STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARIA FERGUSON and GARRY FERGUSON, as parents and natural guardians of CASEY FERGUSON, a minor,	)	
Petitioners,	)	
vs.	)	Case No. 01-1195N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
MORTON PLANT MEASE HEALTH CARE INC., d/b/a MEASE HOSPITAL DUNEDIN and LENORE McCALL, C.N.M.,	)	
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 October 22, 2001, in Tallahassee, Florida.

APPEARANCES

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For Respondent: Kenneth L. Plante, Esquire
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For Intervenor Morton Plant Mease Health Care, Inc:

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For Intervenor Lenore McCall, C.N.M.:

No appearance at hearing.

STATEMENT OF THE ISSUES

The petition (claim) filed on behalf of Petitioners presented the following issues for resolution:[1]

1. Whether the claim is compensable under the Florida Birth-Related Neurological Injury Compensable Plan (Plan).

2. Whether the notice provisions of the Plan were satisfied.

3. Whether the exclusiveness of remedy provision of the Plan is an available defense to a nurse midwife or hospital when no civil claim has been made against the participating physician.

4. Whether the amendments to Sections 766.301(1)(d) and 766.304, Florida Statutes (Supp. 1998), which accorded the

administrative forum exclusive jurisdiction to resolve whether claims are covered by the Plan, may be applied retroactively.

PRELIMINARY STATEMENT

On May 26, 1999, Maria Ferguson and Garry Ferguson, individually and on behalf of their minor child, Casey Ferguson, filed suit against Morton Plant Mease Health Care, Inc., d/b/a Mease Hospital Dunedin and Lenora McCall, C.N.M., in the Circuit Court for the Sixth Judicial Circuit, in and for Pinellas County, Florida, alleging medical malpractice associated with the labor of Mrs. Ferguson and the delivery of Casey. Harvey A. Levin, M.D., the physician who provided obstetrical services at birth, and a "participating physician" in the Plan, was not named as a defendant.

In the wake of the amendments to Sections 766.301(1)(d) and 766.304, Florida Statutes (Supp. 1998) and the decision in O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, 747 So. 2d 624 (Fla. 5th DCA 2000), Mease Hospital Dunedin prevailed upon the court to abate the civil suit until "the issues of applicability of and/or compensability under the Florida Birth-Related Neurological Injury Compensation . . . [Plan], Sections 766.301-766.316, Florida Statutes, are fully and finally resolved by an administrative law judge or in an appellate forum." By order of February 26, 2001, the court expressed its reasoning, as follows:

6. The Florida Birth-Related Neurological Injury Compensation Plan was amended in 1998. Relevant to this case, Section 766.301(1)(d), Florida Statutes (1998), was amended to include the following: "the issue of whether such claims are covered by this Act must be determined in an administrative proceeding."

7. The amendment to Section 766.301, Florida Statutes, took effect July 1, 1998, and it shall apply only to claims filed on or after that date, and to that extent shall apply retroactively, regardless of the date of birth. Section 6, Ch. 98-113.

8. The Plaintiffs' medical malpractice claim against Mease Hospital Dunedin was filed after July 1, 1998, but the birth of Casey Jannell Ferguson occurred prior to July 1, 1998. The issue becomes, therefore, whether Section 766.301(1)(d), Florida Statutes, as amended, applies to this action.

9. If Section 766.301(1)(d), Florida Statutes, as amended, can constitutionally be applied to this case, the parties agree that O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, 757 So. 2d 624 (Fla. 5th DCA 2000) mandates this Court to abate Counts I and II of the Plaintiffs' Complaint.

10. Plaintiffs contend that application of the 1998 amendment to this case would be unconstitutional as a retroactive application. Defendant contends that application of the amendment to this case does not constitute an unconstitutional retroactive application.

11. The amendment to Section 766.301(1)(d), Florida Statutes, is a jurisdictional rule which takes away no substantive right, but simply changes the tribunal that is to hear the case. Jurisdictional statutes speak to the power of the Court, rather than to rights or obligations of the parties. Accordingly,

> application of Section 766.301(1)(d), Florida Statutes (1998), which confers jurisdiction exclusively in the administrative forum to this case, does not constitute an impermissible retroactive application, and it is appropriate to apply the amendment to this case.

