(2) “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. . . . [Emphasis added.]

The two main issues before the First District were (1) whether the ALJ erred in not finding that the presumption set forth in Section 766.309, Florida Statutes,

was only for the benefit of the claimants, and (2) whether the brain injury, which rendered Tristan permanently and substantially mentally and physically impaired, occurred within the prescribed NICA timeframe, or outside of the prescribed NICA timeframe. In addressing the issue of the presumption, the First District misconstrues the definition of a “birth-related neurological injury” in stating:

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. The applicable statute does not preclude coverage if neurological damage becomes manifest at a later date. . . . [Emphasis added.]

See Bennett at 70. Second, in addressing whether Tristan’s brain injury occurred during the statutorily-mandated time period, the First District held:

Further, even if the statutory scheme did require manifestation of neurological damage during labor, delivery, and the postdelivery period, Tristan’s injury is still compensable under the Plan. 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.

Id. Each of the First District’s interpretations of requirements set forth in the definition of “birth-related neurological injury” as set forth in Section 766.302(2), Florida Statutes, are erroneous, in conflict with existing case law and contrary to the plain language and legislative intent of the NICA Statute.

The NICA Plan was established by the Legislature in 1988 to provide exclusive no-fault compensation for a limited class of catastrophic injuries as a “means to alleviate the high costs of medical malpractice insurance for physicians practicing obstetrics.” See Fla. Birth-Related Neurological Injury Comp. Ass’n v. Dep’t of Admin. Hearings, 29 So. 3d 992 (Fla. 2010) (hereinafter “Bayfront”); §§ 766.301, *et seq.*, Fla. Stat.; Fla. Birth-Related Neurological Injury Comp. Ass’n v. McKaughan, 668 So. 2d 974, 978 (Fla. 1996). In creating the Plan, the Legislature made the following findings of fact:

**766.301 Legislative findings and intent.--**

- (1) The Legislature makes the following findings:
  - (a) Physicians practicing obstetrics are high-risk medical specialists for whom malpractice insurance premiums are very costly, and recent increases in such premiums have been greater for such physicians than for other physicians.
  - (b) Any birth other than a normal birth frequently leads to a claim against the attending physician; consequently, such physicians are among the physicians most severely affected by current medical malpractice problems.
  - (c) Because obstetric services are essential, it is incumbent upon the Legislature to provide a plan designed to result in the stabilization and reduction of malpractice insurance premiums for providers of such services in Florida.
  - (d) The costs of birth-related neurological injury claims are particularly high and warrant the establishment of a limited system of compensation irrespective of fault. The issue of whether such claims

are covered by this act must be determined exclusively in an administrative proceeding.

(2) It is the intent of the Legislature 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. This plan shall apply only to birth-related neurological injuries. [Emphasis added.]

§ 766.301, Fla. Stat.; see also Bayfront, supra; Fluet v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 788 So. 2d 1010, 1012 (Fla. 2d DCA 2001).

The main purpose of the Plan “is to limit a participating physician’s exposure to civil liability in cases where the doctor’s professional involvement could make him or her a defendant in a lawsuit.” See Fluet at 1012. Thus, when an injury is determined to be compensable under the Plan, the compensation provided becomes the exclusive remedy available to the claimants as to all health care providers “directly involved with the labor, delivery or immediate postdelivery resuscitation during which such injury occurs,” which are provided immunity from civil action with respect to the birth-related neurological injury, foreclosing alternative civil actions and tort claims. See §766.303(2), Fla. Stat. (emphasis added).

In interpreting the Plan, the Court is guided by the plain and obvious meaning of the language used in the statute as well as the meaning and effect of the words used on the objectives and purposes of the Plan. Fla. Birth Related

Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349, 1354 (Fla. 1997); Fluet v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 788 So. 2d 1010 (Fla. 2d DCA 2001). The legislative intent is the polestar by which the Plan is to be interpreted. Fla. Birth Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, at 1354. Thus, because the Plan is a statutory substitute for common law rights and liabilities, it must be strictly construed and narrowly applied to “include only those subjects clearly embraced within its terms.” Fla. Birth Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, at 1354; *accord* Fluet, 788 So. 2d at 1012 n.4.

