STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MILVIA NAJERA AND MARVIN CHAVARRIA, on behalf of and as parents and natural guardians of MARVIN CHAVARRIA, a minor,	)	
Petitioners,	)	
vs.	)	Case No. 11-3402N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
SAMIR BEYDOUN, M.D., AND THE PUBLIC HEALTH TRUST OF MIAMI-DADE COUNTY,	)	
Intervenors.	)	

SUMMARY FINAL ORDER OF DISMISSAL

This Order addresses Respondent Florida Birth-Related Neurological Injury Compensation Association's (NICA's) Motion for Summary Final Order, Intervenor Samir Beydoun, M.D.'s Motion for Summary Final Order, and Intervenor Public Health Trust's "Amended" Motion for Summary Final Order.[1/]

FINDINGS OF FACT

1. On July 13, 2011, a "Petition Under Protest" styled "Milvia Najera and Marvin Chavarria, on behalf of and as parents

and natural guardians of Marvin Chavarria, a minor v. Florida Birth-Related Neurological Injury Compensation Association," was filed with the Division of Administrative Hearings (DOAH).

2. Pertinent to the pending motions are the allegations of paragraphs 3, 4, 5, 6, and 7 of the petition:

* * *

Name and Address of Physician

> 3. The physicians providing obstetrical services who were present at the birth are Resident Lucia Gaitan, M.D. . . . and Attending Samir N. Beydoun, M.D. . . .

Description of Disability

> 4. It is alleged that Marvin Chavarria currently suffers from developmental delay.

Time and Place of Birth

> 5. Jackson Memorial Hospital,[2/] 1611 N.W. 12th Avenue, Miami, FL 33136 on February 5, 2005.

Time and Place of Injury

> 6. Jackson Memorial Hospital, 1611 N.W. 12th Avenue, Miami, FL 33136 on February 5, 2005.

Statement of the Facts

> 7. This claim is not compensable under NICA as Marvin Chavarria's injury does not meet the definition of a birth-related neurological injury as defined in Florida Statute 766.302(2). The reasons for non-compensability are as follows:

> i. The child does not have substantial physical and mental impairments as defined by Florida Statutes 766.302(2).
>
> * * *

3. The Petition does not allege a lack of notice by the healthcare providers.[3/]

4. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on July 5, 2011; served Dr. Beydoun and Jackson Memorial Hospital, respectively, on July 16, 2011; and served Dr. Gaitan on or about July 21, 2011.

5. Upon appropriate petition and an August 16, 2011 Order, Samir Beydoun, M.D., was granted Intervenor status.

6. On October 13, 2011, after one extension of time in which to do so, NICA filed its response required by section 766.305(4), titled "Notice of Non-Compensability and Request for Evidentiary Hearing."

7. On October 24, 2011, Respondent NICA filed its Motion for Summary Final Order, with supporting affidavits. The thrust of Respondent's motion is that the petition for benefits was filed with DOAH on July 13, 2011, which is more than five years past the birth of the child, Marvin Chavarria, who was born on February 5, 2005. The motion states, "Accordingly, the claim is barred as a matter of law, and cannot qualify for an Award under the NICA Plan. . . . Notwithstanding, the issue of

compensability must be addressed." Respondent also submitted, with its Motion for Summary Final Order, two medical affidavits to the effect that the claim is not compensable. On October 24, 2011, Petitioners filed a Notice of Joinder in Respondent's Motion for Summary Final Order. On October 27, 2011, Intervenor Samir Beydoun, M.D., filed a Response in Opposition to Respondent's Motion for Summary Final Order.

8. On October 26, 2011, Intervenor Samir Beydoun, M.D., also filed a Motion for Summary Final Order, asserting that the Administrative Law Judge has jurisdiction to enter a summary final order solely determining that Petitioners' claim is barred by section 766.313, the statute of limitations for NICA claims. On October 28, 2011, Petitioners filed a Response and Objection to Intervenor's [Beydoun's] Motion for Summary Final Order, to which Response and Objection, Intervenor Beydoun filed an unauthorized Reply, on November 8, 2011.

