DOAH, DEPT. OF MANAGEMENT, STATE OF FLORIDA

AUSTIN K. JOSHNICK, by his Parents, CRAIG AND DEBBIE JOSHNICK
Petitioners
vs
THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION ("NICA")
Respondent
and
MICHAEL DAWSON, MD; DAVID O. PETERFREUND, MD; PATRICIA ST. JOHN, MD; BAY AREA WOMEN'S CARE, INC.; and MORTON PLANT HOSPITAL ASSOCIATION, INC.,
Intervenors

DOAH Case No. 03-0985N

WJK-C105

PETITIONERS' MOTION FOR REHEARING AND CLARIFICATION

Petitioners, through counsel, pursuant to Fla. RCP 1.530, move for rehearing on the Final Order entered April 7, 2004, and for its clarification–a finding whether Austin suffered a "birth-related neurological injury", as required by Fla. Stat. 766.309--stating:

1. UNDISPUTED FACTS SUPPORTING PROMISSORY ESTOPPEL CLAIM

1. Petitioners' claim of promissory estoppel is unified–the Hospital told them they were covered in a limited way for a qualifying injury, they relied in part on this representation, to decide not to more strongly insist on the planned Caesarean section.

2. Petitioners had other options, so their "patient choice" was not an illusion, but NICA's promise of "*Peace of Mind For an Unexpected Problem*" help induce them to go along with Dr. St. John's disastrous forceps delivery.

3. Proof of this was "two-fold"—first, Petitioners independently proved how and why the Hospital told Petitioners about NICA, without mentioning the crucial fact that Dr. St. John and her Group did not "participate" in NICA, or even that they had to.

A. What the Hospital Told Petitioners. Nurse Collins swore she would not have handed out NICA's official brochure–"*Peace of Mind for an Unexpected Problem*"–if she knew NICA did not cover Austin because the obstetricians had not

participated, for $5,000. (All Florida physicians must participate for $250/year.)

B. Nurse Collins' belief–told to Petitioners--that NICA covered Austin for limited compensation for a qualifying injury, was reasonable, under the circumstances:

(I) NICA did not give the Hospital a list of "participating physicians". The Hospital could not tell Nurse Collins *which* attending OBs participated in NICA–or even tell her if that participation was important. NICA testified that it did not think that information important enough, to share with the Hospital. NICA did not alert the Hospital to the possibility/ importance/danger of non-participating attending OBs;

(II) NICA's Pamphlet did not clearly tell the Hospital about this. It stated:

> *You are eligible for this protection if your doctor is a participating physician in the NICA Plan.* If your doctor is a participating physician, that means that your doctor has purchased this benefit for you in the event that your child should suffer a birth-related neurological injury, which qualifies under the law. *If your health care provider has provided you with a copy of this informational form*, your health care provider is placing you on notice that *one or more physician(s) at your health care provider participates in the NICA Plan.* [emphasis added]

The Pamphlet's last sentence, together with Fluet v. NICA, 788 So.2d 1010, 1011 (Fla. 2nd DCA 2001), strongly suggest that: the fact that the Hospital had participating OBs on staff was enough to satisfy NICA's "participating physician" requirement

(III) This is clear and convincing evidence that the Hospital was not well-informed enough about the intricacies of NICA, to warn its patients that some of the Hospital's attending OBs did not "participate" enough.

(IV) The Final Order states: "*...the brochure provides, unequivocally, that 'only injuries to infants delivered by participating physicians, as defined in s. 766.302(7), Florida Statutes, are covered by the Plan.'*"

This statement is "unequivocal", but it is not *clear*. The part of the Act cross-referenced, Fla. Stat. 766.302(7), states, in its entirety:

> "Participating physician" means a physician 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 the birth-related neurological injury compensation plan for the year in which the injury occurred. Such term shall not apply to any physician who practices medicine as an officer, employee or agent of the Federal Government.