- 1. NICA Statute requires that the actual injury to the brain or spinal cord occur during the course of labor, delivery or resuscitation in the immediate postdelivery period.**

The First District erred as a matter of law in interpreting Section 766.302(2), Florida Statutes, as requiring only that oxygen deprivation or mechanical injury must occur in the operative time frame and that neurological damage may manifest at a later date.<sup>2</sup> Section 766.302(2), Florida Statutes, defines a “birth-related neurological injury,” in pertinent part, as follows:

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<sup>2</sup> The First District uses the term “manifest” in relation to neurological damage. Although the intended meaning of “manifest” is not entirely clear as that word does not appear in the NICA Statute, later in its decision, the First District states: “. . . even if the statutory scheme did require manifestation of neurological damage during labor, delivery, and the postdelivery period.” See Bennett at 70. It appears the use of the word “manifest” is intended to relate to the occurrence of the neurological injury (i.e., the injury to the brain).

(2) “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. . . . [Emphasis added.]

Section 766.302(2), Florida Statutes, is not ambiguous and must be afforded its plain and ordinary meaning. The plain language in the definition requires that, for a claim to be compensable, there must be: (1) an injury to the brain or spinal cord; (2) which injury is caused by oxygen deprivation or mechanical injury and; (3) which injury occurs in the course of labor, delivery, or resuscitation in the immediate postdelivery period. The phrases “caused by” and “occurring in,” are essential phrases that modify the “injury to the brain or spinal cord,” not each other.

The Fourth District Court of Appeal (“Fourth District”) in Nagy v. Florida Birth-Related Neurological Injury Comp. Ass’n, 813 So. 2d 155, 160 (Fla. 4th DCA 2002),<sup>3</sup> addressed the requisite timing of the injury to the brain regarding whether the claim which arose from a mechanical injury was compensable under the Plan. In that case, the infant suffered a subgaleal hemorrhage in the layer of the hard tissue that is outside the brain caused by application of a vacuum extractor. Id. at 157-58. Over the period of fourteen (14) hours, the sublegal hemorrhage

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<sup>3</sup> Although in Nagy, the injury at issue involved a mechanical injury, the facts in Nagy are analogous to the instant case.

continued to worsen leading to the infant's ultimate demise. The Fourth District specifically rejected the ALJ's determination that:

Given the plain and ordinary meaning of the language chosen by the legislature to define "birth-related neurological injury," it must be resolved that, as advocated by NICA and the Intervenors, it is the mechanical injury and 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"), which must occur during labor, delivery or resuscitation for the claim to be compensable.

Nagy at 159. The Fourth District found that the Nagys' interpretation that it is both the mechanical injury and the injury to the brain that must occur during the operative time frame for the injury to be a "birth-related neurological injury," is more in keeping with the "requirement that statutes which are in derogation of the common law must be strictly construed and narrowly applied." Nagy at 160. The Fourth District held:

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 . . . Such an expansive reading of the statute does not comport with the expressed legislative intent to limit the Plan's scope. If that were indeed its purpose, we believe the law requires a much plainer statement of such a purpose. [Emphasis supplied.]

See also Orlando Regional Healthcare System, Inc. v. Florida Birth-Related

Neurological, 997 So. 2d 426, 430 (Fla. 5th DCA 2008); see also Matteini v. Florida Birth-Related Neurological, 946 So. 2d 1092 (Fla. 5th DCA 2006). The First District’s decision with respect to the requisite timing of the brain injury is in direct conflict with the Fourth District’s opinion in Nagy.

This more narrow interpretation of the definition of “birth-related neurological injury” is consistent with the other provisions of the NICA Plan. See Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d 452, 455 (Fla. 1992) (must read statutory provision to achieve a cohesive whole); Florida Dep’t of State v. Martin, 916 So. 2d 763, 768 (Fla. 2005). For example, Section 766.303(2), Florida Statutes, provides, in pertinent part:

**766.303 Florida Birth-Related Neurological Injury Compensation Plan; exclusiveness of remedy.--**

(2) The rights and remedies granted by this plan on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, her or his personal representative, parents, dependents, and next of kin, at common law or otherwise, against any person or entity directly involved with the labor, delivery, or immediate postdelivery resuscitation during which such injury occurs, arising out of or related to a medical negligence claim with respect to such injury. . . . [Emphasis supplied.]

