IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

CASE NO.

SAMUEL J. ANDERSON, a minor, by and through ALLISON ANDERSON, as mother and natural guardian of SAMUEL J. ANDERSON, TIMOTHY ANDERSON, as father and natural guardian of SAMUEL J. ANDERSON, ALLISON ANDERSON, individually, and TIMOTHY ANDERSON, individually

Petitioners,

v. L.T. Case No.: 07-969-CI-07

HELEN ELLIS MEMORIAL HOSPITAL FOUNDATION, INC., HOLLY MARIA BAUER, R.N., WEST COAST MEDICAL GROUP, INC., CHRISTINE HILDERBRANDT, R.N., and TREE OF LIFE MIDWIFERY SERVICE,

Respondents.
_____/

PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 9.100(c) of the Florida Rules of Appellate Procedure, Petitioners, SAMUEL J. ANDERSON, a minor, by and through ALLISON ANDERSON, as his mother and natural guardian; TIMOTHY ANDERSON, as father and natural guardian of SAMUEL J. ANDERSON, and ALLISON and TIMOTHY ANDERSON, individually (collectively, the "Parents"), petition this

Court for a writ of certiorari to review a non-final order denying the Parents' motion to lift abatement.

I.

BASIS FOR INVOKING JURISDICTION

The Parents seek a writ of certiorari quashing the trial court's non-final order denying their motion to lift abatement (A-5) and to pursue a civil claim against Helen Ellis Memorial Hospital Foundation, Inc. (the "Hospital"). (A-9.) Because the Hospital failed to give proper notice under the Florida Birth-Related Neurological Injury Compensation Act (the "Plan"), it is not entitled to assert immunity from tort. Notwithstanding that the Parents have already given notice of their intent to reject any benefits payable by the Florida Birth-Related Neurological Injury Compensation Association ("NICA") (A-4), the trial court refused to allow the Parents to proceed against the Hospital on their civil claim for medical negligence until the amount of NICA compensation is determined. (A-7; A-9.)

The order of abatement is reviewable by certiorari. *See Britamco Underwriters, Inc. v. Central Jersey Investments, Inc.*, 632 So. 2d 138, 139 (Fla. 4th DCA 1994). Delay caused by abatement cannot be remedied on appeal from final judgment. *Id.*; *accord Rowell v. Smith*, 342 So. 2d 149, 150 (Fla. 1st DCA 1977); *see also Paley v. Cocoa Masonry, Inc.*, 354 So. 2d 945, 946 (Fla. 2d DCA 1978) (granting certiorari review of stay order that prevented plaintiffs from

proceeding in instant action until payment of court costs assessed in prior suit). Aside from the delay created by abatement, the trial court's order deprives the Parents of their statutory and constitutional rights to elect a civil remedy, pursue the Hospital for medical negligence in circuit court, and represent the Child's interests. (*See infra*, at Section IV.) No plenary appeal after final judgment can adequately restore those rights. *See Bank of the West v. Thompson*, 836 So. 2d 1075, 1077 (Fla. 5th DCA 2003); *Paley*, 354 So. 2d at 947.

II.

STATEMENT OF THE FACTS

The Parents seek certiorari review of a non-final order (A-9) denying the Parents' motion to lift abatement of a civil action against the Hospital for medical negligence (A-5), which had been held in abeyance pending an administrative determination of the availability of NICA coverage (A-1).[1]

In 2007, the Parents filed a complaint in circuit court for medical negligence against the Hospital and other health care providers (including, *inter alia*, the treating physicians and a certified nurse midwife employed by the physicians, Christine Hilderbrandt ("Nurse Hilderbrandt")). *Id.* at 745. The Parents alleged

[1] This is the second appeal in this case. *See Tarpon Springs Hosp. Found., Inc. v. Anderson*, 34 So. 3d 742 (Fla. 2d DCA 2010). Many of the facts relevant to the proceedings may be found in the Court's reported decision.

that the negligence of the defendants caused severe and permanent neurological injury to the minor child, Samuel Anderson (the "Child"). (A-5, at 2.) By entry of an Agreed Order (A-1), the circuit court proceedings were abated for an administrative determination as to whether the Child's injuries were compensable under the Plan. *Tarpon Springs Hosp. Found.*, 34 So. 3d at 745.

The Parents filed an administrative petition for a determination of the availability of NICA coverage. *Id.* (*See also* A-5, at 2.) Nurse Hilderbrandt, the Hospital, and other health care providers moved to intervene. *Tarpon Springs Hosp. Found.*, 34 So. 3d at 745.

