STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| SANDRA NAP BRITT and FRANK BRITT, as parents and natural guardians of DAVID BRITT, a minor, | ) | |
| Petitioners, | ) | |
| vs. | ) | Case No. 00-3823N |
| FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, | ) | |
| Respondent, | ) | |
| and | ) | |
| FLORIDA BOARD OF REGENTS and TAMPA GENERAL HOSPITAL, | ) | |
| Intervenors. | ) | |

## FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a final hearing in the above-styled case on June 25, 2001, in Tampa, Florida.

## APPEARANCES

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For Intervenor Florida Board of Regents:

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For Intervenor Tampa General Hospital:

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## STATEMENT OF THE ISSUES

1. At issue is whether David Britt, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan.

2. If so, whether the notice requirements of the Plan were satisfied.

## PRELIMINARY STATEMENT

On September 14, 2000, Sandra Nap Britt and Frank Britt, as parents and natural guardians of David Britt, a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). Pertinent to this case, the petition specifically averred that David had suffered a "birth-related neurological injury," but sought to avoid any

claim of Plan immunity by contending that the health care providers failed to comply with the notice provisions of the Plan. As for the plea in avoidance, the petition stated:

> . . . Petitioners filed a circuit court action which is now abated [under the authority of O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, 757 So. 2d 624 (Fla. 5th DCA 2000)] pending the outcome of this . . . [p]etition. Petitioners allege that no timely and informed notice was provided by NICA. Any attempt to provide notice was inadequate, ineffective and did not timely notify the Petitioners of NICA, its limitations, nor the healthcare providers' participation in the Plan.[1]

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on September 15, 2000, and on November 8, 2000, the Florida Board of Regents and Tampa General Hospital were accorded leave to intervene.

NICA reviewed the claim, and on January 8, 2001, gave notice that it had determined that the claim was compensable under the Plan. Consequently, an evidentiary hearing was duly noticed for, and held on, June 25, 2001, to resolve whether NICA's proposal to accept the claim, as compensable, should be approved, and whether the healthcare providers complied with the notice provisions of the Plan.

At hearing, Petitioners presented the live testimony of Jean Grattan, Patricia Ogden, and Sandra Nap Britt, as well as

excerpts from the deposition testimony of Catherine Lynch, M.D., J. Kell Williams, M.D., and Norma Kringel Tooley. Petitioners' Exhibits numbered 1-10 were received into evidence. No other witnesses were called; however Respondent's Exhibit numbered 1 and Intervenors' Exhibits numbered 1-29 were received into evidence, subject to limitations noted on the record.

The hearing transcript was filed July 16, 2001, and the parties were accorded 10 days from that date to file proposed final orders. Petitioners and Intervenors elected to file such proposals and they have been duly considered.

## FINDINGS OF FACT

### Fundamental findings

1. Petitioners, Sandra Britt nee Sandra Nap and Frank Britt, are the parents and natural guardians of David Britt, a minor. David was born a live infant on November 9, 1997, at Tampa General Hospital, a hospital located in Tampa, Florida, and his birth weight exceeded 2,500 grams.

2. The physicians providing obstetrical services during David's birth included the attending physician, Catherine Lynch, M.D., an attending faculty physician with the University of South Florida, College of Medicine, as well as a number of resident physicians from the University of South Florida, College of Medicine. At the time, Dr. Lynch was a "participating physician" in the Florida Birth-Related Neurological Injury Compensation

Plan, as defined by Section 766.302(2), Florida Statutes, and the resident physicians, supervised by Dr. Lynch, were deemed participating physicians under the provisions of Section 766.314(4)(a), Florida Statutes.[2]

Coverage under the Plan

3. Pertinent to this case, coverage is afforded by the Plan for infants who suffer a "birth-related neurological injury," defined as an "injury to the brain . . . caused by oxygen deprivation . . . occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired." Sections 766.302(2) and 766.309(1)(a), Florida Statutes.

4. Here, NICA has concluded that David suffered a "birth-related neurological injury" and, since obstetrical services were provided by a "participating physician" at birth, proposes to accept the claim as compensable under the Plan. NICA's conclusion is grossly consistent with the proof and, consequently, its proposal to accept the claim as compensable is approved.