There is nothing in this definition, to tell the Hospital, that "participation" requires a $5,000/year payment. (Hospital counsel even argued in this case, that payment of the $250 required of all Florida doctors, made Dr. St. John, "participating" in NICA.)

Neither the Pamphlet, nor Fla. Stat. 766.302(7), refer to the *correct* part of the Act–Fla. Stat. 766.314(4)(c). Even 766.314(4)(c) only mentions $5,000 as the "initial assessment", rather than an annual assessment.

Finding out that this assessment continued to be $5,000/year, requires a reference to Administrative action, but none of that was included in the Pamphlet, or in the information NICA supplied to the Hospital. Ms. Shipley's comment on page 226 of the Trial Transcript summed up the reason why NICA did not provide lists of NICA-participating OBs–"*[Hospitals] are not really that sophisticated, in most cases.*"

In this case, it never occurred to the Hospital (or at least to its Nurse, who handed out the Pamphlet) that Petitioners would *not* be covered, because Dr. St. John did not pay her $5,000 that year.

4. The Hospital's Limited Agency. On the Hospital's acting as NICA's agent, Petitioners never claimed that Nurse Collins acted as NICA's agent to "*bind*" NICA.

Petitioners only argued that the Hospital acted as NICA's agent to distribute the

Pamphlet (as required by Fla. Stat. 766.316), and to *explain* the Plan.

Since Petitioners received the Pamphlet after 5:00 PM–when NICA's phone shuts off--there was no one else to explain the Plan.

Many cases have ruled that handing out the insurer's *brochures* is an indication that a person is the insurer's *agent*, National Indemnity Co. of the South v. Greater Bethel Christian School, 778 So.2d 404 (Fla. 4th DCA 2001); Russell v. Eckert, 195 So.2d 617 (Fla. 2nd DCA 1967); et al.

Fla. Stat. 766.316 requires the Hospital to distribute NICA's brochure. There was no one else but the Hospital, to interpret the Pamphlet for NICA, between the hours of 5:00 PM and 8:00 AM. NICA made no other provision.

5. Though Petitioners truthfully admitted that they did not read the *entire* Pamphlet, before deciding not to insist on a Caesarean, they certainly both read its title, "*Peace of Mind for an Unexpected Problem.*" There is nothing inside the Pamphlet, to alert the Hospital or Petitioners, that they would not be covered, for an appropriate injury.

6. Since NICA's disclaimer in the "fine print" of the Pamphlet was inadequate, it does not matter that Petitioners did not read all of the fine print, Shands Teaching Hospital & Clinic v. Juliana, 863 So.2d 343 (Fla. 1st DCA 2003), review denied, 865 So.2d 481 (Fla. 2003); Stadelman v. Johnson and Progressive American Insurance Co., 842 So. 2d 1001 (Fla. 4th DCA 2003); and Rayburn v. Orange Park Medical Center, Inc., 842 So.2d 985 (Fla. 1st DCA 2003).

See also Roessler v. Nowak, et al., 858 So.2d 1158 (Fla. 2nd DCA 2003), for good discussions of "apparent authority".

7. Dr. St. John's Deposition Opinion v. Petitioners' and Witnesses' Testimony.

Dr. St. John's self-serving "opinion", referred to in Sections 17 and 18 of the Final Order, is inadmissable, under Fla. RCP 1.330(a).

Moreover, Dr. St. John's credibility in this case is seriously suspect. The Record flatly contradicts many of her statements in this case, sworn and unsworn.

Petitioners incorporate their Motions for Judicial Notice, and to Suppress Dr. St. John's Deposition, herein by reference. This part of the Final Order, inadvertently rests on a foundation of lies.

8. In contrast with Dr. St. John's bland assurances, Petitioners never testified that they read the Pamphlet, before they decided not to oppose the disastrous, vaginal birth.

Petitioners and their fact witnesses could not remember exact words Nurse Collins used, or even the exact number of times Dr. St. John expelled Lisa Weisickle from Debbie's delivery room, for asking about a Caesarean. Nonetheless, this is what the *truth* looks like, three years after the facts.