9. By Order of November 18, 2011, a pending Petition to Intervene, filed on October 24, 2011, by Public Health Trust of Miami was granted,[4/] and, in an abundance of caution, this new Intervenor was given until November 30, 2011, to file a response to the two pending motions for summary final order. Public Health Trust of Miami filed no timely response(s), but joined in Dr. Beydoun's Motion by an untimely and unauthorized "Notice of Joinder" filed December 13, 2011; a Response Opposing [NICA's]

Motion for Summary Final Order, filed December 13, 2011; and an "Amended" Motion for Summary Final Order filed December 14, 2011.

10. All of the pleadings have been considered.

11. NICA's Motion for Summary Final Order alleged that the claim against NICA is barred by the statute of limitations for NICA claims.[5/] The birth certificate, which was filed with the Petition, confirms Marvin's date of birth as alleged in the Petition as February 5, 2005. No party has asserted otherwise. There also is no dispute that the Petition (claim) was filed on July 13, 2011. Therefore, there can be no reasonable debate that the NICA claim was filed more than five years beyond Marvin's birth date, and so, the claim is barred as a matter of law, and cannot qualify for an award under the NICA Plan.

12. NICA's Motion for Summary Final Order further alleged that Marvin's claim is not compensable because he did not suffer a "birth-related neurological injury" as defined in section 766.302(2), first, because there was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord during labor, delivery, or the immediate postdelivery period, and secondly, because Marvin does not suffer from a substantial motor (physical) impairment, both of which are elements of the definition of a compensable injury, at section 766.302(2). (See Conclusion of Law 32).

13. Attached to NICA's Motion for Summary Final Order was an affidavit by Donald C. Willis, M.D., a board-certified obstetrician with special competence in maternal-fetal medicine. Dr. Willis rendered the following opinion within a reasonable degree of medical probability:

* * *

> 5. In summary, baby was delivered with some mild respiratory distress that required bag and mask ventilation for about 30 seconds. Arterial blood gas was normal. The respiratory distress resolved without the need for intubation or mechanical ventilation. A tight Nuchal cord was present at birth, but did not result in oxygen deprivation.
>
> 6. There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery or the immediate post delivery period.
>
> 7. As such, it is my opinion that there was no oxygen deprivation or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery [sic] in the Hospital that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord. Accordingly, there was no causal event which would have rendered MARVIN CHAVARRIA permanently and substantially mentally and physically impaired as a result of same. (emphasis added).

14. Also attached to NICA's Motion for Summary Final Order was the affidavit of Michael S. Duchowny, M.D., a board-

certified pediatric neurologist, who rendered the following opinion within a reasonable degree of medical probability:

* * *

> 3. The Florida Birth-Related Neurological Injury Compensation Association retained me as its expert in pediatric neurology in the above-styled matter to examine the minor child, MARVIN CHAVARRIA, and review the medical records from both MARVIN CHAVARRIA and his mother, MILVIA NOTERA. [sic] The purpose of my review of the medical records and evaluation of MARVIN CHAVARRIA was to determine whether he suffers from an injury which rendered him permanently and substantially mentally and physically impaired, and whether such injury is consistent with an injury caused by oxygen deprivation or mechanical injury occurring during the course of labor, delivery, or the immediate post-delivery period in the hospital.
>
> 4. I evaluated MARVIN CHAVARRIA on October 5, 2011. A true and accurate copy of my Evaluation and Opinion is attached hereto as Exhibit 1. . . .
>
> 5. My Opinion is reflected in my Report and is as follows:
>
> In SUMMARY, Marvin's neurological examination today reveals findings consistent with autism and pervasive developmental disorder (PDD). He has severe social and behavioral problems and also manifests expressive language delay, generalized hypotonia and has a history of a sleep disorder. There are no focal or lateralizing findings noted.
>
> I reviewed medical records that were sent on August 16, 2011. The records do not contain information that points to either an hypoxic event or mechanical injury in the course of