An administrative law judge (ALJ) with the Division of Administrative Hearings (DOAH) conducted a final administrative hearing in April 2008. 34 So. 3d at 745. (A-5, Exh. 2.) The ALJ bifurcated the proceedings, first addressing "whether the claim was compensable and whether the [H]ospital and the participating physicians complied with the notice provisions of the Plan." (A-5, Exh. 2, at 4.) The ALJ noted that the question of the amount of any award was "[l]eft to be addressed in a separate proceeding." (A-5, Exh. 2, at 4.)

Thereafter, the ALJ issued a Final Order on Compensability and Notice (the "Final Order"). (A-5, Exh. 2.) The ALJ ruled that although the Child suffered a birth-related neurological injury, and obstetrical services were provided by participating physicians, the Hospital failed to provide the requisite notice under

the Plan. (A-5, Exh. 2, at 57, ¶ 79; *id.* at 60, ¶ 82.) The ALJ further found that Nurse Hilderbrandt failed to establish that she was a "participating physician" at the time of the Child's birth. (A-5, Exh. 2, at 53-54, § 73.)[2] Because the Parents' claim was found compensable, and the other participating physicians complied with the Plan's notice requirements, the ALJ accorded the parties 45 days to resolve, "the amount and manner of payment of an award" to the Parents. (A-5, Exh. 2, at 60-61.) Alternatively, the ALJ ordered that if the parties are unable to agree, "a hearing will be scheduled to resolve such issues," and "an award will be made consistent with Section 766.31, Florida Statutes." (A-5, Exh. 2, at 60-61.)

The Hospital and Nurse Hilderbrandt appealed. *Tarpon Springs Hosp. Found.*, 34 So. 3d at 746-47. This Court initially reversed the ALJ's Final Order, finding that the notice given by the Hospital was adequate. *See* 35 FLW D40 (Fla. 2d DCA Dec. 30, 2009). However, upon consideration of the Amended Motion for Rehearing and Certification, and the Florida Supreme Court's January 2010 decision in *Bayfront*, this Court withdrew its original opinion, and issued a substitute opinion. (A-2.) *Tarpon Springs Hosp. Found.*, 34 So. 3d at 749-51.

The Court affirmed, in part, and reversed, in part, the ALJ's Final Order. The Court rejected the ALJ's determination that Nurse Hilderbrandt failed to meet

---

[2] The ALJ's Final Order included additional findings relevant to the other health care providers, which are not pertinent to this petition. *See Tarpon Springs Hosp. Found.*, 34 So. 3d at 746.

the statutory definition of a "participating physician." *See id.* at 749. Although Nurse Hilderbrandt complied with the Plan's notice requirements, the Court affirmed the ALJ's finding that the Hospital did not. *See id.* at 750-53. (A-5, at 2-3.) The Court remanded "with instructions that the ALJ modify the final order consistent with this opinion." 34 So. 3d at 753. Mandate issued on June 16, 2010. (A-3.)

On July 7, 2010, the Parents filed a Notice of Rejection of NICA Benefits in the administrative proceeding. (A-4.) The Parents gave "notice of their rejection of NICA benefits" and informed the parties of their "intention to continue their lawsuit in the circuit court." (A-4.)

Thereafter, on September 9, 2010, the Parents served Plaintiffs' Motion to Lift Abatement. (A-5.) The Parents moved for the entry of an order lifting the abatement, which the trial court had originally imposed, by Agreed Order, to allow for an administrative determination of the compensability of the claim under NICA. (A-5.) Nurse Hilderbrandt responded to the Parents' Motion to Lift Abatement. (A-7.) She did not oppose the Motion to Lift Abatement, but instead asked the trial court to enforce her right to tort immunity under the Plan. (A-7, at 2-3.)

The Hospital opposed the Parents' Motion to Lift Abatement (A-6), arguing that further administrative proceedings must be held "before the common law civil

suit is ripe for the Circuit Court to lift the abatement." (A-6, at 2.) Specifically, the Hospital urged the trial court that the ALJ must first determine "the amount of the amount of a NICA award" to which the Child is now entitled; such a determination is "necessary," the Hospital argued, "in order for a reasoned decision to be made as to the best interests of the [C]hild before the Circuit Court's abatement is lifted." (A-6, at 2, 3.) According to the Hospital:

> [A] decision regarding the best interests of the child cannot be made without determining the amount of compensation NICA will provide pursuant to Fla. Stat. § 766.31 ("a bird in the hand") versus pursuing a civil suit against this Defendant in Circuit Court with all its contingencies and uncertainty.

(A-6, at 3.) The Hospital emphasized that the trial court ultimately must determine "what is in the best interests of the child," for "there can be no resolution of this matter in Circuit Court without court approval." (A-6, at 3.)