Notice of Plan participation

5. While the claim qualifies for coverage under the Plan, Petitioners have responded to the healthcare providers' claim of Plan immunity by contending that the hospital and the attending

physician[3] failed to comply with the notice provisions of the Plan. Consequently, it is necessary to resolve whether, as alleged by the healthcare providers, appropriate notice was given. O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, supra.

6. As a prelude to resolving the notice issue, it is noted that Mrs. Britt received her prenatal and intrapartum care at the Genesis Clinic (an obstetric and gynecologic health care facility) and Tampa General Hospital (TGH), facilities owned and operated by the Hillsborough County Hospital Authority. Pertinent to this case, the proof demonstrates that TGH manages the clinic, and provides the necessary nursing and clerical workers; however, prenatal care and intrapartum care are provided, pursuant to an "affiliation agreement," by physicians (faculty and resident) associated with the University of South Florida, College of Medicine, Department of Obstetrics and Gynecology, who are employed by the Florida Board of Regents.

7. Regarding her prenatal care, the proof demonstrates that Mrs. Britt's initial visit to the Genesis Clinic occurred on March 26, 1997.[4] Typically, such a visit would include registration, financial consultation, a tour and orientation, and prenatal lab work.

8. Here, as would be expected, Mrs. Britt initially presented to the front desk where she registered (signed in) and

provided certain basic information about herself to complete a patient profile.

9. Following completion of the patient profile, Mrs. Britt presented to the financial counselor, whose office was adjacent to the front desk and faced the patient waiting area. During the course of that meeting, the proof demonstrates that the financial counselor (Norma Kringel, currently known as Norma Kringel Tooley) reviewed Mrs. Britt's patient profile and, apparently satisfied that Mrs. Britt was Medicaid eligible, provided her with a packet (a plastic bag) containing various samples and child care information, as well as a Genesis Social Assessment form to complete. Following completion of that form, the financial consultant provided Mrs. Britt with a brochure prepared by NICA titled "Peace of Mind for an Unexpected Problem," which contained a concise explanation of the patient's rights and limitations under the Plan. Notably, the brochure included the following language:

> You are eligible for this protection if your doctor is a participating physician in the Association. Membership means that your doctor has purchased this benefit for you in the event that your child should suffer a birth-related neurological injury, which qualifies under the law.

Notwithstanding, while the consultant encouraged Mrs. Britt to read the brochure, she did not identify the physicians who would be providing Mrs. Britt's obstetrical care or advise her (as she

easily could have) that the physicians who would be providing such care were participants in the Plan.[5]

10. The next step in the process presents the most problematic issues with regard to notice. According to the proof, at the conclusion of her meeting with the financial consultant, a new patient, such as Mrs. Britt, was directed to the patient waiting area, where she was to await the health education coordinator (Patricia Ogden, R.N.) for an orientation tour of the facility and classroom presentation.

11. According to Nurse Ogden, it was her established procedure to collect the new patients in the waiting area, and then proceed with a tour of the facility, explaining the various services that were available, followed by a classroom session. During the course of the tour, it was Nurse Ogden's practice to explain to the patients that TGH provides prenatal care at the clinic in "affiliation" with the University of South Florida, College of Medicine, and that the physicians who would be providing obstetrical care were residents (M.D.s) now specializing in obstetrics and gynecology and that their services were under the direct supervision of an attending faculty physician. During the classroom session, it was Nurse Ogden's practice to, inter alia, hold up the "Peace of Mind" brochure to ensure that each new patient had one, explain that the affiliated group of physicians from the University of South Florida who

would be providing their obstetric care were participants in the Plan, and advise the patients that if they had any questions regarding the Plan they should consult with their physicians. Following the classroom session, the new patients would then proceed to the final stage of their initial visit, prenatal lab work.

12. From the routine practice established by the clinic for an initial visit by new patients, Intervenors suggest it is reasonable to infer that Mrs. Britt participated in the tour and classroom session, and was therefore informed as to the identity of her physicians (as a group) and that they were participants in the Plan. As additional proof that Mrs. Britt participated in the tour and classroom session, Intervenors point to the Progress Notes of Mrs. Britt's initial visit of March 26, 1997, which contains a check mark next to an item titled "Orientation tour and class session attended by patient," signed by Nurse Ogden. Notably, however, Nurse Ogden took no roll call or otherwise identified the patients who accompanied her on the tour or participated in the classroom session, and executed the Progress Notes confirming a patient's attendance on the tour and at the classroom session based solely on a list of new patients who had registered (signed in) at the reception desk that day. Consequently, the Progress Notes provide no independent or compelling proof, distinguishable from that which might be

inferred from the clinic's routine practice, that Mrs. Britt attended the orientation tour and class session on March 26, 1997.

