

IN THE SUPREME COURT OF FLORIDA

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION

Petitioner,

CASE NO.: SC10-390

L.C. Nos.: 1D07-5557

1D07-5561

v.

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

Respondents.

**ANSWER 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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PRELIMINARY STATEMENT

In this answer brief, the Petitioner Florida Birth-Related Neurological Injury Compensation Association will be referred to as Petitioner or NICA. Robert and Tammy Bennett, Petitioners in Case Number: SC10-364, will be referred to 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 both individually and collectively as Dr. Long or Respondents.

Respondent St. Vincent's Medical Center, Inc., will be referred to as St. Vincent's.

Citations to the record of the District Court of Appeal, First District ("First District") will be by use of an "R.", followed by the page number, e.g., *R. 1052-1053*. Citations to the transcript of the DOAH hearing will be by use of a "T.", followed by the page number, e.g., *T. 34-35*. Citations to the exhibits jointly submitted and received at the DOAH hearing will be by use of "*Exhib.*", followed by the exhibit number and the page number within that exhibit, if available, e.g., *Exhib. 12, p. 5*. Citations to the opinion of the First District in the underlying case will be to the Southern Reporter, e.g., *St. Vincent's Medical Center v. Bennett*, 27 So.3d 65 (Fla. 1st DCA 2009). And, citations to the record of the Florida Supreme Court will be by use of "SCR." followed by the page number, e.g., *SCR. 17*.

STATEMENT OF THE CASE AND OF THE FACTS

Statement of the facts: On the morning of September 26, 2001, Tammy Bennett was involved in a low speed motor vehicle accident near her home in Macclenny, Florida. *R. 1056.* At the time of the accident, Mrs. Bennett was 38+ weeks pregnant and had been previously scheduled for a caesarean section delivery on October 3, 2001, with her treating obstetrician Dr. William H. Long of North Florida Obstetrics and Gynecology, P.A. The scheduled c-section was to be performed at St. Vincent's Medical Center, Inc., in Jacksonville, Florida. *Id.*

Shortly after the accident, Ms. Bennett was transported by ambulance to Ed Fraser Hospital in Macclenny, where she received her initial care. *R. 1056-1057.* She was evaluated and treated at Ed Fraser Hospital for approximately two hours and was then transported by helicopter to St. Vincent's. She arrived at St. Vincent's at approximately 9:59 a.m., and was admitted to the labor and delivery department under the care of Dr. Long. *R. 1060, 1062.*

At approximately 12:45 p.m., Dr. Long determined that Mrs. Bennett was in renal failure and he made the decision to perform an emergency c-section to deliver the baby. *R. 1062; Exhib. 7.* The monitors were turned off at 12:47 p.m., and Mrs. Bennett was taken to the operating room. 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. *Id.* Arterial umbilical cord blood, which reflects the condition of the baby, was obtained at delivery. Blood gas testing yielded a pH of 6.76, PCO₂ of 51.2, PO₂ of 17, and a base excess (BE) of -28, all of which establish severe metabolic acidosis. *R. 1064-1065.* A second set of arterial blood gases were obtained from Tristan at 1:47 p.m., and revealed a pH of 7.14, PCO₂ of 31.7, PO₂ of 90, and a BE of -16.4. *R. 1065.* Although these blood gases were improved, they still showed severe metabolic acidemia. *T. 83-84.* Tristan was transferred from the newborn nursery to the special care nursery for further monitoring and treatment. *Id.*

In the first several days after delivery, nursery records described Tristan as lethargic, irritable, and having difficulty sucking on multiple occasions. *Exhib. 9.* A nursery note from September 30, 2001, stated that Tristan had “continued flailing of arms” and that one arm was restrained. *Id.* A physician progress note from October 1, 2001, described Tristan as a “critically ill female newborn.” *Id.* Progress notes from October 2, 2001, depicted Tristan as a “critically ill infant w/renal failure,” and “Asphyxia ! Multiorgan failure.” *Exhib. 9* (emphasis in

original). During this post-delivery period, progress notes from Tristan's treating physicians documented her neurological status as grossly intact, within normal limits, or without deficit. *Exhib. 9.* However, no neurologist or pediatric neurologist had examined or was asked to consult on Tristan during this period.