Meanwhile, on August 5, 2010, the ALJ asked that the parties advise her as to the status of the case and "the need, if any, to schedule a hearing to resolve any issues." (A-6, Exh. D, at 2.) The Hospital responded, urging the ALJ that "a hearing to determine the amount of the award of NICA benefits is necessary." (A-6, Exh. F, at 2.)

The trial court heard the Parents' Motion to Lift Abatement on December 21, 2010. (A-9.) The trial court granted Nurse Hilderbrandt's motion to enforce her tort immunity under the Plan by written order, entered December 22, 2010.

(A-8.) On December 23, 2010, the trial court rendered its one-paragraph Order Denying Plaintiffs' Motion to Lift Abatement (the "Order of Abatement"). (A-9; Supp. A-1.)

Thereafter, on January 21, 2011, the ALJ informed counsel for the parties, by letter, that the file appeared to have been administratively closed without the entry of a final order on remand. (A-10.) The ALJ enclosed such an order, entitled Amendment to Final Order Following Remand. (A-11.) In accordance with the Court's opinion and mandate, the ALJ struck certain paragraphs of the original Final Order related to Nurse Hilderbrandt, and adopted this Court's rulings as to Nurse Hilderbrandt's status as a "participating physician" at the time of the Child's birth. (A-11, at 2-3.) The ALJ also vacated the original Conclusions of the Final Order, and substituted the following paragraphs:

> Based on the foregoing Findings of Fact and Conclusions of Law, it is
>
> ORDERED that the claim for compensation filed by Allison Anderson and Timothy Anderson, individually, and as parents and natural guardians of Samuel J. Anderson, a minor, be and the same is hereby approved.
>
> It is FURTHER ORDERED that Helen Ellis Memorial Hospital failed to comply with the notice provisions of the Plan.
>
> It is FURTHER ORDERED that the participating physicians (including CNM Hilderbrandt) complied with the notice provisions of the Plan.
>
> It is FURTHER ORDERED that Petitioners having heretofore filed a Notice of Rejection of NICA Benefits, no further proceedings before

the Division of Administrative Hearings are necessary, and the file of the Division of Administrative Hearings is hereby closed.

(A-11, at 3-4.)

The Parents timely file this petition for certiorari review of the trial court's Order of Abatement, rendered December 23, 2010. (A-9; Supplemental Appendix-1.)[3] *See* Fla. R. App. 9.100(c)(1).

III.

NATURE OF RELIEF SOUGHT

The Parents request that this Court issue a writ of certiorari and quash the trial court's Order, rendered December 23, 2010. The Parents should be permitted to reject NICA benefits and to pursue their civil remedies against the Hospital – without first seeking a determination from the ALJ as to the amount of available compensation under the Plan or otherwise obtaining approval (whether by the trial court or a guardian ad litem) of this election of rights.

IV.

ARGUMENT

The Parents ask this Court to quash the trial court's Order of Abatement. The Order departs from the essential requirements of law, and creates harm that

[3] The Supplemental Appendix, which consists of only the circuit court docket, is attached hereto. The Appendix to the Petition contains the other pleadings, motions, and orders relevant to this proceeding, and is separately bound.

cannot be remedied on appeal from the final judgment. *See generally Lakeland Reg'l Med. Center, Inc. v. Allen*, 944 So. 2d 541 (Fla. 2d DCA 2006).

The trial court's Order of Abatement departs from the essential requirements of law for three reasons. First, the trial court deprived the Parents of the statutory right, under the Plan, to reject NICA benefits and to litigate the medical negligence claim against the Hospital. Second, the trial court denied the Parents their constitutional right of access to courts. And third, the Order of Abatement, while not expressly requiring the appointment of a guardian ad litem, directly interfered with the Parents' constitutional right of privacy. To require the Parents, who are the natural guardians of the Child, to establish that the election of remedies is in the Child's "best interests" is contrary to the protections afforded the Parents under Florida law. The Order of Abatement, if upheld, will cause irreparable harm that cannot be remedied on plenary appeal. For the following reasons, the Parents ask this Court to grant a writ of certiorari and quash the Order:

A. The trial court's Order of Abatement deprives the Parents of their statutory right to exercise an election of remedies under the Plan.

The trial court first departed from the essential requirements of law by refusing to allow the Parents to exercise their statutory right to reject NICA benefits, and to pursue a medical negligence claim against the Hospital in circuit court. Contrary to the trial court's ruling, the Parents are not required to seek a determination of the amount of a NICA award *before* pursuing civil remedies. To

enforce the exclusivity of remedies provision of the Plan, the trial court should have permitted the Parents to proceed on their lawsuit against the Hospital.

