STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN ROMINE and REBECCA ROMINE, as parents and natural guardians of LOREN ROMINE, a minor,	)	
Petitioners,	)	
vs.	)	Case No. 01-2411N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent.	)	

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 January 17, 2002, by teleconference.

APPEARANCES

For Petitioner: Scott R. McMillen, Esquire
McMillen, Reinhart & Voght, P.A.
111 North Orange Avenue, Suite 1450
Orlando, Florida 32801

For Respondent: Donald H. Whittemore, Esquire
Phelps Dunbar LLP
100 North Tampa Street, Suite 3600
Tampa, Florida 33602

STATEMENT OF THE ISSUES

1. Whether Loren Romine, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

2. If so, whether Petitioners' recovery, through settlement of a civil action for medical malpractice against the treating obstetrician and hospital, bars them from recovering benefits under the Plan.

PRELIMINARY STATEMENT

On June 14, 2001, John Romine and Rebecca Romine, as parents and natural guardians of Loren Romine, a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan. Pertinent to this case, apart from averring that Loren suffered an injury compensable under the Plan, the petition included the following allegations regarding a prior civil action:

> 8. Prior to filing this claim for NICA benefits, Petitioners brought a medical negligence claim against the Hospital and Dr. Shakfeh arising out of allegations of inadequate informed consent for the VBAC procedure and failing to recognize and appropriately respond to signs of impending uterine rupture during the labor itself. That tort case was filed in Hernando County, Case No. 99-857-CA-01 on April 12, 1999. Both defendants raised affirmative defenses that they were immune from suit pursuant to Florida Statute Section 766.303. Petitioners

> replied to that affirmative defense by alleging that defendants were barred from claiming immunity by failing to provide adequate notice to the Romines of their participation in the NICA Plan. Prior to any ruling on the merits on that or any other related matter, the Petitioners and the tort defendants agreed to settle the underlying tort claim for discounted sums of money intended to compensate LOREN ROMINE for her future wage losses and her intangible damages, neither of which would normally be covered by NICA anyway, and preserving the family's rights to now seek NICA compensation . . . .
>
> 9. Petitioners claim a right to recover NICA benefits herein in spite of their prior tort settlement, pursuant to the holding in Gilbert v. Florida Birth Related Injury Compensation Association, 724 So. 2d 688 (Fla. 2d DCA 1999). Petitioners acknowledge that there was an amendment to Florida Statute §766.304 in 1998, stating that, " . . . An action may not be brought under §766.301-316 if the claimant recovers or final judgment is entered." Petitioners contend that this provision is inapplicable as to this claim for numerous reasons, including without limitation, Petitioners have not recovered any of the damages which would otherwise be available under NICA, so there has been no "recovery." Reading this amendment in any way other than as to prevent a double recovery for the same damages, would be an unconstitutional retroactive deprivation of LOREN's substantive rights to these benefits which had accrued to her on the date of her birth.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on June 18, 2001. NICA reviewed the claim and on August 31, 2001, filed its response to the petition. In its response, NICA denied

compensability and averred, inter alia, that Petitioners were barred under the provisions of Section 766.304, Florida Statutes, from recovering compensation under the Plan by virtue of their settlement with the treating obstetrician and hospital.

By notice dated October 19, 2001, a hearing was scheduled for January 17, 2002, to resolve whether Loren's injury was compensable under the Plan, as well as the defenses raised by NICA.

Prior to the hearing, the parties agreed that the claim and affirmative defenses be resolved on a stipulated record. That record consisted of a Joint Stipulation of Facts (with exhibits), filed January 14, 2002, a First Supplement to Joint Stipulation of Facts (with exhibits), filed January 16, 2002, and a Second Supplement to Joint Stipulation of Facts (with exhibits), filed January 16, 2002. Moreover, at hearing, the parties agreed that the medical records filed with DOAH on June 14, 2001, be received into evidence as Joint Exhibit 1. No witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed January 31, 2002, and, at their request, the parties were accorded until February 20, 2002, to file proposed final orders. Consequently, the requirement that a final order be rendered within 30 days after the transcript has been filed was waived. Rule 28-

106.216(2), Florida Administrative Code. Both parties elected to file such a proposal, and they have been duly considered.