> labor or delivery. Marvin was born at term at Jackson Memorial Hospital and had Apgar scores of 9, 9 and 9 at 1, 5 and 10 minutes. Although he did have a tight nuchal cord, it was removed immediately. The postnatal course was unremarkable. Marvin's diagnostic studies further confirm that his neurological disabilities are developmentally based and likely the result of problems in brain maturation which began in utero. The physical examination today provides additional confirmation that Marvin does not suffer from a substantial motor impairment.
>
> 6. For the above reasons, I do not believe that Marvin should be considered for compensation under the NICA statute. . . .[6/] (emphasis added).

15. Intervenor Beydoun's Response to NICA's Motion for Summary Final Order urges the granting of NICA's motion to the extent the claim is barred by the statute of limitations, but also urges denial of NICA's motion "because the ALJ cannot reach the question of compensability where, as here, the claim is barred by the statute of limitations.[7/]

16. Intervenor Beydoun has also filed a Motion for Summary Final Order asserting the same arguments in favor of dismissal under the statute of limitations and against dismissal upon grounds of non-compensability, because, he argues, once the statute has run, the Administrative Law Judge is without jurisdiction to determine either compensability or notice. Intervenor Public Health Trust has joined in Dr. Beydoun's Motion for Summary Final Order, and filed a Response to Motion

for Summary Judgment and an Amended [sic] Motion for Summary Final Order.[8/]

17. Petitioners joined in NICA's Motion for Summary Final Order and oppose Intervenor Beydoun's Motion for Summary Final Order. It may be assumed they also oppose the Public Health Trust's late-filed items.

18. Despite both Intervenors' opposition upon the issue of the Administrative Law Judge's jurisdiction to enter a summary final order regarding compensability where the statute of limitations for the filing of a NICA claim has run, no one has posed a challenge concerning the sufficiency of NICA's Motion for Summary Final Order's factual allegations or supporting affidavits. Given the record and the medical affidavits, there is no genuine issue of material fact that Marvin, the child named in the Petition, did not suffer a birth-related neurological injury as defined in section 766.302(2). Accordingly, NICA's Motion for Summary Final Order is, for reasons appearing more fully in the Conclusions of Law, well-founded.[9/]

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. §§ 766.301-766.316, Fla. Stat.

20. However, as a threshold jurisdictional issue, this cause, as against NICA, is barred by section 766.313. Section 766.313, provides that: "[a]ny claim for compensation under ss. 766.301-766.316 that is filed more than 5 years after the birth of an infant alleged to have a birth-related neurological injury shall be barred."

21. It is an undisputed fact that Marvin was born on February 5, 2005, and that the claim/petition was filed at DOAH on July 13, 2011. The claim is barred, and Respondent NICA is entitled to a final order which resolves that, notwithstanding that the claim may be compensable, and notwithstanding that Petitioners allege the claim is not compensable, Petitioners may not pursue or recover an award of benefits under the Plan.

22. However, since Plan immunity may be a viable defense to a civil suit and the Administrative Law Judge has exclusive jurisdiction to resolve whether a claim is compensable, it is necessary, in the posture of this case, to resolve whether the claim is compensable. See §§ 766.301(1)(d), 766.303(2), and 766.304, Fla. Stat., and O'Leary v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 757 So. 2d 624 (Fla. 5th DCA 2000).

23. In Green v. Fla. Birth-Related Neurological Injury Comp. Ass'n and Henricks et al., Case No. 02-2213N (Fla. DOAH Apr. 24, 2003), per curiam aff'd, Green v. Fla. Birth-Related