1. Nothing in the plain language of the Plan requires that the ALJ determine the amount of compensation for every claim.

Sections 766.301 through 766.316, Florida Statutes, comprise the Plan. Under the Plan, the ALJ has "exclusive jurisdiction to determine whether a claim filed under this act is compensable." § 766.304, Fla. Stat. In deciding compensability, the ALJ must determine that: (1) "the injury claimed is a birth-related neurological injury"; (2) "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"; and (3) "factual determinations regarding the notice requirements in s. 766.316 are satisfied." § 766.309(1)(a), (b), (d), Fla. Stat.

A claim becomes compensable against a participating physician or hospital only if all three of the requirements of section 766.309(1) are met. *See* §§ 766.309(1), 766.316, Fla. Stat.; *accord Galen of Fla., Inc. v. Braniff*, 696 So. 2d 308, 309 (Fla. 1997). Both participating physicians and hospitals with participating physicians on staff must give the requisite statutory notice to obstetrical patients. *Fla. Birth-Related Neurological Injury Comp. Ass'n v. Dep't of Admin. Hearings*, 29 So.3d 992, 998 (Fla. 2010) (hereinafter referred to as *Bayfront*).

"[O]nce an injury is determined to be compensable, the ALJ must go on to determine the amount of compensation that is awardable." *All Children's Hosp., Inc. v. Dep't of Admin. Hearings*, 863 So. 2d 450, 456 (Fla. 2d DCA 2004), *quashed on other grounds sub. nom*, 29 So. 3d 992 (Fla. 2010); *accord* § 766.31, Fla. Stat. The ALJ has exclusive jurisdiction to determine "[h]ow much compensation, if any, is awardable under s. 766.31." § 766.309(1)(c), Fla. Stat.

"No civil action may be brought until the determinations under s. 766.309 have been made by the administrative law judge." § 766.304, Fla. Stat. The Plan does not require that the ALJ make each of the section 766.309 determinations in the same proceeding, however. Section 766.309(4) authorizes the ALJ, "[i]f it is in the interest of judicial economy or if requested . . . by the claimant," to bifurcate the proceedings: first, "addressing compensability and notice pursuant to s. 766.316"; and second, "addressing an award pursuant to s. 766.31, if any, in a separate proceeding." § 766.309(4), Fla. Stat.

The ability of the ALJ to determine compensability and notice first – without simultaneously addressing compensation – suggests that a second, separate proceeding to determine the amount of an award is not always required. *See id.*; *see also* § 766.309(1)(c), Fla. Stat. (authorizing the ALJ to determine "[h]ow much compensation, *if any*, is awardable" (emphasis added)). Indeed, if the threshold requirements for compensability and notice are not met, the ALJ need not

determine an award of compensation. *See id.*; *cf. Bayfront*, 29 So. 3d at 999 & n.6 (allowing a claimant to choose to forgo any remedy against a participating physician under the Plan, and to pursue civil remedies against a hospital who failed to give the requisite notice).

2. The Plan's exclusivity of remedies provision allows claimants to seek civil remedies against any person or entity who failed to provide the proper and timely notice required by the Plan.

The rights and remedies afforded by the Plan are exclusive. § 766.303(2), Fla. Stat.; *Pediatrix Med. Group of Fla., Inc. v. Falconer*, 31 So. 3d 310, 312 (Fla. 4th DCA 2010). A claimant cannot recover both in tort and under the Plan for the same compensable injury. §§ 766.303(2), 766.304, Fla. Stat.; *accord Pediatrix Med. Group*, 31 So. 3d at 312 (finding that the Plan's plain language "bars double recovery for a compensable injury under NICA"). The Plan specifically provides that if the ALJ determines that "the claimant is entitled to compensation from the association, or if the claimant accepts an award issued under s. 766.31, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303." § 766.304, Fla. Stat. As the Fourth District held in *Pediatrix*:

> Once a claimant accepts NICA benefits for a compensable claim, he forgoes any civil suit against "any person or entity . . . directly involved with the labor, delivery, or immediate postdelivery resuscitation."

31 So. 3d at 312 (quoting § 766.303(2), Fla. Stat.).

Yet the exclusivity of remedies established by the Plan does not preclude all civil remedies against any and all participating physicians and hospitals, regardless of whether those entities properly gave notice under the Plan. *See Bayfront*, 29 So. 3d at 998-99. In *Bayfront*, the Florida Supreme Court held that the notice requirement imposed by the Plan is *severable* as to defendant liability. *Id.* at 999. Consequently, the Court found that

> if either the participating physician or the hospital with participating physicians on 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.*

Id. (emphasis added).

