

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ASHLEY LAMENDOLA, individually
and as parent and legal guardian
of her minor child, HUNTER
LAMENDOLA,

Petitioner,

vs.

Case No. 13-3870N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

ST. PETERSBURG GENERAL HOSPITAL,
GUILLERMO CALDERON, M.D.,
CHRISTINA SHAMAS, M.D., AND GULF
COAST INSTITUTE OF OB/GYN, LLC,

Intervenors.

_____ /

FINAL ORDER ON NOTICE

Pursuant to notice, a final hearing on the issue of notice was held in this case on June 4, 2014, in St. Petersburg, Florida, before Susan Belyeu Kirkland, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether notice was accorded the patient, as contemplated by section 766.316, Florida Statutes (2012).

PRELIMINARY STATEMENT

On October 2, 2013, Petitioner, Ashley Lamendola, individually and as parent and legal guardian of Hunter Lamendola (Hunter), a minor, filed a Petition for Benefits Pursuant to Section 766.301 et seq., of the Florida Statutes (Petition) with the Division of Administrative Hearings (DOAH) for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The Petition named Christina Shamas, M.D., as the physician who provided obstetric services at the birth of Hunter on June 27, 2012, at St. Petersburg General Hospital in St. Petersburg, Florida. The Petition also named Guillermo Calderon, M.D., as Ashley Lamendola's treating obstetrician.

DOAH served NICA with a copy of the Petition on October 8, 2013. DOAH served St. Petersburg General Hospital with a copy of the Petition on October 11, 2013. On October 15, 2013, DOAH received a return receipt from the United States Postal Service showing that Dr. Shamas had been served with a copy of the Petition. On October 11, 2013, DOAH received a return receipt from the United States Postal Service showing that Dr. Calderon had been served with a copy of the Petition.

On October 21, 2013, St. Petersburg General Hospital filed a Petition to Intervene, which was granted by Order dated November 7, 2013. On October 23, 2013, Dr. Calderon filed a

Petition to Intervene, which was granted by Order dated November 7, 2013. On November 1, 2013, Dr. Shamas and Gulf Coast Institute of OB/GYN, LLC, filed a Petition to Intervene, which was granted by Order dated November 20, 2013.

On April 24, 2014, NICA filed Respondent's Motion for Summary Final Order on the Issue of Birth-Related Neurological Injury, contending that Hunter Lamendola suffered a birth-related neurological injury. On May 29, 2014, the parties filed a Pre-Hearing Stipulation in which the parties agreed to the following:

Hunter Lamendola suffered a birth-related neurological injury and obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital.

On May 30, 2014, a Partial Summary Final Order was entered finding that Hunter Lamendola suffered a birth-related neurological injury. Jurisdiction was retained to determine the issue of an award and whether the notice requirements of section 766.316 were satisfied.

The Pre-Hearing Stipulation filed by the Parties stipulated to certain facts contained in Paragraph (e) of the Pre-Hearing Stipulation. Those facts have been incorporated into this Final Order on Notice.

At the final hearing, Petitioner's Exhibits P1, P3, P4, P5, P6, P7, and P15 were admitted in evidence. Petitioner testified

in her own behalf and called the following witnesses:

Myra Deering, Violet Lamendola, and Tara Yan. At the final hearing, Respondent did not call any witnesses and did not have any exhibits which were admitted in evidence. Intervenor, St. Petersburg General Hospital's, Exhibits H1 and H2 were admitted in evidence. St. Petersburg General Hospital did not call any witnesses. Intervenors, Christina Shamas, M.D., and Gulf Coast Institute of OB/GYN, presented Exhibits G1, G2, G3, G4, G5, G10, G11, and G12, which were admitted in evidence. Elba Acosta testified on behalf of Dr. Shamas and Gulf Coast Institute of OB/GYN. Intervenor, Guillermo Calderon, M.D., did not call any witnesses or present any exhibits.

The two-volume Transcript of the final hearing was filed on June 17, 2014. The parties timely filed their proposed final orders, which have been considered in the drafting of this Summary Final Order on Notice.

FINDINGS OF FACT

1. Ashley Lamendola first presented to Gulf Coast OB/GYN on the morning of December 16, 2011, for a prenatal visit. This visit constituted the beginning of her professional relationship with the physicians who were part of the Gulf Coast OB/GYN group, which included Dr. Calderon and Dr. Shamas.^{1/} Violet Lamendola, Ms. Lamendola's mother, accompanied Ms. Lamendola to that visit. When she arrived at Gulf Coast OB/GYN, Ms. Lamendola was given

information and forms to fill out by the receptionist. According to both Ms. Lamendola and her mother, the materials included a NICA brochure in Spanish and an acknowledgment of receipt of the NICA form.