From the time of delivery to October 3, 2001, Tristan suffered the following conditions: severe metabolic acidosis, declining renal function to renal failure, acute tubular necrosis (ATN), oliguria, disseminated intravascular coagulation (DIC), fluid retention, respiratory distress, hyponatremia, elevated liver enzymes and thrombocytopenia. *R. 1066, 1069.* She was also placed on antibiotics for possible sepsis. *Id.*

On the morning of October 3, 2001, Tristan suffered from a pulmonary hemorrhage, with frank blood noted orally. *R. 1067.* She was apneic and had a heart rate below 80 bpm that was decreasing. She also had decreasing oxygen saturation to the 40% range. *R. 1067-1068.* She was intubated and given a blood transfusion. *R. 1068.* Later that day, Tristan arrested, with her heart rate falling to 53 bpm and her oxygen saturations decreasing to 23%. *Id.; Exhib. 29, p. 40.* CPR was administered until Tristan's heart rate reached 77, and was increasing. *Id.* Oxygen saturations increased to 65%. *Id.* Minutes later, Tristan had another drop in both her heart rate and oxygen saturations. *Id.*

Tristan recovered, but remained unstable throughout the remainder of the day. *R. 1068-1069.* Arterial blood gases collected after the arrest and after the second episode of low heart rate showed a pH of 7.03 and BE of -12.2, and a pH of 6.88 and BE of -23.5, respectively. *Id.; T. 163-164.* Physician progress notes from October 4, 2001, state: “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 pediatric neurologist Carlos Gama, M.D. *R. 1069-1070.* Dr. Gama’s consultation report described Tristan’s condition at delivery as:

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 . . .^[1] [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 creatinine have increased which suggest acute tubular necrosis.

Exhib. 9. Tristan was eventually discharged home on November 14, 2001, with follow-up appointments 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 St. Vincent’s. In an office note from November 27, 2001, Dr. Gama’s assessment was:

¹ These “initial blood gasses” are actually the second set obtained at 1:47 p.m., in the special care nursery (although the PO₂ was “90” and not the “80” stated by Dr. Gama).

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.

R. 1072; Exhib. 10 (emphasis added).

Tristan was subsequently seen by pediatric neurologist, David Hammond, M.D. Dr. Hammond's impression in July 2006, was static encephalopathy, quadriplegic cerebral palsy, complex-partial epilepsy, stable global developmental delay. *Exhib. 11.*

Statement of the case: In April 2004, the Bennetts filed an Amended Complaint in the circuit court against Dr. Long, St. Vincent's, and 14 other defendants, alleging negligence in their care and treatment of Mrs. Bennett and Tristan. Dr. Long moved to abate the circuit court action, pending determination by the Division of Administrative Hearings (DOAH) of the compensability of the injuries under the Florida Birth-Related Neurological Injury Compensation Association ("NICA") Plan, i.e., Section 766.301, *et seq.* Florida Statutes. The circuit court case was abated, allowing the matter of NICA compensability to be

heard.

On July 12, 2006, the Bennetts filed their Petition for Determination of Availability of NICA Coverage with DOAH, asserting that:

By the time of her birth by cesarean section, Tristan Bennett had suffered a hypoxic ischemic event that caused brain damage.

Tristan Bennett then **suffered further injury to her brain** during the first several days of her life, well after the immediate post-delivery resuscitative period.

R. 6 (emphasis added). The Bennetts' petition requested a "determination of whether Tristan Bennett's injuries [were] qualifying injuries under the NICA Plan" *R. 5, 11*. If the injuries were determined to be qualifying injuries, the Bennetts requested that the Administrative Law Judge (ALJ) determine that Dr. Long and St. Vincent's did not have NICA immunity because of their alleged failure to provide pre-delivery notice to the Petitioners or because their pre-delivery notice was inadequate. *R. 11-12*. The Bennetts also requested the ALJ determine that no health care provider be "entitled to NICA immunity for any injuries or damages that Tristan Bennett suffered that did not occur during labor, delivery, or the immediate post-delivery resuscitative period" *R. 12*. Finally, in the event that the ALJ determined that the Bennetts' claim was compensable under NICA, and that notice was properly given, the Bennetts requested that benefits available under the NICA plan be awarded. *R. 12 -13*.