13. Contrasted with the conclusion Intervenors would suggest be drawn from the Clinic's routine procedure for new patients, Mrs. Britt testified that she did not participate in an orientation tour and class session, and was never informed that the physicians who would provide her obstetrical care were participants in the Plan.[6] As independent evidence that she did not follow the routine established for new patients, Petitioners point to the clinic's records, which reveal that she did not, as would be routine, present for prenatal lab work on March 26, 1997, but returned to the clinic on March 27, 1997, for that lab work.

14. Given the proof, it cannot be resolved with any degree of confidence that, more likely than not, Mrs. Britt attended the orientation tour and classroom session. Consequently, since the tour and classroom session was the only occasion (apparent from the record) that patients were advised that their physicians were participants in the Plan, it must be resolved that the proof fails to support the conclusion that Mrs. Britt was ever provided notice that her physicians were participants in the Plan.

15. While the proof failed to demonstrate that Mrs. Britt received notice on behalf of the participating physicians, it did

demonstrate that TGH provided timely pre-delivery notice to Mrs. Britt, as envisioned by Section 766.316, Florida Statutes. In this regard, the proof demonstrated that on October 19, 1997, during the course of pre-registration at TGH, Mrs. Britt was again given a copy of the brochure (prepared by NICA) titled "Peace of Mind for an Unexpected Problem," which, as previously noted, contained a concise explanation of the patients' rights and limitations under the Plan.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Section 766.301, et seq., Florida Statutes.

17. The Florida Birth-Related Neurological Injury Compensation Plan (the "Plan") was established by the Legislature "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims" relating to births occurring on or after January 1, 1989. Section 766.303(1), Florida Statutes.

18. The injured "infant, his personal representative, parents, dependents, and next of kin" may seek compensation under the Plan by filing a claim for compensation with the Division of Administrative Hearings. Sections 766.302(3), 766.303(2), 766.305(1), and 766.313, Florida Statutes. The Florida Birth-Related Neurological Injury Compensation Association (NICA),

which administers the Plan, has "45 days from the date of service of a complete claim . . . in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury." Section 766.305(3), Florida Statutes.

19. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, as it has in the instant case, it may award compensation to the claimant, provided that the award is approved by the administrative law judge to whom the claim has been assigned. Section 766.305(6), Florida Statutes.

20. In discharging this responsibility, the administrative law judge must make the following determination based upon the available evidence:

> (a) Whether the injury claimed is a birth-related neurological injury. If the claimant has demonstrated, to the satisfaction of the administrative law judge, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and that the infant was thereby rendered permanently and substantially mentally and physically impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in s. 766.303(2).
>
> (b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a

> participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.

Section 766.309(1), Florida Statutes. An award may be sustained only if the administrative law judge concludes that the "infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth." Section 766.31(1), Florida Statutes.

21. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes, to mean:

> . . . injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

22. As the claimants, the burden rested on Petitioners to demonstrate entitlement to compensation. Section 766.309(1)(a), Florida Statutes. See also Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977) ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.")

23. Here, it has been established that the physicians who provided obstetrical services at birth were "participating physician[s]," as that term is defined by the Plan, and that David suffered a "birth-related neurological injury," as that term is defined by the Plan. Consequently, David qualifies for coverage under the Plan. Section 766.309, Florida Statutes.

24. While David qualifies for coverage under the Plan, Petitioners have sought to avoid the health care providers' attempt to invoke the Plan as their exclusive remedy by averring that the health care providers (the participating physicians and the hospital) failed to comply with the notice provisions of the Plan. Consequently, it is necessary for the administrative law judge to resolve whether, as alleged by the health care providers, appropriate notice was given. O'Leary v. Florida Birth-Related Neurological Injury Compensation Plan, supra. As the proponent of such issue, the burden rested on the healthcare providers to demonstrate, more likely than not, that the notice provisions of the Plan were satisfied. See Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 311 (Fla. 1997)("[T]he assertion of NICA exclusivity is an affirmative defense.") See also Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1997)("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.").