2. While reviewing the materials, Ms. Lamendola, who does not speak Spanish, noted that the NICA brochure given to her was in Spanish. She asked her mother to take the brochure back to the receptionist. When Ms. Lamendola's mother asked the receptionist about the Spanish brochure, the receptionist told her that the office had run out of NICA brochures printed in English, but that she would obtain one from another office and give it to Ms. Lamendola at the end of her appointment.

Ms. Lamendola was instructed to sign and did sign the acknowledgment form so that she could see the physician. The acknowledgment form advised that all physicians in the Gulf Coast OB/GYN, P.A., were participating physicians in the NICA program.

3. Ms. Lamendola received a black-and-white facsimile copy of the NICA brochure on her way out of the office along with other materials relating to prenatal and infant care. The brochure, received by Ms. Lamendola from Gulf Coast OB/GYN, bears a facsimile transmission header dated December 16, 2011, at 9:47 a.m.

4. The brochure prepared by NICA is a color brochure which contains the following text in white letters on a light-to-medium green background on the back of the brochure:

Section 766.301-766.316, Florida Statutes, ("NICA Law") provides rights and remedies for certain birth-related neurological injuries and is an exclusive remedy. This brochure is prepared in accordance with the mandate of Section 766.316, Florida Statutes. A copy of the complete statute is available free of charge to completely inform patients of their rights and limitations under the application provision of Florida law. Since 1989, numerous court cases have interpreted the NICA law, clarifying legislative intent.

The above-quoted language is absent from the facsimile copy of the brochure that Ms. Lamendola received from Gulf Coast OB/GYN. Apparently because the letters in the original brochure were white, the letters did not transmit. It is noted that on the front of the brochure, white lettering that appears on the green background of the color brochure did not transmit on the copy that Ms. Lamendola received.

5. The majority of the information contained in Ms. Lamendola's facsimile copy of the brochure is contained in the color copy of the brochure. The facsimile copy informed Ms. Lamendola that the statutes provide an exclusive remedy and a copy of the statutes may be obtained from NICA. The facsimile outlined the rights and limitations provided in the statutes. The only things that are not contained in the original brochure

are that a copy of the statutes is available free of charge, the preparation of the brochure was mandated by section 766.316, and court cases have interpreted the statutes.

6. St. Petersburg General Hospital offers a tour of its obstetrical department to expectant mothers and their families. Ms. Lamendola's mother called St. Petersburg General Hospital to register for a tour. The hospital employee who was scheduling the tour asked to speak to Ms. Lamendola to obtain pertinent biographical information. Ms. Lamendola provided the information to the hospital employee.

7. The tour is an informational tour and attendance at the tour does not constitute pre-registration at St. Petersburg General Hospital for the delivery of a baby.

8. Ms. Lamendola and her mother, along with 12 other couples, attended the tour on March 22, 2012. During the tour, Ms. Lamendola received a tour packet, which contained a document titled Preadmission and Financial Information. This document instructed Ms. Lamendola to fill out the pre-admission form and return it to the hospital. Ms. Lamendola filled out the pre-admission form, but did not return it to St. Petersburg General Hospital. Ms. Lamendola did not pre-register for admission to the hospital.

9. On April 3, 2012, Ms. Lamendola presented to St. Petersburg General Hospital with complaints of vaginal bleeding.

Ms. Lamendola was told by a hospital employee that she was already in the system and that additional information would not be necessary. Ms. Lamendola signed a "Consent to Treat" form and was treated in the labor and delivery unit of the hospital. A short time later, she was given informational materials relating to prenatal and infant care and released. She was not given a NICA brochure during the visit on April 3, 2012. It was the hospital's policy to give a NICA brochure to a patient only when the patient was being admitted as an inpatient for delivery of her baby. Ms. Lamendola's professional relationship with St. Petersburg General Hospital relating to her pregnancy began with her visit on April 3, 2012.

10. At 20:19 on June 26, 2012, Ms. Lamendola presented to St. Petersburg General Hospital. She had been experiencing contractions for six hours prior to her arrival at the hospital. She had been placed on bed rest for gestational hypertension five days prior to coming to the hospital. When she arrived at the hospital, she had hypertension.