FINDINGS OF FACT

Findings related to compensability

1. John Romine and Rebecca Romine are husband and wife, as well as the natural parents and court-appointed guardians of the property of Loren Romine (Loren), a minor.

2. Loren was born January 26, 1998, at Columbia Regional Medical Center - Oak Hill, a hospital located in Brooksville, Hernando County, Florida, and her birth weight exceeded 2,500 grams.

3. The physician providing obstetrical services at Loren's birth was Samir Shakfeh, M.D., who, at all times material hereto, was a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes.

4. Pertinent to this case, coverage is afforded by the Plan for infants who have suffered 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." Section 766.302(2), Florida Statutes. See also Section 766.309(1)(a), Florida Statutes.

Here, the parties have stipulated, and the proof is otherwise compelling, that Loren sustained a "birth-related neurological injury," as that term is defined by the Plan.

Findings related to the settlement of the civil action

5. On December 29, 1998, the Romine family served a Notice of Intent to Initiate Litigation, pursuant to Section 766.106, Florida Statutes, on Dr. Shakfeh and Columbia Regional Medical Center - Oak Hill. At the conclusion of the 90-day pre-suit screening period, both the doctor and the hospital denied the claim and on April 12, 1999, the Romine family filed suit against the doctor and the hospital in the Circuit Court of Hernando County. That case was styled John Romine and Rebecca Romine, as parents and next friends of Loren Romine, a minor, and John Romine and Rebecca Romine, individually, Plaintiffs, v. HCA Health Services of Florida, Inc., d/b/a Columbia Regional Medical Center - Oak Hill, and Samir Shakfeh, M.D., Defendants, Case No. 99-857-CA01-Law.

6. Both the doctor and the hospital denied liability and raised, as an affirmative defense, Plan immunity. Petitioners replied to that defense, and alleged that the doctor and the hospital failed to provide notice as required by the Plan. Section 766.316, Florida Statutes.

7. On November 29, 2000, the hospital filed a Motion to Abate the civil action until the Romines filed a petition for

Plan benefits with the Division of Administrative Hearings and an administrative law judge had resolved whether Loren had suffered a compensable injury and whether the doctor and the hospital had complied with the notice provisions of the Plan. O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, 757 So. 2d 624, 627 (Fla. 5th DCA 2000)("All questions of compensability, including those which arise regarding the adequacy of notice, are properly decided in the administrative forum.")

8. The Motion to Abate was never set for hearing, and the case proceeded to mediation on December 7, 2000. Following mediation, the Romine family, the doctor, and the hospital, as well as the doctor's and the hospital's malpractice insurance carriers, reached an agreement to settle the civil suit. The settlement provided for an immediate cash payment to John Romine, Rebecca Romine, and Loren Romine, and the purchase of annuities for each of them. The total present value of the settlement was $5,250,000.

9. The written agreement between the Romines and the hospital included the following stipulation:

> The parties agree that no part of the Settlement is intended to impair in any manner plaintiff's rights to pursue NICA benefits nor is it intended to be a release of any NICA benefits that may be due plaintiffs. It has always been and remains the position of the Defendant that this claim

> is covered by NICA. The Defendant agrees that it will take no action and refrain from doing anything to defeat or disparage plaintiff's NICA claim in any way . . . .

The written settlement agreement between the Romines and the doctor contained a similar stipulation.

10. On or about January 18, 2001, the Romines filed a Petition for Approval and Apportionment of Settlement Involving Minor in the civil suit. And, on or about January 23, 2001, the Guardian Ad Litem filed a written report with the court, and recommended approval of the settlement and apportionment of the settlement as proposed by the Romines.