Applying this reasoning, the *Bayfront* Court explained that where "a participating physician gave the required statutory notice to his patient, but the hospital did not, the injured party would be limited to NICA remedies with respect to the doctor." *Id.* at n.6. The claimant could choose to accept NICA remedies – which would preclude her from seeking civil remedies against the hospital. *Id.* Alternatively, the claimant could "forego any remedy against the participating physician, thereby avoiding the exclusivity provision, and to pursue civil remedies against the hospital and any other person or entity who was required to give notice

but failed to do so." *Id.* "The remedies are mutually exclusive." *Pediatrix*, 31 So. 3d at 312.

Once more, nothing in the statutory language – or the established case law interpreting the Plan – requires the ALJ to determine the amount of an award under the Plan *before* a claimant can elect to forego those benefits and instead pursue his civil suit. *See Bayfront*, 29 So. 3d at 999 & n.6; *Pediatrix*, 31 So. 3d at 312; §§ 766.303, 766.304, 766.309(4), Fla. Stat. Here, the Parents have already filed notice of their intent to reject NICA benefits and to continue the civil action against the Hospital. (A-4.) To require the ALJ now to determine the amount of an award under the Plan – even though the Parents intend to reject NICA benefits – will serve only to waste judicial resources. Given that the Parents have already filed notice of their intent to reject NICA benefits, the ALJ correctly determined that no further proceedings before the Division of Administrative Hearings are necessary. (A-11, at 4.) The administrative proceedings are closed. (A-11, at 4.) The proceedings should not be reopened to require the parties to litigate the amount of an award that the Parents have no intention of accepting. The trial court departed from the essential requirements of law in ruling otherwise.

B. The Order of Abatement denies the Parents their constitutional right of access to the courts of this state.

Next, the trial court's refusal to lift the abatement unjustly deprives the Parents of their constitutional right of access to courts. Section 21 of Article 21 of

the Florida Constitution establishes that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without . . . denial or delay." Fla. Const., Art. I, § 21 (1968). Appellate courts routinely exercise certiorari jurisdiction to quash an improper stay or abatement that effectively eviscerates this constitutional right. *Shoemaker v. State Farm Mut. Auto. Ins. Co.*, 890 So. 2d 1195, 1197 (Fla. 5th DCA 2005) (issuing writ of certiorari to quash stay of case pending resolution of appeals in other cases); *Malloy v. Gunster, Yoakley, Valdes-Fauli & Stewart, P.A.*, 850 So. 2d 578, 581-82 (Fla. 2d DCA 2003) (issuing writ of certiorari to quash order staying action against non-bankrupt defendants because a co-defendant filed bankruptcy); *Britamco Underwriters, Inc.*, 632 So. 2d at 139 (issuing writ of certiorari to quash order abating declaratory judgment action on coverage while insurer defended the insured on liability under a reservation of rights).

The trial court below denied the Parents' access to court for two reasons. First, the Order of Abatement imposes an improper and unnecessary condition precedent, requiring the Parents to first obtain an administrative determination of the amount of the NICA benefits *before* resuming the civil lawsuit against the Hospital. Second, the trial court's Order of Abatement is inconsistent with its prior order, rendered a day earlier, which granted NICA immunity to Nurse Hilderbrandt and relieved her of any liability in tort. (A-8.) The trial court should not be

permitted to selectively enforce the Plan's exclusivity of remedies provisions. For these reasons, the Order of Abatement must be quashed.

Essentially, by refusing to lift the abatement, the trial court allowed the Hospital to compel an administrative determination of the amount of available NICA benefits. Yet the ALJ determined – and this Court agreed – that the Hospital failed to comply with the Plan's notice requirements. *See Tarpon Springs Hosp. Found.*, 34 So. 3d at 750-53. (A-11, at 3.) The Hospital thus has no right to invoke the protections afforded by the Plan: immunity from tort and the exclusivity of remedies. *See Bayfront*, 29 So. 3d at 998-99; *Galen*, 696 So. 2d at 309.

Because the Hospital has no right to avail itself of the Plan, the Hospital should not be permitted to force the Parents to submit to an additional administrative proceeding. The Parents' notice of intent to reject NICA benefits (A-4) – according to the ALJ – renders further administrative proceedings to determine the amount of an award unnecessary. (A-11.) The Parents should be allowed to pursue their civil remedies against the Hospital without delay – and without the need for a determination of the amount of NICA benefits that would otherwise be available.

The trial court also denied the Parents their right to access the courts by selectively enforcing the Plan's exclusivity of remedies provision. *See* § 766.303(2), Fla. Stat. Unlike the Hospital, Nurse Hilderbrandt met the

compensability and notice requirements of the Plan. (A-7, at 3.) She is entitled to immunity from tort liability. *See* § 766.303(2), Fla. Stat. The trial court properly enforced this provision of the Plan in its December 22, 2010 Order, which granted Nurse Hilderbrandt's request for NICA immunity. (A-8.) Yet the next day, the trial court rendered its Order of Abatement, and denied the Parents the right to elect civil remedies against the Hospital for medical negligence. (A-9.)