11. Normally when a patient is 37 to 39 weeks gestation, her physician will bring the prenatal records to the hospital or the physician's office will send the records to the hospital by facsimile transmission. When Ms. Lamendola arrived at St. Petersburg General Hospital, her prenatal records from her physicians' office were not on file. Megan Muse, R.N., was on

duty when Ms. Lamendola presented at St. Petersburg General Hospital. Because Ms. Lamendola's records were not on file, Ms. Muse requested that Bayfront Hospital send Ms. Lamendola's records to St. Petersburg General Hospital. The evidence did not establish how Ms. Muse knew that the prenatal records were at Bayfront Hospital. Ms. Lamendola's prenatal records, consisting of 11 pages, were sent by facsimile transmission to St. Petersburg General Hospital beginning at 21:35 on June 26, 2012. Ms. Muse recorded in her notes that Ms. Lamendola's prenatal records were received from Bayfront Hospital at 21:45 on June 26, 2012.

12. Although Ms. Lamendola's prenatal records may have been sent to Bayfront Hospital, it was never Ms. Lamendola's intention to deliver her baby at Bayfront Hospital. She took the informational tour offered by St. Petersburg General Hospital and went to St. Petersburg General Hospital in April 2012 when she had a problem related to her pregnancy.

13. At 20:33, Dr. Javate admitted Ms. Lamendola to St. Petersburg General Hospital for the delivery of her infant. Ms. Lamendola was examined by Emanuel Javate, M.D., at approximately 21:35. At 22:02, Ms. Lamendola signed the hospital's Condition of Admission form. At 22:10 the hospital gave Ms. Lamendola the brochure prepared by NICA, and

Ms. Lamendola signed the acknowledgment form, acknowledging that she had received the brochure.

14. Ms. Lamendola gave birth to Hunter Lamendola (Hunter) on June 27, 2012, at St. Petersburg General Hospital, which is a licensed Florida Hospital. At birth, Hunter weighed in excess of 2,500 grams and was a single gestation.

15. Ashley Lamendola received obstetrical care from Guillermo Calderon, M.D. Dr. Calderon was a "participating physician" as defined in section 766.302(7).

16. Christina Shamas, M.D., provided obstetrical services in the course of labor, delivery, and resuscitation in the immediate post-delivery period. Dr. Shamas was a "participating physician" as defined in section 766.302(7).

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat. (2012).

18. The only issue to be determined in the final hearing is whether notice was provided pursuant to section 766.316, which provides:

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.

19. Section 766.309(1)(d) provides:

(1) The administrative law judge shall make the following determination based upon all available evidence:

* * *

(d) Whether if raised by the claimant or other party, the factual determinations regarding the notice requirements in s. 766.316 are satisfied. The administrative law judge has the exclusive jurisdiction to make these factual determinations.

20. Ms. Lamendola signed an acknowledgment form that her physicians had provided her with a brochure prepared by NICA, and she signed an acknowledgment form that she had received a NICA brochure form from St. Petersburg General Hospital. Her signature on these forms raises a rebuttable presumption that the notice requirements of section 766.316 have been met. Petitioner contends that the notice provided by the physicians did not meet

the requirements of section 766.316 because part of the language of the copy that she received was absent. Petitioner contends that the notice provided by St. Petersburg General Hospital did not meet the notice requirements of section 766.316 because the notice should have been provided either in March 2012 when Ms. Lamendola toured the labor and delivery section of St. Petersburg General Hospital or on April 3, 2012, when Ms. Lamendola presented to St. Petersburg General Hospital for medical services related to her pregnancy.

21. In Weeks v. Florida Birth-Related Neurological Injury Compensation Association, 977 So. 2d 616, 618-620 (Fla. 5th DCA 2008), the court stated:

[T]he formation of the provider-obstetrical patient relationship is what triggers the obligation to furnish the notice. The determination of when this relationship commences is a question of fact. Once the relationship commences, because [section 766.316] is silent on the time period within which notice must be furnished, under well-established principles of statutory construction, the law implies that notice must be given within a reasonable time. Burnsed v. Seaboard Coastline R. Co., 290 So. 2d 13, 19 (Fla. 1974); Concerned Citizens of Putnam County v. St. Johns River Water Mgmt. Dist., 622 So. 2d 520, 523 (Fla. 5th DCA 1993). The determination depends on the circumstances, but a central consideration should be whether the patient received the notice in sufficient time to make a meaningful choice of whether to select another provider prior to delivery, which is the primary purpose of the notice requirement.