Neurological Injury Comp. Ass'n, 871 So. 2d 223 (Fla. 2d DCA 2004), the Administrative Law Judge ruled that he was obligated to determine compensability even though the statute of limitations barred Petitioners' NICA claim so that Petitioners could not pursue or recover an award of benefits from NICA. To the same effect, see Espositio v. Fla. Birth-Related Neurological Injury Comp. Ass'n, Case No. 10-10320N (Fla. DOAH May 20, 2011), currently on appeal to the Third District Court of Appeal, Case No. 3D11-1621; Bautista v. Fla. Birth-Related Neurological Injury Comp. Ass'n, Case No. 10-3208N (Fla. DOAH Dec. 17, 2010); Romero v. Fla. Birth-Related Neurological Injury Comp. Ass'n, Case No. 05-1901N (Fla. DOAH Aug. 31, 2005); and Foott v. Fla. Birth-Related Neurological Injury Comp. Ass'n, Case No. 02-4344N (Fla. DOAH Aug. 11, 2003).

24. The ruling in Green was based, in part, upon the participation of intervenors seeking to determine the "notice" issue. Herein, Intervenors correctly point out that no party has raised the issue of notice, and they have volunteered, by their various pleadings, that they will not assert the notice defense in circuit court, if and when Petitioners file a civil action in circuit court. It is noted that any issue of notice is deemed waived in the present proceeding because Petitioners did not raise it in their Petition. Further, no determination of the notice issue is required unless it is raised by one or

more parties before DOAH in the same proceeding which addresses compensability. § 766.309(1)(d), Fla. Stat.[10/]

25. Finally, where, as here, it is concluded, as a matter of law, that the child's injury is not compensable under the Plan because it is not a "birth-related neurological injury," the notice issue is rendered moot. See Orlando Reg'l Healthcare Sys. v. Gwyn, 53 So. 3d 385 (Fla. 5th DCA 2011), holding " . . . NICA cannot be found to afford the [parents] their exclusive remedy for the simple reason that, as a matter of law, the [parents] do not have a compensable claim under NICA."

26. 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. § 766.303(1), Fla. Stat.

27. However, much of sections 766.301 - 766.316 (the "NICA" statute) is cumbersome because it presumes that parents will always seek to prove NICA compensability in order to collect from the Association the limited "no fault" benefits provided therein. In practical terms, however, parents more often seek to "opt out" of NICA so as to obtain presumably greater monetary benefits via a circuit court action, which is usually a simple medical malpractice action, although there can also be actions based on malpractice through willful and wanton

disregard of human rights and safety.[11/] Indeed, the NICA statute creates a rebuttable presumption of compensability which may only be asserted by the Petitioners[12/] and provides for tolling of the statute of limitations in circuit court actions for so long as the NICA claim remains pending before the Administrative Law Judge.[13/]

28. The NICA statute presumes that a medical malpractice action cannot even be filed in circuit court until after the Administrative Law Judge has determined that the NICA claim is not compensable, or until he or she has determined that the claim is compensable, but the statutory notice requirements have not been met, so that the claimant is free to sue the hospital and/or any participating physicians who did not give notice. Complicating this situation is the statute of repose for a minor's malpractice action, which does not run until the child turns eight years of age, except where NICA provides "the exclusive remedy."[14/] However, routinely, circuit courts permit the filing of the NICA claimant's circuit court complaint and abate it until the issues of compensability, and possibly notice, are determined by the Administrative Law Judge, who has exclusive jurisdiction of those issues.[15/] However, it is conceivable that even if a child's injuries never fit the definition of a "birth-related neurological injury," was never compensable under NICA for that reason, and no NICA claim was

timely filed for that reason, a circuit court may be placed in the position of having to determine whether the circuit court action is barred. Therefore, it is prudent, at least until the legislature or an appellate court clarifies the situation, for their Order to address the issue of "compensability" even though NICA cannot be required to pay an award in this case.

29. Under sections 766.301-766.316, the injured "infant, her or his personal representative, parents, dependents, and next of kin, "may seek compensation under the Plan by filing a claim for compensation with DOAH. §§ 766.302(3), 766.303(2), 766.305(1), and 766.313, Fla. Stat. 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." § 766.305(4), Fla. Stat.

30. 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. § 766.305(7), Fla. Stat. If, on the other hand, 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. §§ 766.304, 766.309, and 766.31, Fla. Stat.

31. 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.