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. *R. 1054.* Specifically, NICA’s position was that Tristan’s brain injury was the result of oxygen deprivation, secondary to a placental abruption occurring at the time of the automobile accident. *R. 73-75.* NICA requested a hearing be held to resolve the issue. *Id.*

Dr. Long and St. Vincent’s were accorded leave to intervene in the DOAH proceeding. *R. 36-37, 79-80, 246-248, 1054.* A DOAH hearing was scheduled before ALJ William J. Kendrick. *R. 1055.*

Prior to the DOAH hearing, the parties submitted a Pre-Hearing Stipulation, affirming the petition’s statement that “by the time of her birth by caesarean section, [Tristan] had suffered a hypoxic ischemic event that caused permanent brain damage.” *R. 833.* At the hearing, the parties reiterated and made clear to the ALJ that there was no dispute that Tristan had suffered a “brain injury, caused by oxygen deprivation, which rendered her permanently and substantially mentally and physically impaired.” *R. 1072; T. 4-5.*

Because of the stipulations of the parties, the only issues before the ALJ were whether Tristan’s brain injury occurred in the course of labor, delivery, or resuscitation in the immediate postdelivery period and whether Dr. Long and St.

Vincent's provided sufficient notice of their NICA participation.² T. 4-5; R. 1078. On the issue of the timing of Tristan's neurological injury, Dr. Long took the position and argued *inter alia* that the statutory presumption of Section 766.309(1)(a), Florida Statutes, applied in this case, i.e., the injury was "presumed" to be a birth-related neurological injury where it was demonstrated that Tristan suffered a brain injury caused by oxygen deprivation that rendered her permanently and substantially mental and physical impaired. T. 4-5, 215-216, 238; R. 930-934, 1074. For support, Dr. Long cited to *Orlando Reg'l Healthcare Systems, Inc. v. Alexander*, 909 So.2d 582 (Fla. 5th DCA 2005), *receded from, in part, on other grounds, Weeks v. Florida Birth-Related Neurological Injury Comp. Ass'n, et al.*, 977 So.2d 616 (Fla. 5th DCA 2008). R. 931.

In response, NICA took the position that under section 766.309(1)(a), only a claimant is entitled to the presumption, and that case law relating to the application of the presumption was not settled where a claimant attempts to put on evidence that there was not a birth-related neurological injury. R. 1021; T. 193-195. NICA also argued that even if the presumption did apply, there was credible and reliable evidence to overcome the presumption. *Id.*

The ALJ denied NICA compensability. R. 1052-1099. Regarding

² The ALJ's findings and conclusions, regarding Respondents' proper notice are not at issue in this appeal.

application of the statutory presumption of Section 766.309(1)(a), the ALJ rejected Dr. Long's argument, concluding 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. 1075-1076. The ALJ added that there was "credible evidence produced (in Tristan's medical records) to support a contrary conclusion, and to require resolution of the issue without regard to the presumption." *R. 1076.* No expert testimony was cited to as support for the ALJ's finding.

On 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.

Dr. Long and St. Vincent's 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 (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.

Bennett, 27 So.3d at 70. Judge Kahn dissented with a written opinion.

NICA moved for clarification or, in the alternative, rehearing. *SCR. 82-106*. The First District denied NICA's motion. *SCR. 135*. The Bennetts also moved for rehearing, clarification, rehearing en banc and certification. *SCR. 18-81*. The First District clarified that by the majority decision the ALJ was "to enter an order finding that the claim filed by the Bennetts is subject to compensation under the NICA Plan." *Id.* Judge Kahn again dissented.

NICA and 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's holding, regarding the compensability of Tristan's neurological injury under NICA was not error and is not in conflict with any principle of statutory construction or with any other decision of another District Court of Appeal.

Respondents asked the First District to review the ALJ's refusal to apply the presumption of section 766.309(1)(a), to the facts of this case. Those facts included the parties' stipulation that Tristan suffered an injury to the brain caused by oxygen deprivation that rendered her permanently and substantially, mentally and physically impaired. The ALJ accepted the stipulation, finding that it was undisputed that Tristan suffered brain injury, caused by oxygen deprivation, which rendered her permanently and substantially mentally and physically impaired. Because the Bennetts, as claimants, participated in this stipulation and the stipulation was accepted by the ALJ, the prerequisites of section 766.309(1)(a), were met and the presumption of compensability should have been applied.