On March 28, 2001, Maria Ferguson and Garry Ferguson, as parents and natural guardians of Casey, filed their petition with the Division of Administrative Hearings (DOAH). That petition, apart from presenting the issue of compensability for resolution, sought to avoid the exclusiveness of remedy provisions of the Plan, Section 766.303(2), Florida Statutes, based on the following allegations:

> VI. THE FERGUSONS' CIRCUIT COURT CLAIMS AGAINST THE HOSPITAL AND THE MIDWIFE ARE NOT BARRED BY NICA
>
> A. NICA is not an exclusive remedy as applied to this petition because the Fergusons have not asserted any claims against a participating physician
>
> * * *
>
> B. NICA is not an exclusive remedy as applied to this petition because the hospital and midwife never provided their own NICA notice to Ferguson
>
> * * *
>
> C. NICA is not an exclusive remedy as applied to this petition because the only notice that was provided to Mrs. Ferguson was insufficient as a matter of law

> 1. The notice did not fully or clearly explain Ferguson's rights and the limitations on them under NICA
>
> * * *
>
> 2. Notice was never provided advising the Fergusons of her rights and limitations thereon as a result of changes to NICA

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on March 29, 2001, and on May 11, 2001, NICA gave notice that it had determined that the claim was compensable under the Plan. However, given Petitioners' pleas to avoid the exclusiveness of remedy provisions of the Plan, NICA requested that an evidentiary hearing be set to resolve the pending issues. Consequently, an evidentiary hearing was noticed for October 22, 2001, to resolve whether NICA's proposal to accept the claim should be approved, as well as those issues raised in the petition to avoid the exclusiveness of remedy provisions of the Plan. In the interim, Morton Plant Mease Health Care, Inc., d/b/a Mease Hospital Dunedin and Lenore V. McCall, C.N.M., were accorded leave to intervene.

At hearing, Petitioners, Maria Ferguson and Garry Ferguson, testified on their own behalf, and Petitioners' Exhibits 1, 2, 3, 4, 5A-5Y, 6, and 7 were received into evidence. Additionally, Respondent's Exhibit 1 and Intervenor Mease Hospital's Exhibits

1, 2, and 4 were received into evidence. No further witnesses were called and no further exhibits were offered.[2]

The transcript of the hearing was filed November 14, 2001, and the parties, at their request, were accorded until December 11, 2001, to file proposed final orders. Consequently, the parties waived the requirement that a final order be rendered within 30 days after the transcript has been filed. Rule 28-106.216(2), Florida Administrative Code. The parties elected to file such proposals, and they have been duly considered.

FINDINGS OF FACT

Fundamental findings

1. Petitioners, Maria Ferguson (formerly known as Maria Mish) and Garry Ferguson, are the parents and natural guardians of Casey Ferguson, a minor. Casey was born a live infant on January 28, 1997, at Morton Plant Mease Health Care, Inc., d/b/a Mease Hospital Dunedin (Mease Hospital), a hospital located in Dunedin, Florida, and her birth weight exceeded 2,500 grams.

2. The physician who provided obstetrical services during Casey's birth was Harvey A. Levin, M.D., and he was, at the time, a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes.

3. Services were also provided during the course of birth by Lenore V. McCall, a certified nurse midwife (C.N.M.). At the

time, Ms. McCall had not paid the assessment requirement by Section 766.314(4)(c) and (5)(a), Florida Statutes, and was not a "participating physician" in the Plan.

Coverage under the Plan

4. 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.

5. Here, NICA has concluded, and the parties have stipulated, that Casey suffered a "birth-related neurological injury," as defined by the Plan. NICA's conclusion, as well as the parties' stipulation, is grossly consistent with the record. Consequently, since obstetrical services were provided by a participating physician at birth, the claim is compensable, and NICA's proposal to accept the claim is approved.[3] Sections 766.309(1) and 766.31(1), Florida Statutes.