11. A hearing was held before the trial court on January 26, 2001, and on the same date the trial court entered an order granting the Petition for Approval and Apportionment of Settlement. The order further provided, as follows:

> 3. Nothing about this settlement is intended by the parties or this Court to limit or reduce the amount of compensation which may be recoverable by the Petitioners or LOREN ROMINE in a subsequent NICA proceeding, or from any other governmental program or private health insuror.

12. NICA was not a party to the settlement agreements entered into between the Romine family and the healthcare providers, nor was it advised of and nor did it participate in the hearing on the Petition for Approval and Apportionment of Settlement.

13. After the settlement was approved by the trial court, the settlement funds were disbursed to the Romines and releases were exchanged. Petitioners filed their claim for benefits under the Plan on June 14, 2001, seeking actual expenses for, inter alia, Loren's medical and hospital care, and a lump sum award to Mr. and Mrs. Romine of $100,000.

CONCLUSIONS OF LAW

Jurisdiction

14. 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.

Compensability

15. The Florida Birth-Related Neurological Injury Compensation 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.

16. 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, 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.

17. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, 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. If, however, NICA disputes the claim, as it has in the instant case, the dispute must be resolved by the assigned administrative law judge in accordance with the provisions of Chapter 120, Florida Statutes. Sections 766.304, 766.307, 766.309, and 766.31, Florida Statutes.

18. 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.

19. 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.

20. 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 Loren suffered a "birth-related neurological injury," as that term is defined by the Plan. Consequently, the administrative law judge is required to make an award of compensation unless, as alleged by NICA, Petitioners are barred from pursuing an award by virtue of their settlement of the civil suit. See Sections 766.304 and 766.31(1), Florida Statutes.

The statutory bar to recovery (Section 766.304, Florida Statutes)

21. The Florida Birth-Related Neurological Injury Compensation Plan (the "Plan") was enacted by the Legislature to address "a perceived medical malpractice . . . crisis affecting obstetricians and to assure the continued availability of essential obstetrical services." Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852, 855 (Fla. 2d DCA 1995), and Section 766.301(1), Florida Statutes. As enacted, the Plan "establishes an administrative system that provides compensation on a no-fault basis for an infant who suffers a narrowly defined birth-related neurological injury." Humana of Florida, Inc. v. McKaughan, supra, at page 855, and Section 766.301(2), Florida Statutes.

22. The Plan is a substitute, a "limited no-fault alternative," for common law rights and liabilities. Section 766.316, Florida Statutes. See also Section 766.303(2), Florida Statutes, and Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So. 2d 974

(Fla. 1996). Regarding the exclusiveness of the remedy afforded by the Plan, Subsection 766.303(2) provides:

> (2) The rights and remedies granted by this plan on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, his personal representatives, parents, dependents, and next of kin, at common law or otherwise, against any person or entity directly involved with the labor, delivery, or immediate postdelivery resuscitation during which such injury occurs, arising out of or related to a medical malpractice claim with respect to such injury; except that a civil action shall not be foreclosed where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property, proved 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 provided for in s. 766.311.

23. With but two exceptions, the Plan forecloses any civil action against a NICA participant when the injury is of the type defined in Section 766.302(2), Florida Statutes. See Barden v. Haddox, 695 So. 2d 1271 (Fla. 5th DCA 1997). The first exception is prescribed by Subsection 766.303(2), which permits a civil action "where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property." Notably, such suit must be "filed prior to and in lieu of payment of an award under ss.

766.301-766.316." The second exception is based on an interpretation of Section 766.316, which provides:

> 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 . . . .

24. In Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 309 (Fla. 1997), the Supreme Court observed that:

> . . . 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 healthcare provider participating in the NICA plan or using a provider who is not a participant and thereby preserving her civil remedies . . . .

