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NICA NOTICE

By Ted Babbitt

Since 1988, Florida has had a unique system of compensation available to children injured in the birthing process under the Florida Birth-Related Neurological Injury Compensation Plan commonly referred to as NICA. That plan provides very minimal benefits to an injured infant in return for which both a child and his parents are precluded from pursing any civil remedy against any healthcare provider who negligently caused the injury. Because this plan eliminates both a child and parents' right to bring a civil suit, the statute requires that pre-delivery notice must be given to an obstetrical patient in advance of delivery ostensibly to give the patient the opportunity to choose alternate healthcare providers who are not participants in the NICA plan.

On an extremely theoretical basis, a woman about to deliver a child could, therefore, get in her car, while in labor, and go to a hospital that was not a participant in NICA utilizing a physician who also had not elected to participate in the plan. What make this choice extremely theoretical is that all hospitals in Florida are members of NICA whether they chose to be or not since they are assessed a per bed assessment for every obstetrical bed in the hospital. Theoretically, of course, a physician might chose not to pay that physician's assessment and thus be eliminated from the benefits of NICA but realistically the vast majority of physicians chose to join NICA because of the benefit of eliminating suits in these high verdict cases.

The Second District Court of Appeals ruled in both All Children's Hospital, Inc. v. Department of Administrative Hearings, 989 So. 2d 2 (Fla. 2nd DCA 2008) and Bayfront Medical Center, Inc. v. Florida Birth-Related Neurological Injury Compensation Ass'n, 982 So. 2d 704 (Fla. 2nd DCA 2008) that even if a hospital fails to give the required notice under the NICA statute, the hospital is still immune from suit so long as the physician involved has given the required notice. That issue was certified to the Supreme Court in the case of Florida Birth-Related Neurological Injury Compensation Association v. Department of Administrative Hearings, 35 Fla. L. Weekly S40 (Fla. Jan. 14, 2010).

Both cases came to the Supreme Court as a result of rulings by Administrative Law Judges who concluded that when either a doctor or a hospital fails to give notice under NICA, the plaintiff has a right to sue either or both the physician and/or hospital even where either the hospital or doctor has given the required notice.

The Supreme Court was thus faced with a case of first impression on the question of whether the failure to give pre-delivery notice under NICA by either the physician or hospital eliminated the right to sue either or both. The Court concluded that both the Second District and the Administrative Law Judge were wrong and at S42 held:

> In particular, the ALJ ruled in the Kocher case that if either the hospital or the participating physician fails to give notice, then the notice provision is not fulfilled, and the injured party can either elect to take NICA remedies or seek civil remedies against *either* party. *See Bayfront*, 982 So. 2d at 707. And the Second District has held that if one party

> gives notice, then the notice requirement is satisfied and NICA is the only available remedy. *See id.* at 708; *All Children's*, 989 So. 2d at 3. We disagree with both the ALJ and the Second District. Instead, we hold that the 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.
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> Consistent with the plain meaning and the purpose of the statute, our holding (i) shields from civil liability those persons or entities that gave proper and timely notice, and (ii) allows a claimant who did not receive proper and timely notice to pursue civil remedies only against the person or entity who failed to provide such notice. (Emphasis by the Court.)

In addition to holding that the failure to give pre-delivery notice by a physician and hospital subjects the non-notice giving party to the potential for civil litigation, the Court also reversed the Second District's holding that a hospital is required to give notice only if the delivering physician is a plan participant and also an employee of the hospital as opposed to merely on the staff of the hospital. The Court held that the only way a hospital has no obligation to give notice is if it has no physicians participating in the NICA plan who have staff privileges at the hospital.

The elimination of all civil remedies is a drastic legislative decision. This is particularly true when the alternative remedy, as in the case of NICA, provides very limited benefits. This decision, while not eliminating those restrictions, at least gives credibility to the plain meaning of the statutory language creating NICA which requires both the hospital and doctor to give pre-delivery notice to an obstetrical patient.

While this minimal requirement does not apply to the vast majority of obstetrical patients whose children suffer catastrophic injuries, it at least does not give the benefit of immunity to a physician or hospital who fails to give the required notice.

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