The trial court's inconsistent ruling cannot be upheld. The effect of the trial court's ruling is to unjustly delay the Parents' right to pursue civil remedies against the Hospital – even though the Hospital is plainly not entitled to tort immunity under the Plan. The trial court should not be permitted to selectively enforce the Plan's exclusivity of remedies provision, allowing those rights to Nurse Hilderbrandt but not to the Parents. This is an unconstitutional denial of the Parents' right of access to courts.

C. The Order of Abatement directly interferes with the Parents' familial right of privacy, established under the Florida Constitution.

Notwithstanding the statutory and constitutional rights of the Parents to pursue their civil remedies, the trial court apparently agreed with the Hospital that the Parents cannot reject NICA benefits – and pursue the Hospital in tort – without first seeking an administrative determination of the amount of Plan coverage available. (A-6, at 3.) In the Hospital's words:

> [A] decision regarding the best interests of the child cannot be made without determining the amount of compensation NICA will provide pursuant to Fla. Stat. § 766.31 ("a bird in the hand") versus pursuing a civil suit against this Defendant in Circuit Court with all its contingencies and uncertainty.

(A-6, at 3.) The Hospital further emphasized that it is the ultimate responsibility of the trial court to determine "what is in the best interests of the child," for "there can be no resolution of this matter in Circuit Court without court approval." (A-6, at 3.)

Yet contrary to the Hospital's argument, the election of remedies is a decision for the Parents. *See Tallahassee Memorial Reg'l Med. Center, Inc. v. Petersen*, 920 So. 2d 75, 79-81 (Fla. 1st DCA 2006); *White v. Fla. Birth-Related Neurological*, 655 So. 2d 1292, 1297 (Fla. 5th DCA 1995). The Parents are the natural guardians of the minor Child. *Petersen*, 920 So. 2d at 77; § 744.301(1), Fla. Stat. By definition, the Parents are the "claimants" under the Plan;[4] they act as the "legal representatives on behalf of an injured infant." § 766.302(3), Fla. Sta.

Now that the ALJ has found – and this Court has agreed – that the Hospital did not give proper notice, the Parents are "statutorily entitled" to elect a remedy. *Petersen*, 920 So. 2d at 79 (citing § 766.303(2), Fla. Stat.); *accord* White, 655 So. 2d at 1297; *see also* § 766.304, Fla. Stat. ("If it is determined that a claim filed

[4] Section 766.302(3) defines a "claimant" as "any person who files a claim pursuant to s. 766.305 for compensation for a birth-related neurological injury to an infant." § 766.302(3), Fla. Stat.

under this act is not compensable, neither the doctrine of collateral estoppel nor res judicata shall prohibit the claimant from pursuing any and all civil remedies available under common law and statutory law.")

The right to make that election belongs to the Parents alone. *See White*, 655 So. 2d at 1297; *accord Petersen*, 920 So. 2d at 80. The decision of the Fifth District in *White* is instructive. In *White*, the Fifth District considered whether a participating physician and his professional association could file a claim for compensation under the Plan on the injured infant's behalf. 655 So. 2d at 1296. The Fifth District rejected the health care providers' attempt to invoke the Plan's benefits. *Id.* As the court explained:

> [S]hould an infant's legal representative elect to proceed with a medical malpractice claim, as opposed to seeking the benefits under the Plan, that party faces the risk that a defense will be raised in the malpractice action regarding the exclusivity of the remedies afforded by the Plan and, if sustained, be barred from recovery. *That election is, however, the exclusive province of the infant's legal representative*, and there is no provision or mechanism in the Plan that compels the filing of a claim for compensation or permits the initiation of a claim by a health care provider.

Id. at 1297 (emphasis added).

Nonetheless, the trial court below seeks to "second guess" the Parents' election of remedies. In denying the Parents' Motion to Lift Abatement, the trial court apparently agreed with the Hospital's contention that only upon a determination of the amount of NICA benefits ("a bird in the hand") can a

"reasoned decision . . . be made as to the best interests of the child." (A-6, at 3.) While the trial court did not expressly require the appointment of a guardian ad litem to make this determination, this is the clear import of its ruling. The trial court's ruling interferes with the Parents' right of privacy.