Notice of Plan participation

6. While the claim qualifies for coverage under the Plan, Petitioners have responded to the health care providers' claim of Plan immunity by contending that the participating physician who

delivered obstetrical services at birth (Dr. Levin), as well as the hospital (Mease Hospital), failed to comply with the notice provisions of the Plan.[4] Consequently, it is necessary to resolve whether, as alleged by the health care providers, the notice provisions of the Plan were satisfied. O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, 757 So. 2d 624 (Fla. 5th DCA 2000), and University of Miami v. M.A., 793 So. 2d 999 (Fla. 3d DCA 2001).

7. Pertinent to this issue, it is worthy of note that, at the time of Casey's birth, Section 766.316, Florida Statutes, prescribed the notice requirements, as follows:

> Notice to obstetrical patients of participation in the plan.--Each hospital with a participating physician on its staff and each participating physician . . . 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.

It is further worthy of note that NICA developed a brochure titled "Peace of Mind for An Unexpected Problem" to comply with the statutory mandate, and distributed the brochure to participating physicians and hospitals so they could furnish the brochure (form) to their patients.

8. Turning now to the case at hand, it is observed that Mrs. Ferguson received her prenatal care at A Woman's Place, an office maintained for the practice of obstetrics and gynecology by Harvey A. Levin, M.D., and A. Trent Williams, M.D., at 5347 Main Street, Suite 302, New Port Richey, Florida. Also active in the practice were a number of midwives, including Lenore McCall. Of note, Doctors Levin and Williams delivered exclusively at Mease Hospital Dunedin.

9. Regarding her care, the proof demonstrates that Mrs. Ferguson's initial visit to A Woman's Place occurred on May 30, 1996. As would be expected, Mrs. Ferguson initially presented to the front window (front desk), registered her presence (by writing her name on the pad at the front window), and then took a seat in the waiting room. Shortly thereafter, Mrs. Ferguson was recalled to the front window and given a number of forms (referred to as a packet in this proceeding) to fill out, date, sign, and return before she could be seen by a healthcare provider. Among the documents she completed and returned to the front desk was a form titled Notice to Obstetric Patient,[5] which provided:

> NOTICE TO OBSTETRIC PATIENT
> (See Section 766.316, Florida Statutes)
>
> I have been furnished information by A WOMAN'S PLACE AND/OR MEASE HOSPITAL prepared by the Florida Birth Related Neurological Injury Compensation Association, and have

> been advised that Drs. Levin and Williams are participating physicians in that program, wherein certain limited compensation is available in the event certain neurological injury may occur during labor, delivery or resuscitation. For specifics on the program, I understand I can contact the Florida Birth Related Neurological Injury Compensation Association (NICA), Barnett Bank Building, 315 South Calhoun Street, Suite 312, Tallahassee, Florida 32301, (904) 488-8191. I further acknowledge that I have received a copy of the brochure prepared by NICA.
>
> DATED this ____ day of _____________, 199__.
>
> ________________________
> Signature
>
> ________________________
> (NAME OF PATIENT)
>
> ________________________
> Social Security Number
>
> Attest:
>
> ________________________
> (Nurse or Physician)
>
> Date: ________________

10. Here, Mrs. Ferguson acknowledges receipt of the Notice to Obstetric Patient, and therefore notice that Doctors Levin and Williams were participants in the Plan, but denies receipt of the brochure prepared by NICA. Notably, it is that brochure, titled Peace of Mind for An Unexpected Problem, which contains the "clear and concise explanation of a patient's rights and

limitations under the [P]lan" required by the notice provisions of Section 766.316, Florida Statutes.[6]

11. In response to Mrs. Ferguson's denial, and to buttress its argument that Mrs. Ferguson received the brochure, Mease Hospital offered proof regarding the customary practice employed by A Woman's Place for all new patients. According to Joanie Perkins, the OB coordinator, all new patients were routinely handed a number of forms (the packet) to fill out on their first visit, including the Notice to Obstetric Patient, with a copy of the NICA brochure attached.

12. The packets were prepared by Ms. Perkins once or twice a month in quantities of 20 or 30, and stored at her desk until needed. Then, the day preceding a new patient's first visit, she would place a packet inside the new patient's file (also referred to as a chart) and give the file to the front desk clerk. On arrival, the front desk clerk would hand the packet (on a clipboard) to the new patient. When returned to the clerk, the forms were then given back to Ms. Perkins, who would put them in the patient's chart.