Consequently, the Court concluded that:

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

Stated differently, where notice is not given, Plan immunity is not a defense to a civil action. See also Braniff v. Galen of

Florida, Inc., 669 So. 2d 1051, 1053 (Fla. 1st DCA 1995)("The presence or absence of notice will neither advance nor 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.")

25. Apart from the foregoing exceptions, the Plan is designed to foreclose any civil action against a NICA participant when the injury is of the type defined in Section 766.302(2), Florida Statutes; however, the Plan "is not without defects." Central Florida Regional Hospital, Inc. v. Wagner, 656 So. 2d 491, 493 (Fla. 5th DCA 1995). Pertinent to this case, the Wagner court succinctly described the problem commonly associated with implementation of the Plan, as follows:

> . . . Claims under the act are commenced by a "claimant" who files a petition seeking compensation. The Division of Administrative Hearings . . . is charged with providing the administrative hearings for the participating health care providers and the claimant. § 766.305, Fla.Stat. (1993). Claimants are defined by section 766.302(3):
>
> (3) "Claimant" means any person who files a claim pursuant to s. 766.305 for compensation for a birth-related neurological injury to an infant. Such a claim may be filed by any legal representative on behalf of an injured infant; and, in the case of a deceased infant, the claim may be filed by an administrator, personal representative, or other legal representative thereof.

. . . In the instant case, the persons defined as claimants under the statute have taken the position that their infant's injuries do not qualify or they have elected not to make a claim under the act. The defendants disagree that the injuries do not qualify, but are unable to initiate administrative proceedings because they do not fit the statutory definition of claimant and no provision is made elsewhere for them to initiate proceedings under the act.

Since the nature of the injuries causing the death of the plaintiffs' infant is disputed and apparently cannot be resolved without factual findings, and, since no claim as been filed with the Division, the circuit court cannot abate or dismiss the action brought by the plaintiffs without determining whether the injuries are neurological in nature. But, how must the circuit court proceed to determine this issue? The circuit court has denied the defendants' request for a pre-trial evidentiary hearing to determine the nature of the injuries. That denial leaves the issue to be resolved by the jury requested by the plaintiffs.

* * *

The trial court's denial of petitioners' motions is affirmed because we have found no authority for the proposition that the trial court lost or was required to relinquish jurisdiction to an administrative agency to resolve the dispute over the nature of the injuries.

* * *

ORDER ON MOTION FOR CERTIFICATION

BY ORDER OF COURT:

ORDERED that the motion to certify question as one of great public importance filed by

> David C. Mowere, et al., pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v) is hereby granted and we certify the identical question presented in Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852 (Fla. 2d DCA 1995):
>
> DOES AN ADMINISTRATIVE HEARING OFFICER HAVE THE EXCLUSIVE JURISDICTION TO DETERMINE WHETHER AN INJURY SUFFERED BY A NEW-BORN INFANT DOES OR DOES NOT CONSTITUTE A "BIRTH-RELATED NEUROLOGICAL INJURY" WITHIN THE MEANING OF THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, SECTIONS 766.301-316, FLORIDA STATUTES (1993), SO THAT A CIRCUIT COURT IN A MEDICAL MALPRACTICE ACTION SPECIFICALLY ALLEGING AN INJURY OUTSIDE THE COVERAGE OF THE PLAN MUST AUTOMATICALLY ABATE THAT ACTION WHEN THE PLAN'S IMMUNITY IS RAISED AS AN AFFIRMATIVE DEFENSE PENDING A DETERMINATION BY THE HEARING OFFICER AS TO THE EXACT NATURE OF THE INFANT'S INJURY?

In Central Florida Regional Hospital, Inc. v. Wagner, 672 So. 2d 34 (Fla. 1996), the court answered the question, as follows: "Since we have already answered the identical question in the negative in Florida Birth-Related Neurological Injury Compensation v. McKaughan, 668 So. 2d 974 (Fla. 1996), the district court decision is approved."