* * *

[T]he NICA notice must be given within a reasonable time after the provider-obstetrical patient relationship begins, unless the occasion of the commencement of the relationship involves a patient who presents in an "emergency medical condition," as defined by the statute, or unless the provision of notice is otherwise "not practicable." When the patient first becomes an "obstetrical patient" of the provider and what constitutes a "reasonable time" are issues of fact. As a result, conclusions might vary, even where similar situations are presented. For this reason, a prudent provider should furnish the notice at the first opportunity and err on the side of caution.

22. The physician-patient relationship between Ms. Lamendola and Dr. Shamas and Dr. Calderon began when Ms. Lamendola presented at Gulf Coast OB/GYN on December 16, 2011. The notice provided by Gulf Coast OB/GYN covered all physicians employed by Gulf Coast OB/GYN, including Dr. Shamas and Dr. Calderon.

23. Gulf Coast OB/GYN provided a copy of a NICA brochure, which had been sent by facsimile transmission. Part of the text of the brochure did not transmit, probably because that text on the color brochure was printed in white. The copy of the brochure that Ms. Lamendola received was sufficient to satisfy the provisions of section 766.316 in that it included a clear and concise explanation of Ms. Lamendola's rights and limitations under the NICA plan. Most of the missing text was a reiteration

of what was already contained in the copy of the brochure that Ms. Lamendola received. Thus, Dr. Shamas and Dr. Calderon provided sufficient notice pursuant to section 766.316.

24. Ms. Lamendola's tour of St. Petersburg General Hospital did not form a professional relationship between her and St. Petersburg General Hospital. It was an informational tour and did not constitute pre-registration at the hospital for delivery of her baby. She was given a form to use to pre-register, but she did not avail herself of the opportunity to pre-register. Even if Ms. Lamendola had pre-registered, the policy of St. Petersburg General Hospital was to provide the NICA notice only when the patient arrives at the hospital and is admitted as an inpatient for delivery of her baby.

25. The hospital's professional relationship with Ms. Lamendola, relating to her pregnancy, began when Ms. Lamendola presented to St. Petersburg General Hospital on April 3, 2012, with complaints relating to her pregnancy. She was treated at the hospital for those complaints. The hospital did not provide notice at that time as required by section 766.316.

26. At 8:19 p.m., on June 26, 2012, when Ms. Lamendola arrived at St. Petersburg General Hospital, she was having contractions and had hypertension. She had been placed on bed rest for the hypertension five days prior to her coming to the

hospital. The hospital did not provide her with NICA notice until 10:10 p.m. To contend that under these circumstances that the notice provided by the hospital was reasonable when it had an opportunity to do so almost three months prior to June 26, 2012, misses the mark. A woman who has been on bed rest for hypertension, has hypertension on arrival at the hospital, is experiencing contractions, and is given NICA notice at ten o'clock at night does not have sufficient time to go and find a non-participating physician to deliver her baby. The notice provided by St. Petersburg General Hospital did not meet the requirements of section 766.316.

CONCLUSION

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

ORDERED that St. Petersburg General Hospital did not comply with the notice provisions of section 766.316; that Dr. Calderon did comply with the notice provisions of section 766.316; and that Dr. Shamas did comply with the notice provisions of section 766.316.

It is further ORDERED that the parties are accorded 30 days from the date of this Order to resolve, subject to approval of the Administrative Law Judge, the amount and manner of payment of an award to Ms. Lamendola; the reasonable expenses incurred in connection with the filing of the claim, including reasonable

attorney's fees and costs; and the amount owing for expenses previously incurred. If not resolved within such period, the parties shall so advise the Administrative Law Judge, and a hearing will be scheduled to resolve such issues. Once resolved, an award will be made consistent with section 766.31.

It is further ORDERED that in the event Petitioner files an election of remedies declining or rejecting NICA benefits, this case will be dismissed and DOAH's file will be closed.

DONE AND ORDERED this 13th day of August, 2014, in Tallahassee, Leon County, Florida.

Susan Belyeu Kirkland

SUSAN BELYEU KIRKLAND
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of August, 2014.

ENDNOTE

^{1/} Ms. Lamendola visited Gulf Coast OB/GYN on at least fourteen other occasions after her initial visit on December 16, 2011. During these visits she was treated by different physicians in the group, including Dr. Shamas and Dr. Calderon.

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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).