25. Pertinent to the issue of notice, Section 766.316, Florida Statutes, provided, at the time of David's birth, as follows[7]:

> Notice to obstetrical patients of participation in the plan.--Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan.

26. In Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 309 (Fla. 1997), the Florida Supreme Court had before it the following question certified by the court in Braniff v. Galen of Florida, Inc., 669 So. 2d 1051 (Fla. 1st DCA 1995), as a matter of great public importance:

> Whether Section 766.316, Florida Statutes (1993), requires that health care providers give their obstetrical patients pre-delivery notice of their participation in the Florida Birth Related Neurological Injury Compensation Plan as a condition precedent to the providers' invoking NICA as the patient's exclusive remedy?

In addressing the question, the Florida Supreme Court described the legislative intent and purpose of the notice requirement as follows:

. . . the only logical reading of the statute is that before an obstetrical patient's remedy is limited by the NICA plan, the patient must be given pre-delivery notice of the health care provider's participation in the plan. Section 766.316 requires that obstetrical patients be given notice "as to the limited no-fault alternative for birth-related neurological injuries." That notice must "include a clear and concise explanation of a patient's rights and limitations under the plan." Section 766.316. This language makes clear that the purpose of the notice is to give an obstetrical patient an opportunity to make an informed choice between using a health care provider participating in the NICA plan or using a provider who is not a participant and thereby preserving her civil remedies. Turner v. Hubrich, 656 So. 2d 970, 971 (Fla. 5th DCA 1995). In order to effectuate this purpose a NICA participant must give a patient notice of the "no-fault alternative for birth-related neurological injuries" a reasonable time prior to delivery, when practicable.

Our construction of the statute is supported by its legislative history. Florida's Birth-Related Neurological Injury Compensation Plan was proposed by the 1987 Academic Task Force for Review of the Insurance and Tort Systems. In its November 6, 1987, report, the Task Force recommended adoption of a no-fault compensation plan for birth-related neurological injuries similar to the then newly enacted Virginia plan . . . . However, the Task Force was concerned that the Virginia legislation did not contain a notice requirement and recommended that the Florida plan contain such a requirement. The Task Force believed that notice was necessary to ensure that the plan was fair to obstetrical patients and to shield the plan from constitutional challenge. The Task Force explained in its report:

> The Virginia statute does not require participating physicians and hospitals to give notice to obstetrical patients that they are participating in the limited no-fault alternative for birth-related neurological injuries. The Task Force recommends that health care providers who participate under this plan should be required to provide reasonable notice to patients of their participation. This notice requirement is justified on fairness grounds and arguably may be required in order to assure that the limited no fault alternative is constitutional.
>
> Task Force Report at 34 (emphasis added). Since Florida's NICA plan was the result of the Task Force's report, it is only logical to conclude that the plan's notice requirement was included in the Florida legislation as a result of this recommendation and therefore was intended to be a condition precedent to immunity under the plan.

Consequently, the court concluded:

> . . . as a condition precedent to invoking the Florida Birth-Related Neurological Injury Compensation Plan as a patient's exclusive remedy, health care providers must, when practicable, give their obstetrical patients notice of their participation in the plan a reasonable time prior to delivery.

27. In Board of Regents v. Athey, 694 So. 2d 46 (Fla. 1st DCA 1997), the First District Court of Appeal, consistent with its decision in Braniff v. Galen of Florida, Inc., supra, again resolved that notice was a condition precedent to invoking the Plan as a patient's exclusive remedy.[8] Of particular interest to

this proceeding, the court in Athey (under circumstances where it was alleged neither the participating physicians nor the hospital gave the pre-delivery notice required by the Plan) spoke to the independent obligation of both the physician and the hospital to accord the patient notice, as mandated by Section 766.316, Florida Statutes, as follows:

> Under the plan, a "participating physician" is one who is "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 participation" in NICA. Section 766.302(7), Fla. Stat. (1989). Thus, if a hospital has a "participating physician" on staff, to avail itself of NICA exclusivity the hospital is required to give pre-delivery notice to its obstetrical patients. In addition, except for residents, assistant residents and interns who are exempted from the notice requirement, a participating physician is required to give notice to the obstetrical patients to whom the physician provides services. Under section 766.316, therefore, notice on behalf of the hospital will not by itself satisfy the notice requirement imposed on the participating physician(s) involved in the delivery. [Conversely, it reasonably follows, notice on behalf of the participating physician will not by itself satisfy the notice requirement imposed on the hospital.]