In its opinion, the First District correctly pointed out that NICA coverage 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 post-delivery period in a hospital. The First District also correctly pointed out that neither Section 766.302(2), nor section 766.309(1)(a), require that the neurological damage be “manifest” during labor, delivery, or resuscitation in the immediate post-delivery period in a hospital. These statements are accurate and not in conflict with *Nagy v. Florida Birth-Related Neurological Injury Comp. Ass’n*, 813 So. 2d 155 (Fla. 4th DCA 2002). “Manifest” does not mean the “occurrence of the neurological injury,” it means “clearly apparent,” “obvious,” or “to show or demonstrate plainly; reveal.” This plain reading of section 766.302(2), facilitates the goals of the statute to provide no fault compensation for “birth-related neurological injuries” to a limited class of catastrophically injured infants. It is no stretch in logic to believe that the legislature was aware that infants may not reveal, i.e., manifest, injuries to either the brain or spinal cord in the limited statutorily prescribed period.

The First District also did not err and is not in conflict with *Orlando Reg’l Healthcare Sys., Inc. v. Florida Birth-Related Neurological*, 997 So.2d 426 (Fla. 5th DCA 2008), in applying the phrase “immediate postdelivery period.” The First District did not “rule” or hold that the Bennetts’ claim, or any other claim, was NICA compensable because the “immediate postdelivery period” can include “an extended period of days when a baby is delivered with a life threatening

condition that requires close supervision.”

The comments by the First District that NICA takes exception to are not holdings of the case, as they were prefaced by the statement: “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 First District also did not fail to consider the term “resuscitation” when addressing the application of the phrase “immediate postdelivery period in a hospital.” The First District cited to the *Orlando Reg’l*, which thoroughly analyzed that word, and ALJ’s finding that the injury “likely continued during the immediate postdelivery resuscitative period.”

This Court has frequently reversed course on granting jurisdiction after briefing on the merits has revealed that conflict jurisdiction has been improvidently granted. This is one such case, and the Court should discharge jurisdiction and dismiss the appeal.

ARGUMENT

I. THE FIRST DISTRICT’S HOLDING, REGARDING THE COMPENSABILITY OF TRISTAN’S NEUROLOGICAL INJURY UNDER NICA WAS NOT ERROR AND IS NOT IN CONFLICT WITH ANY PRINCIPLE OF STATUTORY CONSTRUCTION OR WITH ANY OTHER DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

A. Standard of review. The standard of review for an ALJ’s interpretation of the NICA statutes is de novo. *See Alexander*, 909 So.2d at 586. 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 Florida Birth-Related Neurological Injury Comp. Ass’n v. Dep’t of Admin. Hearings*, 29 So.3d 992 (Fla. 2010)(hereinafter “*Bayfront*”).

B. There was no error by the First District in interpreting the section 766.302(2), Florida Statutes, in dicta.

In the First District, Respondents asked the court to review the ALJ’s refusal to apply the presumption of section 766.309(1)(a), to the facts of this case. Those facts included the Bennetts’ petition for NICA benefits, the stipulations by

the parties, and the factual findings of the ALJ. Significantly, the parties stipulated that Tristan suffered an injury to the brain caused by oxygen deprivation that rendered her permanently and substantially, mentally and physically impaired. The ALJ accepted the parties' stipulation, finding that it was "undisputed that Tristan suffered brain injury, caused by oxygen deprivation, which rendered her permanently and substantially mentally and physically impaired." *R. 1072.*

Because the Bennetts, as claimants, participated in this stipulation and the stipulation was accepted by the ALJ, claimants plainly demonstrated to the ALJ that Tristan "sustained a brain . . . injury caused by oxygen deprivation . . . and that the infant was thereby rendered permanently and substantially mentally and physically impaired" Under these factual circumstances, the prerequisites of section 766.309(1)(a), were met and the presumption of compensability should have been applied by the ALJ. The First District correctly 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.