13. Following completion of the forms, a new patient was routinely seen by Ms. Perkins, who entered certain basic information on the patient's antepartum record (such as, the date of the first visit; the patient's name, address, date of birth, and insurance carrier; the hospital where delivery was to occur;

and height and weight). It was also during this period that Ms. Perkins routinely distributed to the new patient what was referred to as the OB packet. That packet included a folder from Mease Hospital (also referred to by the hospital as their baby book), which contained information about the hospital and other materials, including pre-registration papers. The OB packet also included a prenatal care booklet, as well as education materials pertaining to Lamaze and exercise classes, and information pertaining to anesthesia. Samples of pre-natal vitamins, coupons for diaper bags, and other miscellaneous materials were also included in the OB packet. Following her meeting with Ms. Perkins, the new patient was then referred to a physician or nurse midwife to complete her initial visit.

14. Contrasted with the conclusion one would draw from her acknowledgment execution of the Notice to Obstetric Patient and the customary practice of A Woman's Place, Mrs. Ferguson testified that not only was the NICA brochure not attached to the notice she signed, but the only items she received that day were a book titled Child Birth Planner and some prenatal vitamins. The reasons for Mrs. Ferguson's statements are two-fold. First, according to Mrs. Ferguson, she recalls that one of the forms referred to an attachment or additional document that was not included, and that when she brought this oversight to the attention of the front desk clerk she was unable to locate one.

Of note, the only form Mrs. Ferguson signed that day that referred to another document she should have received was the Notice to Obstetric Patient. Second, Mrs. Ferguson observed that she is compulsive regarding the retention of documents, and that with regard to her pregnancy with Casey she retained every document she received from, inter alia, A Woman's Place and Mease Hospital. Those documents, which Mrs. Ferguson identified as Petitioners' Exhibit 5A-5Y at hearing, did not include a NICA brochure or a Mease Hospital baby book, but did include two pages of education materials pertaining to Lamaze and exercise classes, and information pertaining to anesthesia, all of which were customarily included in the new patient OB packet. Also included was a booklet Mrs. Ferguson received when she participated in a tour of the Mease Hospital Maternity Center. Of note, the availability of Maternity Center tours was a topic addressed in the hospital's baby book.

15. Here, giving due consideration to the proof, it must be resolved that, more likely than not, Mrs. Ferguson received the NICA brochure on her initial visit, as evidenced by her signature on the Notice to Obstetric Patient and as one would anticipate from the customary practice of A Woman's Place. It is further resolved that, more likely than not, Mrs. Ferguson received the OB packet on her initial visit, which included a Mease Hospital baby book.

16. In concluding that Mrs. Ferguson did receive a copy of the NICA brochure on her initial visit, the testimony of Mrs. Ferguson to the contrary, has clearly not been overlooked. However, Mrs. Ferguson's testimony, both in deposition and at hearing, demonstrates that she had very little recall of the events which took place during her initial visit. Moreover, while Mrs. Ferguson suggests that the front desk clerk could not locate a NICA brochure, the compelling proof reflects that the brochures were readily available and that staff was aware they could be obtained at Ms. Perkins' desk.

17. In concluding that Mrs. Ferguson also received the OB packet on her initial visit, the testimony of Mrs. Ferguson to the contrary has also not been overlooked. However, for reasons similar to those noted with regard to the NICA brochure, Mrs. Ferguson's testimony has been found unpersuasive.

18. While Mrs. Ferguson received notice on behalf of the participating physician, the proof failed to demonstrate that Mease Hospital provided any pre-delivery notice, as envisioned by Section 766.316, Florida Statutes. Moreover, there was no proof offered to support a conclusion that the hospital's failure to accord Mrs. Ferguson pre-delivery notice was occasioned by a medical emergency or that the giving of notice was otherwise not practicable.