The First District's decision in *Petersen* demonstrates the trial court's error. In *Petersen,* the First District rejected a hospital's attempt to require the appointment of a guardian ad litem. 920 So. 2d at 79-81. In that case, the parents initially filed a medical malpractice action, alleging that the physician and hospital negligently injured the infant during her birth and thereafter. *Id.* at 76-77. The parties agreed to abate the action to allow for a determination of compensability under the Plan. *Id.* at 77.

In deciding the questions of compensability and notice, the ALJ in *Petersen* found that the infant suffered a birth-related neurological injury and that the delivering obstetrician gave proper notice of her status as a participating physician under the Plan. *Id.* Although the participating physician was entitled to immunity under the Plan, the hospital, Tallahassee Memorial Regional Medical Center ("TMRMC"), was not. *Id.* The ALJ determined that TMRMC failed to give the requisite notice under the Plan. *Id.* The ALJ awarded lifetime medical expenses for the infant, plus $100,000 to the parents and reasonable expenses. *Id.*

The parents informed counsel for TMRMC that they intended to reject the award under the Plan and to pursue the medical malpractice claim. *Id.* TMRMC then filed an emergency motion for the appointment of a guardian ad litem. *Id.* TMRMC sought to require "a determination of whether [the parents'] rejection of a guaranteed payment under the . . . [Plan] in exchange for the chance of a jury verdict was in [the child's] best interest." *Id.* According to TMRMC, a guardian ad litem should evaluate "the uncertainty of litigation before a jury," "the customary delays associated with any jury trial," and "the potential for appeal" before rejection of the administrative award. *Id.* TMRMC also argued that the parents' interests conflicted with the child's and that "an independent advocate should make recommendations as to whether the child's best interests would be served by a lawsuit." *Id.*

The trial court denied the motion to appoint a guardian ad litem. *Id.* TMRMC sought certiorari review. The First District denied TMRMC's petition, ruling that the trial court did not violate any clearly established principle of law that resulted in a miscarriage of justice. *Id.* at 81. The First District upheld the trial court's ruling for three reasons, finding that: (1) the Plan itself does not require appointment of a guardian ad litem; (2) the parents' interests in pursuing the medical malpractice action were not adverse to the child's; and (3) the

appointment of a guardian ad litem would invade the parents' constitutional right of privacy. *Id.* at 79-81.

The *Petersen* court first explained that the Plan "does not provide . . . for the appointment of a guardian ad litem to represent the interests of the injured child," nor does the statute "contain any other provision that mandates appointment of a guardian ad litem under the present circumstances." *Id.* at 79. Moreover, the court ruled that TMRMC failed to show that the interests of the parents so conflicted with the interests of the child to require the appointment of a guardian ad litem. *Id.* As the First District reasoned:

> The mere decision to proceed [to a jury trial in circuit court] in an attempt to gain fuller recovery for the child is not, even in the face of some risk, tantamount to an adverse interest.

Id. Explaining that the damages sought in the medical malpractice action were for the child's benefit, the First District rejected any notion that the parents sought personal financial gain at the child's expense. *Id.* at 79-80. Rather, the parents – as natural guardians – properly represented the child's interests. *Id.* at 80.

Finally, the First District ruled that to require a guardian ad litem "under the not-unusual facts of this case would directly interfere with the parents' familial right of privacy" granted by the Florida Constitution. *Id.* (citing Art. I, § 23, Fla. Const.). "[N]atural parents have a right to make decisions about their child's welfare without interference by third parties." *Id.* (citation omitted). At best,

"TMRMC has merely shown that the [parents'] election of a civil remedy has some risk and does not preserve the guaranteed return of the administrative compensation award." *Id.* This is not enough, according to the First District, to justify the invasion of the parents' fundamental parental privacy rights. *Id.*

The First District's decision in *Petersen* demonstrates that the trial court below, in refusing to lift the abatement, departed from the essential requirements of law. Even though the Hospital may not have directly petitioned the trial court for the appointment of a guardian ad litem, the Hospital nonetheless suggested that the Parents are not competent to act in the Child's best interests. (*See* A-6, at 2-3.) The Hospital emphasized, for example, that "the responsibility for determining what is in the best interests of the child" ultimately lies with the trial court. (A-6, at 3.) The Hospital argued – and the trial court apparently agreed – that only after a determination of the amount of available compensation under the Plan can a "reasoned decision" be made on the Child's behalf. (A-6, at 3; A-9.)

Petersen establishes that the Plan does not require a guardian ad litem to act on behalf of the injured infant. *See Petersen*, 920 So. 2d at 79. Nor is the appointment of a guardian ad litem otherwise necessary. *See id.* The Hospital fails to argue, much less prove (A-6), that the Parents' interests conflict with the interests of the Child. The Parents' decision to pursue litigation against the

Hospital for medical negligence is not, "even in the face of some risk, tantamount to an adverse interest." *Petersen*, 920 So. 2d at 79.