Bennett, 27 So.3d at 70. This holding is not in conflict with any principle of

statutory construction or with any other Florida court.

In order to sidestep the obvious lack of conflict between the First District's opinion and other district courts "on the same question of law," NICA asserts that the analysis utilized by the First District in interpreting NICA's statutory scheme is in conflict with existing case law, the plain language of the statute, and with NICA's legislative intent. NICA's assertion is without merit.

(1) NICA takes issue with the analysis used by the First District, relating its reading of the plain language of the Section 766.302(2). In its opinion, the First District correctly pointed out that NICA coverage 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 post-delivery period in a hospital" *St. Vincent's*, 27 So.3d at 70. This statement is completely consistent with the analysis used in *Nagy*, in addressing the timing of an injury. *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.").

In reading the plain language of the statutes at issue, the First District also correctly pointed out that neither Section 766.302(2), nor section 766.309(1)(a), require that the neurological damage “be manifest during labor, delivery, or resuscitation in the immediate post-delivery period in a hospital”

St. Vincent’s, 27 So.3d at 70. The court continued: “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 statutes do not preclude coverage if neurological damage becomes manifest at a later date.” This statement of the law is accurate and, again, consistent with *Nagy*. See 813 So.2d at 160.

NICA, like t

one must assume that the First District intended the word “manifest” to “relate to the occurrence of the neurological injury.” See *Init. Brief at 14, n. 2*. Clearly, the First District did not intend to use the word “manifest” in that way.

“Manifest” means “clearly apparent to the sight or understanding; obvious To show or demonstrate plainly; reveal.” *The American Heritage Dictionary*, 763 (Second College Ed. 1991).

The timing of the occurrence of Tristan’s neurological injury and the “manifestation” of that injury are distinct concepts that arose because of the

arguments made by the Bennetts and the factual context of those arguments in the lower court. Specifically, the Bennetts asserted in the First District that although they stipulated that Tristan had suffered an injury to the brain caused by oxygen deprivation that rendered her permanently and substantially mentally and physically impaired, they effectively rebutted the presumption of section 766.309(1)(a), with Tristan's medical records, which allegedly had no description of any neurological injury until after the events of October 3, 2001.

In rejecting that argument, the First District correctly stated that the NICA Plan does not require that the neurological damage, i.e., injury to the brain or spinal cord, **be manifest** during "labor, delivery, or resuscitation in the immediate postdelivery period." *St. Vincent's*, 27 So.3d at 70. 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.*; *see also Nagy*, 813 So.2d at 160.

Additionally, the plain reading of section 766.302(2), set forth by the First District, does not run afoul of the strict construction concept applicable to statutes that substitute for common law rights and liabilities. It is certainly arguable that strict construction is not even implicated here, where the statute in

question is neither vague nor ambiguous. *See Hess v. Walton*, 898 So.2d 1046 (Fla. 2d DCA 2005). Further, the First District’s analysis does not read the word “manifest” into the definition of birth-related neurological injury, as the Bennetts claim; it simply notes its absence. The First District’s application of the statute appropriately “includes only those subjects clearly embraced within its terms,” and does not displace the common law “further than is clearly necessary.” *See Nagy*, 813 So.2d at 159-160, n. 4; *Birnie*, 686 So.2d at 1354; *Carlile v. Game and Fresh Water Fish Comm’n*, 354 So.2d 362, 364 (Fla. 1977). Finally, the P

catastrophically injured infants. It is no stretch in logic to believe that the legislature was aware that infants may not show or manifest injuries to either the brain or spinal cord in the limited statutorily prescribed period. Indeed, some neurological deficits will be hidden in the first few days, weeks, months and even years of life and may not be revealed until the child is older, more mobile, and better able to communicate and understand commands. This idea is supported by the legislature’s decision to provide a longer statute of limitations for a NICA claim vis-a-vis a standard medical malpractice claim. *Compare* §766.313 Fla. Stat. (Establishing a 5 year statute of limitations.); *with* 95.11(4)(b), Fla. Stat. (Establishing a 2 year statute of limitations.).³

³ The NICA Plan originally had 7 year statute of limitations. No legislative

(2) The First District did not err and is not in conflict with *Orlando Reg'l*, in applying the phrase “immediate postdelivery period.” The First District did not “rule” or hold that the Bennetts’ claim, or any other claim, was NICA compensable because the “immediate postdelivery period” can include “an extended period of days when a baby is delivered with a life threatening condition that requires close supervision.” Again, the First District held that the Bennetts’ claim was NICA compensable because the presumption of compensability applied under the facts and circumstances of the case and it could not be rebutted by either Petitioners’ or NICA’s evidence.