19. In reaching such conclusion, the inclusion of the hospital's name in the Notice to Obstetric Patient provided by A Woman's Place to Mrs. Ferguson has not been overlooked. However, the reason the hospital's name was included on the form stands unexplained, and there is no proof that A Woman's Place was requested or authorized to provide notice on behalf of the hospital. Indeed, for all that appears of record, the inclusion of the hospital's name was gratuitous, and can hardly be deemed to satisfy the hospital's independent obligation under Section 766.316, to provide notice to Mrs. Ferguson.[7]

20. Finally, in concluding that the hospital did not provide pre-delivery notice as envisioned by the Plan, the testimony offered by the hospital (through the deposition of Rosemary Atkinson, Intervenor's Exhibit 1), wherein she testified that the hospital routinely included a copy of the NICA brochure in its baby book, has likewise not been overlooked. However, given the absence of proof regarding the manner in which the hospital's baby books were assembled, the method employed to distribute them to physicians, and the manner in which the books were safeguarded at the physician's office prior to distribution, such proof is inadequate to allow a conclusion to be drawn with any sense of confidence that a baby book given to a patient, such as Mrs. Ferguson, contained a NICA brochure. Moreover, even if it could be demonstrated that the baby book contained a copy of

the NICA brochure (commingled with other papers) when it was given to Mrs. Ferguson, the absence of any statement or explanation to draw her attention to the brochure, or its significance, could hardly be considered notice as that word is commonly understood and as that word is used in the Plan.

CONCLUSIONS OF LAW

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.")

28. Here, it has been established that the physician who provided obstetrical services at birth was a "participating

physician," as that term is defined by the Plan, and that Casey suffered a "birth-related neurological injury," as that term is defined by the Plan. Consequently, Casey qualifies for coverage under the Plan. Section 766.309, Florida Statutes.

29. While Casey 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 physician and 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 health care 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.").

30. Pertinent to the issue of notice, Section 766.316, Florida Statutes, provided, at the time of Casey's birth, as follows:[8]

> 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.

31. 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.

32. 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.[9] 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.

33. 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."), and Levin v. Dade County School Board, 442 So. 2d 210, 212 (Fla. 1983)("Our views about the wisdom or propriety of the notice requirement are irrelevant because the requirement is so clearly set forth in the statute . . . Consideration of the efficacy of or need for the notice requirement is a matter wholly within the legislative domain.") 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).

34. Given the foregoing, it must be resolved that where, as here, notice was not given by the hospital, the patient 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 her 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 participating physician may have complied with the notice provisions, as he did in this case, does not alter the conclusion reached.

35. 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 hospital failed to give the patient notice, neither the participating physician (even though he 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. If rejected, the claimants may proceed with their civil remedies, and the health care providers may not assert Plan exclusivity to defeat such civil suit.

36. 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 suit) 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.)

37. 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 claimant's 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.

38. Having resolved that the notice provisions of the Plan were not satisfied and the claimants may, at their election, pursue their civil remedies without limitation, it would appear unnecessary to resolve the remaining issues raised by

Petitioners. Nevertheless, since the likelihood cannot be foreclosed that such issues may ultimately prove ripe for review they are summarily addressed as follows. First, Petitioners' suggestion that the exclusiveness of remedy provisions of the Plan are not an available defense to a nurse midwife or hospital when no civil claim has been made against participating physician is rejected as contrary to the express language of the statute. Section 766.303(2), Florida Statutes. Second, Petitioners' suggestion that the exclusiveness of remedy provisions of the Plan do not apply where, as here, the nurse midwife and hospital did not give notice requires a dual response. As for the nurse midwife, her lack of participation in the Plan is not relevant where, as here, obstetrical services were otherwise provided at birth by a participating physician. Sections 766.309(1) and 766.31, Florida Statutes, and Fluet v. Florida Birth-Related Neurological Injury Compensation Association, 788 So. 2d 1010 (Fla. 2d DCA 2001). The consequences of the hospital's failure to accord notice is discussed supra. Finally, Petitioners' suggestion that the amendments to Sections 766.301(1)(d) and 766.304, Florida Statutes (1998 Supp.), which accord the administrative forum exclusive jurisdiction to resolve whether claims are covered by the Plan, may not be applied retroactively must be rejected as contrary to the express language chosen by the legislature. Section 6, Chapter 98-113, Laws of Florida