§ 766.309(1), Fla. Stat. 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." § 766.31(1), Fla. Stat.

32. Pertinent to this case, "birth-related neurological injury" is defined by section 766.302(2), to mean:

> injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery 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. (emphasis added).

33. Here, indisputably, Marvin Chavarria did not suffer a mechanical trauma or oxygen deprivation in the statutory period specified in section 766.302(2), and he does not suffer both a permanent and substantial mental impairment and a permanent and substantial physical impairment. Consequently, given the provisions of section 766.302(2), Marvin has never qualified for coverage under the Plan. See also Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997)(The Plan is written in the conjunctive and can only be interpreted to require both substantial mental and physical impairment.). Humana of Fla., Inc. v. McKaughan, 652 So. 2d 852, 859 (Fla. 2d DCA 1995)("[B]ecause the Plan . . . 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."), approved, Fla. Birth-Related Neurological Injury Comp. Ass'n v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996). See also Masterton v. Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, Case No. 08-6032N (Fla. DOAH Jan. 29, 2010)(Corrected Order).

CONCLUSION

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

ORDERED that:

1. This cause, as against Respondent Florida Birth-Related Neurological Injury Compensation Association, is barred by section 766.313, and Petitioners may not pursue or recover an award of benefits under the Plan.

2. Respondent's Motion for Summary Final Order is granted; the claim is determined to be noncompensable; and the Petition Under Protest, filed herein by Milvia Najera and Marvin Chavarria, on behalf of and as parents and natural guardians of Marvin Chavarria, a minor, is dismissed with prejudice.

3. Intervenor Beydoun's Motion for Summary Final Order, and Intervenor Public Health Trust's Amended [sic] Motion for Summary Final Order are granted in part and denied in part as explained herein and those rulings are subsumed within decretal paragraph 2, above.

DONE AND ORDERED this 19th day of December, 2011, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of December, 2011.

ENDNOTES

1/ There was no Public Health Trust motion for summary final order.

2/ This is the "hospital" as contemplated by sections 766.302(2) and (6), Florida Statutes.

3/ In the event a claimant satisfies an Administrative Law Judge that the child's injury meets the section 766.302(2), definition of "birth-related neurological injury," (shows the injury is compensable under the NICA Plan) recovery is limited to NICA Plan benefits as set out in section 766.31, unless one of the healthcare providers has failed to give appropriate and timely notice as set out in section 766.316.

In situations of lack of notice, the Florida Supreme Court in Florida Birth-Related Neurological Injury Compensation v. Department of Administrative Hearings, 29 So. 3d 992 (Fla. 2010), concluded that:

> . . . [T]he notice provision is severable with regard to defendant liability. Consequently, under our holding today, if

> either the participating physician or the hospital with participating physicians on its staff fails to give notice, then the claimant can either (1) accept NICA remedies and forgo any civil suit against any other person or entity involved in the labor or delivery, or (2) pursue a civil suit only against the person or entity who failed to give notice and forgo any remedies under NICA.

4/ When a petition to intervene does not comply with DOAH's rules requiring that the motion state the positions of all other parties, the Administrative Law Judge may either strike the pleading or wait the specified time for written responses. See Fla. Admin. Code R. 28-106.103 and 28-106.204. In this situation, the undersigned waited the appropriate time for written responses.

5/ Section 766.313, Florida Statutes, provides:

> Any claim for compensation under ss. 766.301-766.316 that is filed more than 5 years after the birth of an infant alleged to have a birth-related neurological injury shall be barred.

6/ See, e.g., Vero Beach Care Ctr v. Ricks, 476 So. 2d 262, 264 (Fla. 1st DCA 1985)("Lay testimony is legally insufficient to support a finding of causation where the medical condition involved is not readily observable."); Ackley v. Gen. Parcel Servs., 646 So. 2d 242, 245 (Fla. 1st DCA 1994)("The determination of the cause of a non-observable medical condition, such as a psychiatric illness, is essentially a medical question."); Wausau Ins. Co. v. Tillman, 765 So. 2d 123, 124 (Fla. 1st DCA 2000)("Because the medical conditions which the claimant alleged had resulted from the workplace incident were not readily observable, he was obligated to present expert medical evidence establishing that causal connection.").