26. The seminal case of Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852 (Fla. 2d DCA 1995), approved Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So. 2d 974 (Fla. 1996), and its progeny Gilbert v. Florida Birth-Related Neurological Injury Compensation Association, 724 So. 2d 688 (Fla. 2d DCA 1999), precipitated the

amendments to Sections 766.301 and 766.304, Florida Statutes, at issue in this case, and discussed infra. Consequently, these cases, commonly referred to as the McKaughan litigation, provide insight to the Legislature's intent when it amended Sections 766.301 and 766.304.

27. Pertinent to this case, the history of the McKaughan litigation was described by the court in Gilbert, as follows:

> This litigation began in January 1992 when Jaimes McKaughan and Darlene McKaugan-Lack, Michael's parents, filed a medical malpractice action against William L. Capps, M.D., Kenneth Soloman, M.D., and their professional associations, and Humana of Florida, Inc., d/b/a Humana Women's Hospital Tampa. The suit alleged that the defendants' negligence caused Michael to suffer injuries at or near the time of his birth on May 19, 1989, which rendered him a quadriplegic with substantial mental impairment. Dr. Capps provided the obstetrical services during Michael's birth, and Dr. Soloman provided neonatal care subsequent to the birth. The defendants asserted, as affirmative defenses, that the suit was barred by virtue of the Plan's statutory provisions affording an exclusive administrative remedy for infants who sustain birth-related neurological injuries.
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> The trial court stayed the action and directed the McKaughans to file a petition for benefits under the Plan. They did so, but alleged in their petition that Michael had not suffered a birth-related neurological injury as defined by the Plan. In that proceeding, the administrative law judge dismissed the petition, finding that
>
> > it would be rather anomalous to accede, as suggested by the

> circuit court, and accept the petition, as filed, where the petitioners have the burden of demonstrating entitlement to benefits under the Plan, but propose to prove a negative: that they are not entitled to such benefits. Section 766.309(1)(a).

The medical malpractice defendants, who had been granted leave to intervene in the administrative proceeding, together with the Florida Birth-Related Neurological Injury Compensation Association (NICA), appealed that decision to this court.

In Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852 (Fla. 2d DCA 1995)("McKaughan I"), this court affirmed the dismissal, holding that the issue of the exclusive remedy of the Plan was the proper subject of litigation and determination in the circuit court as an affirmative defense in that action. We certified the issue to our supreme court. In Florida Birth-Related Neurological Injury Compensation Ass'n v. McKaughan, 668 So. 2d 974 (Fla. 1996) ("McKaughan II"), the supreme court approved our decision, holding that the Plan does not vest exclusive jurisdiction in an administrative hearing officer to determine if an injury suffered by a newborn infant is covered by the Plan when the Plan's provisions are raised as an affirmative defense to a medical malpractice action in the circuit court.

The action in the circuit court then resumed, where Humana filed a motion to appoint a guardian ad litem for Michael. The motion alleged that a conflict of interest existed between Michael and his parents on the issue of whether he had suffered a birth-related neurological injury covered by the Plan. Richard Gilbert was appointed as the guardian ad litem on May 7, 1996. On May 16, 1996, he filed an administrative petition on Michael's

behalf for Plan benefits. However, the claim was abated by order dated July 8, 1996, pending a Florida Supreme Court decision on the issue of pre-delivery notice of NICA participation.

The civil action then proceeded towards a scheduled trial date of April 14, 1997. Prior to trial, a settlement was reached with Humana and Dr. Capps. During the trial, Dr. Soloman settled. There was no judicial determination of the defendants' affirmative defense.