("The amendments to sections 766.301 and 766.304, Florida Statutes, shall take effect July 1, 1998, and shall apply only to claims filed on or after that date and to that extent shall apply retroactively regardless of the date of birth.") To the extent Petitioners' contention raises constitutional implications, they are beyond the jurisdiction of the Division of Administrative Hearings to resolve. See Palm Harbor Special Fire Control Dist. V. Kelly, 516 So. 2d 249 (Fla. 1987), Cook v. Florida Parole and Probation Commission, 415 So. 2d 845 (Fla. 1st DCA 1982), and Hays v. Department of Business Regulation, 418 So. 2d 331 (Fla. 3d DCA 1982). However, these issues appear to have been addressed by the trial court in its order of February 26, 2001, discussed supra.

39. 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," he 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 Maria Ferguson and Garry Ferguson, as parents and natural guardians of Casey Ferguson, a minor, and NICA's proposal to accept the claim for compensation be and the same are hereby approved.

IT IS FURTHER ORDERED, 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. Maria Ferguson and Garry Ferguson, as the parents and natural guardians of Casey Ferguson, 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 18th day of December, 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 18th day of December, 2001.

ENDNOTES

1/ The issues raised by the petition have been restated, and those which raised various notice issues are subsumed in the more general issue of whether the notice provisions of the Plan were satisfied. As originally pled, the issues are noted in the Preliminary Statement which follows.

2/ Mease Hospital's Exhibit 3 was marked for identification only.

3/ In reaching such conclusion the fact that services were also rendered during the course of labor by Lenore V. McCall, C.N.M., and that she was not, at the time, a participating physician has not been overlooked. However, her lack of participation is not dispositive where, as here, obstetrical services were otherwise provided at birth by a participating physician. Sections 766.309(1) and 766.31, Florida Statutes, and Fluet v. Florida Birth-Related Neurological Injury Compensations Association, 788 So. 2d 1010 (Fla. 2d DCA 2001).

4/ Petitioners also contend that Lenore McCall, the nurse midwife who provided services at birth, failed to give notice. Notably, under the notice provisions of the Plan, it is only the hospital and the participating physician that are required to give notice. Section 766.316, Florida Statutes. Consequently, Ms. McCall's failure is not relevant.

5/ Mrs. Ferguson completed the form by entering the date, her name, and social security number, and then affixed her signature.

6/ While Petitioners contend otherwise, it is resolved that the brochure prepared by NICA, titled Peace of Mind for An Unexpected Problem, satisfies the requirements of Section 766.316, Florida Statutes.

7/ While no proof was offered from A Woman's Place or the hospital to explain why the hospital's name was included on the Notice to Obstetric Patient Mrs. Ferguson was provided, a likely explanation appears from the deposition testimony of Mrs. Lynn Larson, Executive Director of the Florida Birth-Related Neurological Injury Compensation Plan. (Petitioners' Exhibit 3).

Therein, reference is made to a proposed notice form NICA sent to all participating physicians and hospitals for their consideration in December 1995. That proposed form provided, as follows:

NOTICE TO OBSTETRIC PATIENT
(See Section 766.316, Florida Statutes)

I have been furnished information by NAME OF DOCTOR AND/OR HOSPITAL prepared by the Florida Birth Related Neurological Injury Compensation Association, and have been advised that NAME OF DOCTOR is a participating physicians in that program, wherein certain limited compensation is available in the event certain neurological injury may occur during labor, delivery or resuscitation. For specifics on the program, I understand I can contact the Florida Birth Related Neurological Injury Compensation Association (NICA), 1435 East Piedmont Drive, Suite 101, Tallahassee, Florida 32312, (904) 488-8191. I further acknowledge that I have received a copy of the brochure prepared by NICA.

DATED this ____ day of _____________, 199__.

____
Signature

____
(NAME OF PATIENT)
Social Security No.:

Attest:

____
(Nurse or Physician)

Date: ________________

This form is informational only, and each person, participating physician or hospital should contact their own

attorney to ensure compliance with Section 766.316, Florida Statutes.

Here, it appears likely that A Woman's Place simply embraced the generic form, and blindly adopted its format.

8/ 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.)

Chapter 98-113, Section 7, 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."

9/ 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.