This will be Petitioners' only child. Unlike the spotty and inaccurate Hospital Notes, Petitioners and their fact witnesses vividly remember the gist of the important things to this case .

9. The Final Order credited Dr. St. John's statements over Petitioners. With the conflicting parts of the Record described, however, and additional evidence, it would be an abuse of discretion, and a violation of Fla. RCP 1.330(a), to continue to do so.

10. Clear and Convincing Evidence. On the Final Order's requirement that NICA's estoppel must be proved by "clear and convincing evidence", this standard only applies to jury trials, not to administrative actions, decided without a jury.

11. Though estoppel must be proved by "clear and convincing evidence" under

Workers Compensation Fla. Stat. 440.19, that requirement had to be added by statute. Similarly, Fla. Stat. 766.303 refers to "clear and convincing evidence", but only to allow a civil action for bad faith or malicious purpose.

12. Warren v. Dept. of Admin., 554 So.2d 568 (Fla. 5th DCA 1989), the leading case on estoppel for government benefits, cited by the Final Order, does not impose such a requirement. See also following Workers Compensation cases, previously submitted:

Painter v. Bd. of Public Instruction of Dade Co., 223 So.2d 33 (Fla. 1969);

Florida Workers' Compensation JUA v. Mundell, 765 So.2d 151 (Fla. 1st DCA 2000);

B & B Steel Erectors v. Burnsed, 591 So.2d 644 (Fla. 1st DCA 1991);

Criterion Leasing v. Gulf Coast Plastering & Drywall, 582 So.2d 799 (Fla. 1st DCA1991);

United Self Insured Services v. Reedy Carpets, 561 So.2d 1358 (Fla. 1st DCA 1990);

Atlantic Masonry v. Miller Construction, 558 So.2d 433 (Fla. 1st DCA 1990); et al.

In Branca v. City of Miramar, 634 So.2d 604 (Fla. 1994), the Supreme Court credited an unconstitutional city pension, for inducing the Mayor to retire, but did not require "clear and convincing evidence" of that inference.

II MOTION FOR CLARIFICATION AND RULING ON "BIRTH-RELATED INJURY"

13. On November 5, 2003, the Court rejected the parties' suggestion to bifurcate the trial–to try the question of promissory estoppel, first. Instead, Petitioners carefully (and expensively) proved that Austin suffered a "birth-related neurological injury".

14. At trial, the Court heard all evidence on promissory estoppel first. Petitioners then (expensively) proved damages and causation. If the Court wanted to rule as it ultimately did, in the Final Order, it could have done so, after Ms. Shipley's testimony. This, or an earlier ruling, would have saved Petitioners funds for experts they do not

have.

15. Fla. Stat. 766.309(1), applicable to this case (a 90-day extension of the Statute of Limitations was filed by other counsel in 2002), provides:

> The administrative law judge **shall make** the following determinations based upon all available evidence: (a) whether the injury claimed is a birth-related injury.

16. Because Dr. St. John's "facts" are suspect and inadmissable, Petitioners should also know how the Court will rule on the other side of their case. To require them to try the "injury" side of the case again, after winning rehearing on estoppel, would be cruel and unjust.

WHEREFORE, Petitioners request the Court to rehear the Final Order, and to clarify the Final Order, by making the findings required by the Act, and to grant other appropriate relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the above was furnished by US Mail, or by hand delivery, this 19th day of April, 2004, to *James A. Martin, Jr., Esq.*, MacFarlane Ferguson & McMullin, 625 Court Street, Suite 200, Clearwater, Florida 33756-5505; and *Donald H. Whittemore, Esq.*, Phelps Dunbar LLP, 100 South Ashley Drive, Suite 1900, Tampa, Florida 33602, and a copy thereof was filed by fax with *DOAH*, Dept. of Management Services, State of Florida, DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060.

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