The phrase “such injury” relates directly back to the reference in the beginning of that section to “birth-related neurological injury” which does not occur until there is an actual injury to the brain or spinal cord pursuant to the definition of “birth-related neurological injury.” Pursuant to Section 766.303(2), Florida Statutes, in

order for the health care providers directly involved in the labor, delivery, or immediate postdelivery resuscitation to claim immunity under the Plan, injury to the brain or spinal cord must occur in the course of labor, delivery or immediate postdelivery resuscitation.<sup>4</sup> This is a reasonable interpretation since at the point in which the infant is transferred from the delivery room, the obstetrician relinquishes responsibility of the infant to other health care providers. To allow claims to be compensable when the actual injury to the brain or spinal cord which renders the child permanently and substantially mentally and physically impaired does not occur until days later, or longer, when the infant's care is well out of the obstetrician's control and out of the control of those directly involved in the immediate postdelivery resuscitation, is contrary to the intent of the Plan as well as contrary to this Court's holding in Fla. Birth Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997) that the NICA

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<sup>4</sup> A "participating physician" is defined, in pertinent part, as:

. . . a physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full time or part time and who had paid or was exempted from payment at the time of the injury the assessment required for participating in the birth-related neurological injury compensation plan for the year in which the injury occurred. . . [Emphasis added.]

See §766.302(7), Fla. Stat. Under this definition, a physician's status as a participating physician depends on payment of the appropriate NICA assessment for the year "in which the injury occurred." The "injury" referred to in this section is the "birth-related neurological injury."

Plan must be strictly construed. The First District’s interpretation of the definition of a “birth-related neurological injury” requires reversal and/or clarification that the actual injury to the brain or spinal cord must occur in the operative statutory time frame as a result of oxygen deprivation or mechanical injury also occurring within the statutory time frame.

- 2. The First District erred in interpreting the phrase “resuscitation in the immediate postdelivery period,” to include a period of several days when an infant is born with a life threatening condition requiring close supervision although no actual “resuscitation” is required during that time frame.**

The interpretation of the requirements for compensation in the NICA Statute is a matter of law, but whether a particular injury occurred in the course of resuscitation in the immediate postdelivery period is to be determined on a case-by-case basis. See Orlando Regional Healthcare System, Inc. v. Florida Birth-Related Neurological, 997 So. 2d 426 (Fla. 5th DCA 2008) (hereinafter “Stever”). In the instant case, the First District erroneously interpreted Section 766.302(2), Florida Statutes, as a matter of law, that the period of time constituting “resuscitation in the immediate postdelivery period” includes an “extended period of days when a baby is delivered with a life threatening condition and requires close supervision.” See Bennett at 70. Based on this erroneous interpretation, the First District concluded that the claim is compensable under the Plan. [A, Tab 2]

The NICA Statute does not define the phrase “resuscitation in the immediate postdelivery period.” When the Legislature elects not to define terms in a statute, the courts must look to the plain meaning of the language. Steever; Adventist Health Systems/Sunbelt, Inc. v. Florida Birth-Related Neurological Injury, 865 So. 2d 561, 568 (Fla. 5th DCA 2004) (“Because the legislature chose not to define the terms used in the test for NICA qualification, these terms are to be given their ordinary meanings.”). As noted by the ALJ, because the NICA Plan “is a statutory substitute for common law rights and liabilities, it should be strictly construed to include only those subjects clearly embraced within its terms.” [R: 387, citing Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852, 859 (Fla. 2d DCA 1995), *approved*, Florida Birth-Related Neurological Injury Comp. Ass’n v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996).]

Here, the First District held that:

Further, even if the statutory scheme did require manifestation of neurological damage during labor, delivery, and the postdelivery period, Tristan’s injury is still compensable under the Plan. 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. *Orlando Reg’l Healthcare Sys., Inc. v. Fla. Birth-Related Neurological*, 997 So. 2d 426 (Fla. 5<sup>th</sup> DCA 2008). Here, the ALJ found that:

[T]he 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 post-delivery resuscitative period.

Shortly after delivery, Tristan was placed in the special care nursery where she remained through October 3. 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. [Emphasis added.]<sup>5</sup>

Bennett at 70. The First District did not set forth its own analysis of the statutory requirement or seek to interpret Section 766.302(2), Florida Statutes. Instead, the First District cites to the Fifth District Court of Appeal’s (“Fifth District”) decision in Stever. In so doing, the First District misinterprets the holding in Stever and omits the key term of “resuscitation” in its application of the definition in this case. The First District merely focuses on what constitutes the “immediate postdelivery period” rather than “in the course of resuscitation in the immediate postdelivery period” as required by Section 766.302(2), Florida Statutes.