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*, 27 So.3d at 70. Indeed, *Orlando Reg'l*, holds that the application of the phrase “immediate postdelivery period” must be made on a case-by-case basis, i.e., on the

history was found regarding the reason for the original limitations period. However, when the legislature reduced the limitations period from 7 to 5 years in 1993, House of Representative Committee on Insurance, commented: “Because of the nature of the injuries covered by NICA (permanent and substantial mental and physical impairment), it seems reasonable to expect that all such injuries can be discovered within the 5 years following the birth.” *House of Representatives, Committee on Ins., Final Bill Analysis and Econ. Impact*, CS/HB 1199, (May 15, 1993).

facts of each case. 997 So.2d at 430.

The comments by the First District that NICA takes exception to are not holdings of the case. Indeed, these comments are prefaced by the statement: “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.” *St. Vincent’s*, 27 So.3d at 70 (emphasis added). One must not forget that in the previous paragraph of the opinion, the First District noted that the sections 766.302(2), and 766.309(1)(a), do not require “that neurological damage be manifest during ‘labor, delivery or resuscitation in the immediate postdelivery period.’” *Id.* The comments that followed are clearly dicta.

Petitioners also take issue with the First District’s alleged failure to consider the term “resuscitation.” Again, the First District cited to the *Orlando Reg’l* when addressing the application of the phrase “immediate postdelivery period in a hospital.” *St. Vincent’s*, 27 So.3d at 70. *Orlando Reg’l* thoroughly analyzed that phrase and the meaning of “resuscitation,” when it applied them to the facts of that case. The First District obviously considered the term “resuscitation” as

evidenced by its citation to the ALJ's finding that the injury "likely continued during the immediate postdelivery resuscitative period." *St. Vincent's*, 27 So.3d at 70.

Further, NICA appears to argue that resuscitation necessarily requires "ongoing artificial respiration or respiratory support," citing *Orlando Reg'l*, and that because Tristan did not have ongoing artificial respiration in the days following her birth she could not fit with the phrase "resuscitation in the immediate postdelivery period." Although the Fifth District certainly relied on the fact that the child in *Orlando Reg'l* continued to need artificial respiration until being placed on the ECMO bypass, the court did not hold that such was a requirement for the term "resuscitation." The Fifth District stated, "in looking at the definition of 'resuscitate' **it includes measures such as artificial respiration.**" *Orlando Reg'l*, 997 So.2d at 432 (emphasis added). The court then went on to evaluate, based on the facts before it, whether the child's resuscitative care fell within the immediate postdelivery period. That is the same type of evaluation the First District engaged in here.

CONCLUSION

This Court has frequently reversed course on granting jurisdiction after

briefing on the merits has revealed that conflict jurisdiction has been improvidently granted. *See e.g., State v. Wightman*, 14 So.3d 211 (Fla. 2009); *Healthcare and Retirement Corp. of America Inc. v. Bradley*, 997 So.2d 400 (Fla. 2008); *Florida Dept. of Children and Families v. H.D.*, 985 So.2d 1059 (Fla. 2008); *State v. Moninger*, 982 So.2d 682 (Fla. 2008); *Elwell v. State*, 979 So.2d 956 (Fla. 2008); *Luton v. State*, 974 So.2d 384 (Fla. 2008). This is one such case where jurisdiction has been improvidently granted. Accordingly, the Court should discharge jurisdiction and dismiss this appeal.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by U.S. Mail to Rebecca Bowen Creed, Esquire, Creed & Gowdy, 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 18th day of August, 2010.

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CERTIFICATE OF COMPLIANCE PURSUANT TO
Fla. R. App. P. 9.210(a)(2); 9.100(1)

Counsel for the Respondents 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: August _____, 2010 /s/William T. Jackson
William T. Jackson
FL BAR ID #0928021