

**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  
REPLY 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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## ARGUMENT

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

The Respondents attempt to distinguish the Fourth District Court of Appeal's holding in Nagy v. Florida Birth-Related Neurological Injury Comp. Ass'n, 813 So. 2d 155 (Fla. 4th DCA 2002), from the instant case by arguing that the Court in Nagy focused on the phrase "caused by" rather than ruling on when the injury to the brain must occur. To the contrary, as acknowledged by the Fourth District in its opinion, the issue before it was "when the brain injury must occur," which rendered the child permanently and substantially mentally and physically impaired.

The Fourth District summarized the parties' varying positions on the issue as:

The Nagys do not dispute the ALJ's findings of fact. They dispute the ALJ's interpretation of when the brain injury must occur according to section 766.302(2). The Nagys argue that both the mechanical injury and the injury to the brain, must occur during labor, delivery or resuscitation in the immediate post delivery period for the injury to be a "birth-related neurological injury."

NICA, Dr. Davila and the hospital (collectively, appellees), argue it is the mechanical injury and **not** the injury to the brain that must occur during labor, delivery or resuscitation in the immediate post delivery period for the injury to be a "birth-related neurological injury."

See id. at 159 (emphasis in original). The requisite timing of the injury to the brain was squarely before the Court. While the Court may have discussed the etiology of the infant's brain injury, the issue before the Court was whether the NICA Statute required only the mechanical injury or oxygen deprivation to occur during

the statutory time frame, or whether the NICA Statute required the neurological injury which renders the child permanently and substantially mentally and physically impaired also to occur during the statutory time frame.

In opining that the NICA Statute required that the neurological injury must occur within the statutory time frame, the Nagy Court specifically rejected the ALJ's finding that: "it is the mechanical injury [or oxygen deprivation] 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." Id. at 159. 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.]

Id. at 160.

Although the Nagy case dealt with a mechanical injury, the healthcare providers in the instant case argue the etiology of Tristan's injuries as follows:

because Tristan suffered oxygen deprivation on September 26, 2001, 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 (1) likely continued during the immediate postdelivery resuscitative period, (2) which caused multi-system failure, (3) which then led to cardiac arrest several days later on October 3, 2001, (4) which cardiac arrest caused oxygen deprivation and brain injury resulting in permanent and substantial physical and mental injury, and therefore concludes that Tristan qualifies for NICA coverage.

Notwithstanding the healthcare providers' argument, the ALJ found that the evidence demonstrated that Tristan had stabilized after delivery on September 26, 2001, and that there was no indication in the medical records that Tristan had suffered neurological injury to the brain, which would have rendered her permanently and substantially mentally and physically impaired. [R: 1065-67, 1077-78] The ALJ concluded that when Tristan stabilized, resuscitation in the immediate postdelivery period concluded. Also, the ALJ found that the evidence demonstrated that it was not until October 3, 2009 – seven (7) days later, that Tristan suffered cardiac arrest, and at that time suffered from oxygen deprivation significant enough to cause the neurological injury to the brain that rendered Tristan permanently and substantially mentally and physically impaired. [R: 1077-78] Thus, the ALJ concluded that although Tristan suffered a NICA-like brain

injury, that such injury did not occur during the time frame required under the NICA statute, but rather occurred seven (7) days after such time frame had concluded. The ALJ's conclusions are consistent with the holdings in Nagy and Orlando Regional Healthcare Sys., Inc. v. Fla. Birth-Related Neurological, 997 So. 2d 426 (Fla. 5th DCA 2008); however, the First District Court overruled the ALJ's conclusions [not findings of fact], as a matter of law.

The First District Court held:

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 the "oxygen deprivation or mechanical injury" which must occur during "labor, delivery, or resuscitation in the immediate postdelivery period" under the statutory scheme.

See Bennett at 70.

This ruling is the complete opposite of what the Nagy Court held. In reaching its legal conclusion that Tristan's claim was a compensable NICA claim, the Court inserted the term "manifest" into the statutory definition, and omitted the term "resuscitation," effectively extending the time frame in which the neurological injury must occur under the NICA Statute. The First District Court's opinion, therefore, conflicts with the Fourth District Court of Appeal's holding in Nagy.

The First District, citing Orlando Regional, then further ruled:

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.

See id. at 70.

The Respondents also argue that this portion of the First District’s decision discussing the “immediate postdelivery period” is merely dicta which cannot support a finding of conflict with Orlando Regional. To the contrary, the Court found the claim compensable because the brain injury to Tristan occurred in the “immediate postdelivery” period based on their interpretation of law, as to the meaning of “immediate postdelivery.”