7/ Dr. Beydoun argues that section 766.313, the statute of limitation on recovery from NICA, bars any determination of "compensability" or of "notice or lack thereof" by the ALJ, and further asserts:

> . . . No medical malpractice action has been filed by Petitioners and thus no health care

> provider has asserted NICA Plan immunity. Further SAMIR BEYDOUN, M.D., hereby represents that he has no intention of asserting NICA Plan immunity in any future medical malpractice action brought by the Petitioners arising out of MARVIN CHAVARRIA's birth and hereby disclaims any right to the defense in any such action. . . .

8/ Public Health Trust's late Response, Motion for Summary Judgment, and Amended Motion for Summary Final Order may be read as stating the Trust also will not assert a notice defense in circuit court.

9/ When, as here, the "moving party presents evidence to support the claimed non-existence of a material issue, he . . . [is] entitled to a summary judgment unless the opposing party comes forward with some evidence which will change that result; that is, evidence to generate an issue of a material fact. It is not sufficient for an opposing party merely to assert that an issue does exist." Turner Produce Co., Inc. v. Lake Shore Growers Coop. Ass'n, 217 So. 2d 856, 861 (Fla. 4th DCA 1969). Accord, Roberts v. Stokley, 388 So. 2d 1267 (Fla. 2d DCA 1980); Perry v. Langstaff, 383 So. 2d 1104 (Fla. 5th DCA 1980).

10/ If raised by the claimant or any other party, the undersigned may determine notice or lack thereof. Here, the notice issue has not been raised by any party.

While the Administrative Law Judge is required [if the issue is raised by any party] to resolve whether the notice requirements of section 766.316, have been satisfied, he or she does not have jurisdiction to resolve whether any person or entity is entitled to invoke the immunity from tort liability provided-for in subsection 766.303(2). Depart v. Macri, 902 So. 2d 271 (Fla. 1st DCA 2005); Gugelmin v. Div. of Admin. Hearings, 815 So. 2d 764 (Fla. 4th DCA 2002). All issues of immunity from civil suit are for the circuit court to decide.

11/ See § 766.303(2), Fla. Stat.

> 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, her or his personal representative, 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 negligence 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, 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 provided for in s. 766.311.

12/ See § 766.309(1)(a), Fla. Stat., and Bennett v. St. Vincent's Med. Ctr., 36 Fla. Weekly § 366, 2011 Fla. LEXIS 2278 (Fla. Sept. 22, 2011).

13/ See § 766.306, Fla. Stat.

> Tolling of statute of limitations.--The statute of limitations with respect to any civil action that may be brought by, or on behalf of, an injured infant allegedly arising out of, or related to, a birth-related neurological injury shall be tolled by the filing of a claim in accordance with ss. 766.301-766.316, and the time such claim is pending or is on appeal shall not be computed as part of the period within which such civil action may be brought.

14/ See § 95.11(4)(b), Fla. Stat.

> An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from

> the date of the incident or occurrence out of which the cause of action accrued, except that this 4-year period shall not bar an action brought on behalf of a minor on or before the child's eighth birthday. An "action for medical malpractice" is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care. The limitation of actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care. In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury the period of limitations is extended forward 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred, except that this 7-year period shall not bar an action brought on behalf of a minor on or before the child's eighth birthday. This paragraph shall not apply to actions for which ss. 766.301-766.316 provide the exclusive remedy.

15/ See §§ 766.304 and 766.309, Fla. Stat.

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(Certified Mail No. 7011 1570 0001 1540 5222)

NOTICE OF RIGHT TO JUDICIAL REVIEW

Review of a final order of an administrative law judge shall be by appeal to the District Court of Appeal pursuant to section 766.311(1), Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy, accompanied by filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal. See § 766.311(1), Fla. Stat., and Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992).