

The Latest on Nica

By Ted Babbitt

Florida and Virginia are the only states in the nation which have a plan which theoretically provides benefits to infants injured in the course of birth while at the same time prohibiting those infants from bringing actions as a result of their injuries. Virginia's plan is far more limited than Florida's both because its definition is less encompassing than Florida and perhaps, as a consequence, because fewer physicians choose to become members of the Virginia association than do Florida physicians. The recent case of Adventist Health System/Sunbelt, Inc. v Florida Birth-Related Neurological Injury Assoc., 29 Fla. L. Weekly D147 (Fla. 5th DCA 2004), discusses the latest law on the subject of when NICA's restrictions on suit will apply. That opinion resulted from a Motion for Rehearing *En Banc* in which the entire Fifth District panel withdrew their prior decision and entered a divided opinion. In that case, the plaintiffs brought an action for the injury of their infant at birth without filing a NICA petition for compensation. NICA intervened and sought to force the plaintiffs to file such a petition. The trial court granted NICA's Motion to Abate the civil action and entered an order requiring the Plaintiffs to file a NICA claim. The Plaintiffs complied and an Administrative Law Judge made a factual determination that while the plaintiffs' daughter was clearly severely physically disabled, there was insufficient evidence to determine that the child was substantially mentally impaired. The Administrative Law Judge thus denied the plaintiffs' petition and permitted the plaintiffs to pursue their civil action. NICA appealed relying principally on Florida Birth Related Neurological Injury Compensation v Florida Division of Administrative Hearing, 686 So. 2d 1349 (Fla. 1997) which has been referred to by the plaintiff's name of the "Birnie" decision. Birnie involved facts strikingly similar to the Adventist Health System case. Those children had cerebral palsy and the record in both children's cases contained testimony which was very similar as to the degree of impairment of the children. In Birnie, the Administrative Law Judge had found that the child was mentally impaired within the meaning of the statute, while in Adventist, supra, an opposite conclusion was reached.

The Adventist Court quoted from the case of Humana of Florida, Inc. v McKaughan, 652 So. 2d 852, 859 (Fla. 2nd DCA 1995) as follows:

"because the [NICA] Plan, like the Worker's Compensation Act, 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. . . [and] a legal representative of an infant should be free to pursue common law remedies for damages resulting in an injury not encompassed within the express provisions of the Plan."

The Adventist Court also pointed out that the Birnie decision, supra, specifically held that pursuant to the wording of the statute in question, both physical and mental impairment were necessary in order to meet the narrow NICA definition. Birnie, 686 So. 2d at 1356.

The Court in Adventist concluded that there was substantial competent evidence to support the Administrative Law Judge's finding that the plaintiffs' son was not mentally impaired. The Court pointed out that while it is true that the Birnie facts were very similar, a finder of fact is given great latitude in the interpretation of those facts and that finding, when so supported, cannot be disturbed.

It is at least interesting to note that while NICA in the Adventist case, took the position that the facts in Birnie compelled, as a matter of law, a finding that both children were mentally impaired, NICA took the position in Birnie that the child was not mentally impaired and, thus, not entitled to NICA benefits. In Adventist, NICA took the opposite position in an attempt to foreclose the child's parents from being able to bring a malpractice suit. One wonders about the motivation of NICA in these cases. Is it possible that NICA is set up not to protect innocent children whose injuries require financial support but rather is intended to protect doctors from being sued for malpractice? If that, indeed, is NICA's goal, it is far different from that espoused to the public.

Any time a newly born infant, the most innocent of all victims of medical malpractice, suffers devastating neurologic injuries, the legislatively created program known as NICA rises as a potential bar to compensation under the civil justice system. This case places some roadblocks in the path of the prevention of a civil suit.

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Kotzen	x	x	x	x	x	x	x	x
Leopold	x	x	x	x	x	x	x	x
Farach	x	x	x	x	x	x	x	x
Whitfield	x	x	x		x	x	x	
Schuler	x	x	x	x		x	x	x
Murray	x	x	x	x	x	x		x
Trinley	x	x	x	x	x	x	x	x
Slavin	x	x	x	x	x	x	x	x
Gora	x	x	x		x		x	x

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