The applicable standard of review, as acknowledged by the First District, is explained by the First District as follows:

The standard of review of an ALJ’s interpretation of the NICA statutory scheme is *de novo*. *Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass’n*, 813 So. 2d 155, 159 (Fla. 4th DCA 2002). The ALJ’s determination with regard to the qualification of the claim for compensability purposes under the statute is conclusive and binding as to all questions of fact. §766.311(1), Fla. Stat. An ALJ’s final order is reversible on appeal, however, where its findings of fact are not supported by competent, substantial evidence. [Citations omitted.]

In the instant case, the Final Order was reversed by the First District, not because the Court found that the ALJ’s findings of fact were not supported by competent substantial evidence, but because the First District found the ALJ erred

in interpreting the NICA Statute, as a matter of law.<sup>1</sup> In reaching its conclusions, the First District relied on the facts as found by the ALJ. St. Vincent's Medical Center v. Bennett, 27 So. 3d 65, 69-70 (Fla. 1st DCA 2009). The Court did not determine the claim was compensable by reason of the application of the presumption. In fact, the Court relied on the facts as found by the ALJ to reach a different end result based on the Court's interpretation of what constitutes the "immediate postdelivery period."

The First District 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. *Orlando Reg'l Healthcare Sys., Inc. v. Fla. Birth-Related Neurological*, 997 So. 2d 426 (Fla. 5th 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

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<sup>1</sup> With respect to the presumption issue, the First District held that the ALJ erred as a matter of law in failing to apply the rebuttable presumption provided by Section 766.309(1)(a), Florida Statutes (2001). The First District Court stated:

Because the ALJ erred as a matter of law in failing to apply the rebuttable presumption provided by section 766.309(1)(a), Florida Statutes (2001), we reverse and remand for further proceedings.

\* \* \*

Given the stipulation and the ALJ's findings of fact, we hold that the ALJ erred as a matter of law in not applying the presumption of compensability. St. Vincent's Medical Center v. Bennett, 27 So. 3d 65, 66, 70 (Fla. 1st DCA 2009).

Tristan was delivered), that likely continued during the immediate postdelivery 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 cesarean section and the events through October 3 constituted the "immediate postdelivery period in the hospital" for purposes of the NICA Plan.

Id. at 70.

The First District Court did not reweigh evidence, or determine that any of the ALJ's factual findings were not supported by competent substantial evidence.

What the First District Court did was overrule the ALJ's conclusion that the injury to Tristan occurred after the "immediate postdelivery period," and ruled that the "immediate postdelivery period" included "an extended period of days when a baby is delivered with a life-threatening condition and requires close supervision," adding "close supervision" to the statutes expanding the "immediate postdelivery period." See Bennett at 70. The First District's holding as to compensability conflicts with the Fifth District's holding in Orlando Regional regarding what constitutes the statutory time frame for NICA.

While the Fifth District in Orlando Regional properly acknowledged that the applicable statutory time frame is "in the course of labor, delivery, or *resuscitation in the immediate postdelivery period in a hospital.*" Orlando Regional at 430 (emphasis in original). In this case, the First District does not even use the term "resuscitate" in its opinion, except for the quotation from the ALJ. This quotation

is not a sufficient basis to argue that the First District considered that resuscitation is a requirement includable in the “immediate postdelivery period.” The First District’s reasoning that the brain injury occurring on October 3, 2001, was within the “immediate postdelivery period” centered around the “fact” that, after birth, Tristan was placed in a special nursery and had a life-threatening conditioning that required constant monitoring.

The Respondents argue that because the infant was critically ill, the appellate Court properly found, based on the facts of this case, that the “immediate postdelivery period” spanned seven days. Such an argument is erroneous.

However critically ill the infant in this case may have been, the facts are that the statutory operative time frame under the NICA Statute for compensability is “in the course of labor, delivery, or resuscitation in the immediate postdelivery period.” See §766.302(2), Fla. Stat. Both the Respondents and the First District overlook and fail to consider the requirement for “resuscitation,” and focus on “critically ill,” not “on-going resuscitative” efforts through October 3, 2001.

“Resuscitate” is defined as “to perform resuscitation.” “Resuscitation” is defined as “revival from potential or apparent death.” See Stedman’s Medical Dictionary 1156 (27<sup>th</sup> ed. 2000); see also Orlando Regional at 431 (noting one definition of “resuscitation” is “[t]o return to consciousness, vigor or life; revive.”). Here, the record evidence establishes that Tristan was stabilized shortly after birth.

[R: 1065-67] While it is possible that “resuscitation” may connote different types of activities depending on the facts; and that resuscitation may not rise to the level of artificial resuscitation such as that in Orlando Regional, the NICA Statute requires that the injury occur “in the course of . . . resuscitation in the immediate postdelivery period.” That the infant in this case received brief resuscitation after birth and then was stabilized, does not support the First District’s interpretation that the injury in this case fell within the operative time frame.

### **CONCLUSION**

WHEREFORE, Petitioner, Florida Birth-Related Neurological Injury Compensation Association, respectfully requests that this Court 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 REPLY 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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