Id. at 49.

28. The conclusions reached by the court in Athey regarding the independent obligation of the physician and the hospital to accord the patient notice "as to the limited no-fault alternative

for birth-related neurological injuries" are consistent with basic principles of statutory construction. First, the statutory language in Section 766.316, clearly supports the court's conclusion:

> Each hospital with a participating physician on its staff and each participating physician . . . shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries . . . (emphasis added).

Had the Legislature intended for the patient to receive notice from only the physician or the hospital, the statute could easily have been worded to reflect that intention. The legislature's choice of clear, unambiguous language to the contrary evidences its intention that Plan exclusivity will preclude a civil action only when the hospital and the participating physician have provided notice. As noted in Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984):

> Florida case law contains a plethora of rules and extrinsic aids to guide courts in their efforts to discern legislative intent from ambiguously worded statutes. However, [w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning . . . . Courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power. (citations omitted).

Accord, Tropical Coach Line, Inc. v. Carter, 121 So. 2d 779, 782 (Fla. 1960)("If the language of the statute is clear and unequivocal, then the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think that the legislators intended or should have intended.")

Finally, because the Plan, like the Workers' Compensation Act, 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. Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So. 2d 974, 977 (Fla. 1996).

29. Given the foregoing, it must be resolved that where, as here, notice was not given by the participating physician, the claimants may accept compensation under the Plan (thereby foreclosing the filing or continuation of a civil suit against the participating physician, hospital or others involved with the labor or delivery) or reject the Plan benefits and pursue their common law remedies. See Braniff v. Galen of Florida, Inc., supra, at page 1053 ("The presence or absence of notice will neither advance or defeat the claim of an eligible NICA claimant who has decided to invoke the NICA remedy . . . Notice is only relevant to the defendants' assertion of NICA exclusivity where

the individual attempts to invoke a civil remedy.") Accord, O'Leary v. Florida Birth-Related Neurological Injury Compensation Plan, supra, at page 627 ("We recognize that lack of notice does not affect a claimant's ability to obtain compensation from the Plan.") That the hospital may have complied with the notice provisions, as it did in this case, does not alter the conclusion reached.

30. In so concluding, it is observed that there is nothing in the language chosen by the Legislature that would suggest that a participating physician, hospital or other provider involved in the birth process enjoys any benefit (i.e., Plan exclusivity or immunity) independently from that enjoyed by all persons or entities involved in the birth process. Stated differently, Plan exclusivity and Plan benefits are inclusive, not severable. See Section 766.303(2), Florida Statutes (The rights and remedies granted by the Plan are exclusive of any civil or other remedies that may be available against any person or entity directly involved in the birth process during which injury occurs). See also Gilbert v. Florida Birth-Related Neurological Injury Compensation Association, 724 So. 2d 688, 690 (Fla. 2d DCA 1999)("[I]f an administrative petition results in a determination, that the infant is a NICA baby, a civil action is foreclosed . . . [since] [t]he remedies are mutually exclusive.") Consequently, it must be resolved that where, as here, the

participating physicians failed to give the patient notice, neither hospital (even though it gave notice) nor any other health care provider involved in the birth process can enforce the exclusivity of the Plan. Rather, acceptance of Plan benefits under such circumstances is an option to be exercised at the discretion of the claimants. Conversely, if rejected, the claimants may proceed with their civil remedies, and the health care providers may not assert Plan exclusivity to defeat such civil action.

31. While the Plan has been interpreted by the courts to accord claimants, such as Petitioners, the option to accept coverage under the Plan (thereby foreclosing the filing or continuation of any civil action) or to reject the Plan benefits and pursue their common law remedies, neither the Plan nor the courts expressly address how or when that election must be manifested. Notably, however, the Plan does speak to such matters with regard to another exception to the exclusivity of the remedy afforded by the Plan. That exception is prescribed by Section 766.303(2), Florida Statutes, which permits a civil action under the following circumstances:

> . . . where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property, provided that such suit is filed prior to and in lieu of payment of an award under ss. 766.301-766.316. Such suit shall be filed before the award of the

> division becomes conclusive and binding as providing for in s. 766.311. (emphasis added.)