In Stever, the Fifth District went to great lengths to explain its interpretation of the phrase “resuscitation in the immediate postdelivery period.” The Fifth

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<sup>5</sup> Although framed as an alternative basis for reversing the ALJ in the decision, by Order dated February 4, 2010, the First DCA granted clarification of its opinion and orders that: “. . . the parties are advised that by the majority decision, the administrative law judge is to enter an order finding that the claim filed by the Bennetts is subject to compensation under the NICA Plan.” [A, Tabs 1, 2] Thus, the First District determined that the claim is compensable based on its determination that the injury to the brain occurred during the “immediate post delivery period.” [A, Tab 1]

District Court states:

Under the Plan, the terms “resuscitation” and “immediate” are important qualifiers to determining the compensability of a claim. However, those terms are not defined by the statute.

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The American Heritage Dictionary defines the term “resuscitate” as “[t]o return to consciousness, vigor or life; revive.” [Citation omitted.] Dorland’s Illustrated Medical Dictionary similarly defines “resuscitation” as “the restoration to life or consciousness of one apparently dead; it includes such measures as artificial respiration and cardiac massage.” [Citation omitted.] Further, “immediate” is commonly understood to mean “[n]ext in line or relation[;] . . . [o]ccurring without delay[;][o]f or near the present time [;]. . . [c]lose at hand; near.” The American Heritage Dictionary 642 (2d ed. 1985); *see* Merriam-Webster’s Colligate Dictionary 578 (10<sup>th</sup> ed. 2000) (defining “immediate” as being without intervening space or substance[;] . . . being near at hand [;]. . . occurring, acting, or accomplished without loss or interval of time [;] . . . near or related to the present”).

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[I]n looking at the definition of “resuscitate,” it includes measures such as artificial respiration. In this case, although the code ended at 1:05 p.m., Harper continued to suffer respiratory failure that required artificial respiration. He could not breathe on his own and required active resuscitation continuously until he was placed on the ECMO bypass. It is not logical to find that “immediate” only means through the first resuscitative attempt when Harper was initially revived but no spontaneous respirations could otherwise be established. Harper continued to need resuscitation, *without interruption*, and that ongoing need creates a onetime period – the “immediate postdelivery period.” [Underlined emphasis added, italicized emphasis in original.]

See Stever at 431-32. In Stever, the Fifth District focused on the fact that the child required and received continuous respiratory support which constituted an ongoing resuscitative effort which created a one time period of the immediate postdelivery

period. The First District's opinion, however, expands that interpretation by impermissibly omitting the key term "resuscitation," which is used in Section 766.302(2) as a qualifier for the time period at issue and instead focuses on what constitutes the "immediate postdelivery period." See Exposito v. State, 891 So. 2d 525, 528 (Fla. 2004) (noting a court is not at liberty to ignore terms used by the Legislature and add terms that are not placed there by the Legislature).

In this case, the facts as found by the ALJ and the First District evidence that Tristan did not require ongoing artificial respiration or respiratory support as Harper did in the Stever decision. Here, the ALJ found 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 neurological impairment until after she experienced profound episodes of oxygen deprivation on October 3, 2001, following the onset of pulmonary hemorrhaging and pulmonary arrest.

42. In so concluding, it is noted that Tristan was delivered a traumatically, she responded rapidly to resuscitation immediately after delivery, her neurologic examinations during the first seven days of life were normal, she suffered prolonged and severe decreases in fetal heart rate and saturations on October 3, 2001, she manifested prolonged and severe acidosis following her arrest, and she evidenced seizure activity and neurologic decline thereafter. Given the proof, it

is more 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: 1077-78]

The First District erred as a matter of law in interpreting what constitutes the time period of “resuscitation in the immediate postdelivery period” by expanding the time period to several days without addressing whether there was a continuing need for resuscitative efforts, and when the facts demonstrated that there was not. Therefore, the First District’s conclusion that the claim is compensable is erroneous, as a matter of law, since such conclusion is based on the First District’s misinterpretation of what constitutes “resuscitation in the immediate postdelivery period.”

## CONCLUSION

Based on the forgoing, this Court should determine as a matter of law that for a claim to be compensable under the Plan, Section 766.302(2), Florida Statutes, requires that both the actual injury to the brain and the oxygen deprivation or mechanical injury causing such injury must occur in the course of labor, delivery or resuscitation in the immediate postdelivery period. With respect to what period of time constitutes “resuscitation in the immediate postdelivery period,” this Court should find that the First District’s interpretation is erroneous as a matter of law and reverse and remand this case for further proceedings.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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**CERTIFICATION OF FONT SIZE AND STYLE**

I HEREBY CERTIFY that this INITIAL BRIEF ON THE MERITS has been typed using the 14 point Times New Roman font as required by Rules 9.210(a) and 9.210(a)(2), Florida Rules of Appellate Procedure.

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