The stay on the guardian's administrative petition was lifted on July 30, 1997, and on August 12, 1997, the guardian advised the agency that he wished to proceed with his claim. NICA then filed its "Response to Petition and Motion for Final Summary Order" wherein it asserted that the guardian's claim was waived or otherwise barred by the settlement of the civil action. The administrative law judge ordered the parties to provide a stipulated record, which they did. In pertinent part, that stipulation provided:

1. Michael was a born-alive infant at Humana Women's Hospital, a participant in the Plan.

2. The physician providing the obstetrical services during Michael's birth was Dr. Capps, a participant in the Plan.

3. At or hear the time of Michael's birth, he suffered a fracture of his cervical vertebra, a transected spinal cord, and other neurological injuries.

4. Michael's parents instituted a medical malpractice action where the defendants asserted, as affirmative defenses, the claim was barred by the Plan's statutory provisions.

> 5. The civil action was settled. The trial court dismissed the action with prejudice without a resolution of the defendants' affirmative defenses. The guardian participated in the settlement as guardian ad litem. The trial court did not make a judicial determination that Michael suffered a birth-related injury as defined by the Plan.
>
> The stipulation went on to identify the following disputed issues of fact:
>
> 1. Whether Michael did in fact suffer a "birth-related neurological injury" as defined in section 766.302(2), Florida Statutes (Supp. 1988), so as to entitle him to benefits?
>
> 2. If not barred by the settlement of the civil action, how much compensation is to be awarded?
>
> Thereafter, [on December 4, 1997] the administrative law judge entered his "Summary Final Order of Dismissal" determining that Michael's claim was barred by the doctrine of election of remedies and that to permit the petition to proceed would thwart the purpose of the Plan.

28. In Gilbert, the court resolved that a claimant could receive the proceeds of a settlement with the defendant physician and hospital in a civil suit and still pursue a claim for benefits under the Plan. The court expressed its reasoning as follows:

> The sole issue is whether the obtaining of benefits as a product of a civil action forecloses access to Plan benefits. The answer is yes if that action resulted in a factual determination that the infant was not a NICA baby. Conversely, if an

> administrative petition results in a determination that the infant is a NICA baby, a civil action is foreclosed. The remedies are mutually exclusive, but only upon a determination of whether the infant is a NICA baby. That is the core issue of both the civil action and the administrative petition. To maintain the civil action and avoid the exclusive remedy provisions of section 766.303(2), Florida Statutes (Supp. 1988), the McKaughans alleged that Michael was not a NICA baby. The resulting settlement of that action, although it may imply that assertion to be true, fell short of such a determination, by admission or otherwise. The issue remains open to determination, as if neither the civil action nor the administrative proceeding had been commenced.

The court further noted that the facts of Gilbert did not fit within the law of election of remedies, and that the Legislature, at the time the Gilbert claim was filed, had not incorporated an election of remedies clause.[1]

29. In 1998, after the McKaughan decision, and while Gilbert was pending before the appellate court, the Legislature adopted Chapter 98-113, Laws of Florida, which amended Sections 766.301 and 766.304, Florida Statutes. Chapter 98-113, Section 6 provided that "[t]he 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 date of birth."

30. Pertinent to this case, the amendments (underlined) to Sections 766.301 and 766.304 were, as follows:

766.301 Legislative findings and intent.--

(1) The Legislature makes the following findings:

* * *

(d) The costs of birth-related neurological injury claims are particularly high and warrant the establishment of a limited system of compensation irrespective of fault. The issue of whether such claims are covered by this act must be determined exclusively in an administrative proceedings.

* * *

766.304 Administrative law judge to determine claims.--The administrative law judge shall hear and determine all claims filed pursuant to ss. 766.301-766.316 and shall exercise the full power and authority granted to her or him in chapter 120, as necessary, to carry out the purposes of such sections. The administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable. No civil action may be brought until the determinations under s. 766.309 have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303 . . . . An action may not be brought under ss. 766.301-766.316 if the claimant recovers or final judgment is entered . . . .