32. Since the courts have interpreted the Legislature's intention with regard to the notice requirements of Section 766.316 to accord claimants, such as Petitioners, the option of accepting or rejecting Plan coverage, it is reasonable to infer that, as with the first exception, the Legislature intended that a claimants' election to proceed with their common law remedies be evidenced "prior to and in lieu of payment of an award under ss. 766.301-766.316," and that such election be made "before the award of the division becomes conclusive and binding as provided for in s. 766.311." Therefore, absent the rejection of the award before it becomes final as provided in Section 766.311, it reasonably follows that the remedy accorded by the Plan will be considered exclusive and will bar the filing or continuation of any civil action.

33. Where, as here, the administrative law judge determines that "the infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth," the administrative law judge is required to make a determination as to "how much compensation, if any, is to be awarded pursuant to s. 766.31." Section 766.309(1)(c), Florida Statutes. In this case, the issues of compensability and the amount of compensation to be awarded were

bifurcated. Accordingly, absent agreement by the parties, or rejection of this award by the claimants, a further hearing will be necessary to resolve any existing disputes regarding "actual expenses," the amount and manner of payment of "an award to the parents or natural guardians," and the "reasonable expenses incurred in connection with the filing of the claim." Section 766.31(1), Florida Statutes. Nevertheless, and notwithstanding that matters related to the amount of compensation may need to be addressed (absent rejection of Plan benefits by Petitioners), the determination that the claim qualifies for compensation under the Plan constitutes final agency action subject to appellate court review. Section 766.311(1), Florida Statutes.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the claim for compensation filed by Sandra Nap Britt and Frank Britt, as parents and natural guardians of David Britt, a minor, and NICA's proposal to accept the claim for compensation be and the same are hereby approved.

IT IS FURTHER ORDERED that, absent timely rejection of this award by the Claimants, that:

1. NICA shall make payment of all expenses previously incurred, and shall make payment for future expenses as incurred.

2. Sandra Nap Britt and Frank Britt, as the parents and natural guardians of David Britt, a minor, are entitled to an award of up to $100,000. The parties are accorded 45 days from the date of this order to resolve, subject to approval by the administrative law judge, the amount and manner in which the award should be paid. If not resolved within such period, the parties will so advise the administrative law judge, and a hearing will be scheduled to resolve such issue.

3. Petitioners are entitled to an award of reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees. The parties are accorded 45 days from the date of this order to resolve, subject to approval by the administrative law judge, the amount of such award. If not resolved within such period, the parties will so advise the administrative law judge, and a hearing will be scheduled to resolve such issue.

IT IS FURTHER ORDERED that pursuant to Section 766.312, Florida Statutes, jurisdiction is reserved to resolve any disputes, should they arise, regarding the parties' compliance with the terms of this Final Order.

DONE AND ORDERED this 14th day of August, 2001, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of August, 2001.

## ENDNOTES

1/ On January 29, 2001, Petitioners filed an amended petition to assure there would be no misunderstanding regarding their preference to pursue their civil action, as opposed to accepting the benefits provided by the Plan. The amended petition, which was not in substance at variance with the initial petition, averred:

> 1. Petitioners file this Petition solely to establish the following allegations: First, Petitioners' claim qualifies for coverage under Florida Birth Related Neurological Injury Compensation Act, Sections 766.301-766.316, Florida Statutes. Secondly, the participating physician and the hospital failed to provide Sandra Nap Britt proper notice of their participation in the NICA Plan, or any explanation of a patient's rights and limitations under the Plan, as required by Section 766.316, Florida Statutes.
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> * * *
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> 6. No actual award of benefits under the Plan is sought, and it is Petitioners'

> intention to pursue the presently pending civil lawsuit upon a determination by the Administrative Law Judge that there is coverage under the NICA Plan, and that no proper and adequate notice was given. Petitioners are well aware of the exclusivity of remedy provisions of the Act, and specifically wish to avoid any determination pursuant to this Petition which would invoke the exclusivity provisions.
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> * * *
>
> WHEREFORE, Petitioners . . . respectfully request that the Administrative Law Judge enter his Order determining that Petitioners' claim is a compensable one which qualifies for coverage under the NICA Plan, and that there was a failure by the participating physician, as well as the hospital, to give notice of participation in the Plan or any explanation of a patient's rights and limitations under the Plan.