31. Here, the claim for benefits was filed June 14, 2001. Consequently, the amendments apply to this case. Chapter 98-113, Section 6, Laws of Florida, and O'Leary v. Florida Birth-

Related Neurological Injury Compensation Association, 757 So. 2d 624 (Fla. 5th DCA 2000).

32. By the amendments to Sections 766.301 and 766.304, the Legislature reacted "adversely to the result reached in McKaughan," and mandated that coverage be resolved exclusively in the administrative forum. O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, supra, at page 627. Additionally, by amending Section 766.304 to provide that "[a]n action may not be brought under ss. 766.301-766.316 if the claimant recovers or final judgment is entered," the Legislature evidenced its intent to adopt an election of remedies clause to avoid future claims such as those pursued in Gilbert. In all, by the amendments to the Plan, the Legislature evidenced its intention that "[t]he administrative law judge has exclusive jurisdiction to determine whether a claim . . . is compensable," that [n]o civil action may be brought . . . [or continued, if Plan exclusivity is raised as a defense] until the determinations under s. 766.309 have been resolved by the administrative law judge," and that if a claimant persists and "recovers or final judgment is entered" she or he may not pursue an award under the Plan.

33. Notwithstanding the amendments to Sections 766.301 and 766.304, Petitioners contend that this claim is controlled by Gilbert and, since they settled their civil suit before it was

resolved whether Loren was a NICA baby, they are entitled (as in Gilbert) to pursue NICA benefits. Essentially, Petitioners contend that they are entitled to pursue the relief that existed on the date of Loren's birth (January 26, 1998), and that to apply the amendments to Sections 766.301 and 766.304 as of the date the claim was filed (June 14, 2001), as prescribed by Chapter 98-113, Section 6 Laws of Florida, would be an unconstitutional retroactive deprivation of their substantive rights. Here, given the clear and unambiguous language chosen by the Legislature, Petitioners' contention must be rejected. Abramson v. Florida Psychological Association, 634 So. 2d 610, 612 (Fla. 1994)("Administrative agencies have the authority to interpret the laws which they administer, but such interpretation cannot be contrary to clear legislative intent."), and Hughes v. Variety Children's Hospital, 710 So. 2d 683 (Fla. 3d DCA 1998)(An agency is not allowed to render an interpretation of a statute which is contrary to the express terms of the statute). Moreover, the constitutionality of the Legislature's action is beyond the jurisdiction of the administrative law judge to address. See Palm Harbor Special Fire Control District v. Kelly, 516 So. 2d 249 (Fla. 1987)(An administrative agency has no power to declare a statute void or otherwise unenforceable), and Cook v. Florida Parole and Probation Commission, 415 So. 2d 845 (Fla. 1st DCA 1982)(The Division of Administrative Hearings does not

have jurisdiction to dispose of constitutional issues in a proceeding pursuant to the statutory section governing determination of rules by hearing officers.)

34. Finally, Petitioners contend that if the change to Section 766.304 is to be applied retroactively to them, that the word "recovers" should be narrowly construed to include only those damages recovered in the civil suit that otherwise would have been recoverable under the Plan, so as to prevent a double recovery. NICA argues, however, that there has been a recovery, as that term is used in Section 766.304 by virtue of the settlement, regardless of how the Petitioners in the underlying civil suit chose to characterize the settlement proceeds.

35. Here, it must be resolved, as contended by NICA, that by settlement of the civil suit Petitioners have recovered, as that term is used in Section 766.304. Notably, the Legislature did not choose to narrowly define the term "recovers," although the Legislature could easily have done so had it so chosen.[2] Consequently, the administrative law judge is not authorized to narrowly define the term "recovers," as Petitioners suggest. Abramson v. Florida Psychological Association, supra, and Hughes v. Variety Children's Hospital, supra. See also Lee v. Gulf Oil Corp, 148 Fla. 612, 4 So. 2d 868 (1941)(In construing a statute, the court must assume that the Legislature used particular wording advisably and for a purpose.) Moreover, as heretofore

noted, it is apparent that, by enacting the amendments to Sections 766.301 and 766.304, the Legislature reacted adversely to the result reached in McKaughan, and intended to adopt an election of remedies clause to preclude a repeat of Gilbert. Brannon v. Tampa Tribune, 711 So. 2d 97, 100 (Fla. 1st DCA 1998)("[T]he legislature is presumed to know the judicial constructions of a law when enacting a new version of the law.")

CONCLUSION

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

ORDERED that, given the provisions of Section 766.304, Florida Statutes, Petitioners may not pursue a claim under Sections 766.301-766.316, Florida Statutes, and the petition filed by John Romine and Rebecca Romine, as parents and natural guardians of Loren Romine, a minor, is dismissed with prejudice.

DONE AND ORDERED this 1st day of April, 2002, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of April, 2002.

ENDNOTES

1/ In Gilbert, at page 691, footnote 1, the court observed:

> 1. The Plan was first proposed by the 1987 Academic Task Force for Review of the Insurance and Tort Systems. See Galen of Fla., Inc. v. Braniff, 696 So. 2d 308 (Fla. 1997). 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 (1987 Va. Acts Ch. 540). Id. In 1990, the Virginia plan was amended to include, in relevant part, the following provision in its exclusivity clause, § 38.2-5002:
>
> D. Notwithstanding anything to the contrary in this section, a civil action arising out of or related to a birth-related neurological injury under this chapter, brought by an infant, . . . shall not be foreclosed against a nonparticipating physician or hospital, provided that (i) no participating physician or hospital shall be made a party to any such action or related action, and (ii) the commencement of any such action, regardless of its outcome, shall constitute an election of remedies, to the exclusion of any claim under this chapter . . . . 1990 Va. Acts Ch. 535 (emphasis added). In 1993, the Florida Legislature amended the Plan. See Ch. 93-251, Laws of Fla. (1993). Among other changes, the legislature reduced the time to file a Plan petition from seven years to five years. However, the legislature did not incorporate an election of remedies clause like Virginia's statute.

> In 1998, however, the legislature did amend section 766.304 to provide . . . [inter alia, that] [a]n action may not be brought under ss. 766.301-766.316 if the claimant recovers or final judgment is entered . . . .

As discussed infra, the amendments to Section 766.304 only applied to claims filed on or after July 1, 1998. Consequently, the amendments did not apply to and were not addressed in Gilbert.

2/ Similarly, like the Virginia plan discussed supra, the election of remedies provision adopted by the Legislature does not narrowly define the phrase "or final judgment is entered," to include only those occasions on which the plaintiff prevails or to preclude recovery of only those damages recovered in the civil suit that would otherwise have been recoverable under the Plan, so as to prevent a double recovery.
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COPIES FURNISHED:
(By certified mail)

Lynn Larson, Executive Director
Florida Birth-Related Neurological
Injury Compensation Association
1435 Piedmont Drive, East, Suite 101
Post Office Box 14567
Tallahassee, Florida 32312

Donald H. Whittemore, Esquire
Lawrence P. Ingram, Esquire
Stanley L. Martin, Esquire
Phelps Dunbar LLP
100 North Tampa Street, Suite 3600
Tampa, Florida 33602

Scott McMillen, Esquire
McMillen, Reinhart & Voght, P.A.
111 North Orange Avenue, Suite 1450
Orlando, Florida 32801

Samir Shakfeh, M.D.
11373 Cortez Boulevard, Suite 408
Brooksville, Florida 34613

Columbia Regional Medical Center-Oak Hill
11375 Cortez Boulevard
Spring Hill, Florida 34606

Ms. Charlene Willoughby
Agency for Health Care Administration
Consumer Services Unit
Post Office Box 14000
Tallahassee, Florida 32308

Mark Casteel, General Counsel
Department of Insurance
The Capitol, Lower Level 26
Tallahassee, Florida 32399-0300

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.