2/ Dr. Lynch and the resident physicians, as faculty physician and resident physicians, were employees of the Florida Board of Regents.

3/ Residents, assistant residents, and interns deemed to be participating physicians under Section 766.314(4)(c), Florida Statutes, are not required to provide notice to the obstetrical patients to whom they provide services. Section 766.316, Florida Statutes.

4/ In March 1997, following confirmation of her pregnancy by the Women's Care Center in Tampa, Florida, Mrs. Britt applied for Medicaid assistance at the local (Hillsborough County) office. Thereafter, on the recommendation of the Women's Care Center, she sought prenatal care at the Genesis Clinic.

5/ The proof regarding what occurred between the financial consultant, Ms. Kringel, and Mrs. Britt was based on Ms. Kringel's testimony regarding her normal or routine practice, as well as the clinic's records. (Petitioner's Exhibit 5.) Such proof has been accepted as a reliable explanation of the events that transpired.

6/ Mrs. Britt also testified that she was never aware that the physicians who would provide her obstetrical care were University of South Florida physicians. Here, given the signs prevalent at the clinic (announcing it as a Tampa General Hospital facility, without any reference to an association with the University of South Florida, College of Medicine) and the staff Mrs. Britt encountered on March 26, 1997, who were all TGH employees and wore name tags clearly indicating that employment, it is reasonable to conclude, since she did not participate in the tour and classroom session, that on March 26, 1997, Mrs. Britt was not aware the physicians who would provide her obstetrical care would be affiliated with the University of South Florida. However, it is inherently improbable that Mrs. Britt was never aware of such association. In so concluding, consideration has been given, inter alia, to Mrs. Britt's age, training, and experience (having previously birthed two children); her previous gynecological care at the University of South Florida Medical Clinic; her treatment on no less than 13 occasions at Genesis Clinic by physicians and advanced registered nurse practitioners (ARNPs), who wore university identification badges and had university insignia on their lab coats; and her execution of a Certification and Authorization for medical treatment at TGH (on May 14, 1997, and October 19, 1997) which provided:

> I. I consent to such diagnostic procedures, hospital care, medical treatment and other actions which, in the judgement of my physician, may be considered necessary or advisable while a patient at Tampa General Healthcare, Tampa, Florida. I recognize that Tampa General Healthcare is a teaching and research facility and that my treatment and care will be observed and, in some instances, aided by University of South Florida students under the supervision of my physician. I consent to the use of all my medical data and any non-identifiable photographs for educational or research purposes. I authorize the University of South Florida and/or Tampa General Healthcare to retain, preserve and use for scientific, educational or research purposes, or dispose of as they might deem fit, any specimens or tissues taken from my body during hospital or clinic visits.

7/ Effective July 1, 1998, Section 766.316, Florida Statutes, was amended to read as follows:

> . . . Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(8)(b) or when notice is not practicable. (Amendment emphasized.)

Section 7, Chapter 98-113, Laws of Florida, provided that the "[a]mendments to section 766.316, Florida Statutes, shall take effect July 1, 1998, and shall apply only to causes of action accruing on or after that date." However, such amendments basically codified the conclusions reached in Galen of Florida Inc. v. Braniff, discussed infra.

8/ The court in Athey certified the same question to the Florida Supreme Court that it had certified in Braniff v. Galen of Florida, Inc., supra. In University Medical Center, Inc. v. Athey, 699 So. 2d 1350 (Fla. 1997), the Florida Supreme Court, Per Curiam, concluded:

> In Galen of Florida, Inc. v. Braniff, 696 So. 2d 308 (Fla. 1997), we answered the certified question by holding "that as a condition precedent to invoking the Florida Birth-

> Related Neurological Injury Compensation Plan as a patient's exclusive remedy, health care providers must, when practicable, give their obstetrical patients notice of their participation in the plan a reasonable time prior to delivery." 696 So. 2d at 309. Accordingly, we answer the question certified here as we did in Galen [,] approve the decision under review to the extent it is consistent with that opinion . . . [and decline to reach any other issues raised by the petitioners].

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## NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Sections 120.68 and 766.311, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 120.68(2), Florida Statutes, and Florida Birth-Related Neurological Injury Compensation Association v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992). The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.