The Parents, as the Child's natural guardians, properly represent his interests. *See id.* at 80. They have weighed the risk and decided to reject available benefits under the Plan, in favor of the potential for greater recovery against the Hospital in a civil action for medical negligence. To allow the Hospital to interfere with the claimants' election of remedies is to directly invade the Parents' familial right of privacy, as established by the Florida Constitution. *See id.* (citing Art. I, § 23, Fla. Const.).

Doubtless, the Hospital will emphasize that in *Petersen*, unlike the facts before this Court, the ALJ had already determined the amount of Plan compensation (the proverbial "bird in the hand" (A-6, at 3)). This distinction makes no difference. The First District did not decide *Petersen* by weighing the amount of the guaranteed benefits against the potential recovery in tort. 920 So. 2d at 79-80. Instead, *Petersen* established that the election of remedies is for the Parents alone, without second-guessing as to whether they may have acted "in the best interest" of the Child. *See id.* While the Parents' choice to pursue a civil remedy does have "some risk," and "does not preserve the guaranteed return" of an award under the Plan, this is "an insufficient basis upon which to invade . . . fundamental parental privacy rights." *Id.* at 80. To find otherwise would subject

"virtually any litigation decision made by parents . . . to review by a stranger to the parent-child relationship." *Id.*

Likewise, the trial court's ultimate responsibility to approve any settlement on the minor Child's behalf does not justify the result reached below. The Hospital persuaded the trial court that because "there can be no resolution of this matter in Circuit Court without court approval," the trial court has the ultimate "responsibility for determining what is in the best interests of the child." (A-6, at 3.) The Hospital cited no authority as support. Nor does such authority exist. Section 744.301(4)(a), Florida Statutes, requires the court to appoint a guardian ad litem to represent and protect the interests of a minor child if the gross settlement equals or exceeds $25,000. § 744.301(4)(a), Fla. Stat. Yet to require review of every litigation decision made by parents *before* settlement would directly interfere with their constitutional right of privacy. *See Petersen*, 920 So. 2d at 80. Again, nothing in the language of the Plan requires the Parents to submit to a "best interests of the child" determination before exercising their statutory right to elect a civil remedy, rather than to accept Plan benefits. *See id.* at 79-80.

For all these reasons, the trial court departed from the essential requirements of law. Continued abatement of the Parents' lawsuit against the Hospital causes irreparable harm that cannot be remedied on plenary appeal. The Parents ask this Court to issue a writ of certiorari and quash the Order of Abatement.

Respectfully submitted,

SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.

James W. Gustafson, Jr.
Florida Bar No. 0008664
P.O. Drawer 1230
Tallahassee, Florida 32302
(850) 224-7600 Telephone
(850) 224-7602 Facsimile

CREED & GOWDY, P.A.

Rebecca Bowen Creed
Rebecca Bowen Creed
Florida Bar No. 0975109
865 May Street
Jacksonville, Florida 32204
(904) 350-0075 Telephone
(904) 350-0086 Facsimile

Attorneys for Petitioners
Allison and Timothy Anderson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **G. Bruce Hill** and **Christopher Steinhaus,** 1030 W. Canton Avenue, Ste. 200, Winter Park, FL 32789; and **Mindy McLaughlin, Gabrielle Osborne,** and **Judith W. Simmons**, One Tampa City Center, 201 N. Franklin Street, Ste. 2900, Tampa, FL 33602; by U.S. Mail, this 24th day of January, 2011.

Rebecca Bowen Creed
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Petition complies with the font requirements of Rule 9.100(l) of the Florida Rules of Appellate Procedure in that it was produced in Times New Roman 14 point type.

Rebecca Bowen Creed
Attorney

INDEX TO PETITIONERS' SUPPLEMENTAL APPENDIX

Pinellas County | General | Court | Official Records | Property | Other Records | eBusiness

KEN BURKE, CPA
CLERK OF THE CIRCUIT COURT
PINELLAS COUNTY, FLORIDA

Civil/Small Claims - Docket Viewing - Fct D

Return to Previous Page Records Main Menu

Uniform Case	Pinellas Case	Section	Case Type	Type
522007CA000969XXCICI	07000969CI	007	MED MAL PRAC	PM
Style:	ANDERSON ALLISON			
vs.	HELEN ELLIS MEMORIAL HOSPITAL FOUNDATION INC			
Jury Trial	Stipulation (STIP)	Notice of Hearing (NOTH)	Reason	Type Disp.
		Y		
Filing Date	Appeal Date	Judg. Date	Reop Date	Docket Date
01/31/2007				
Case/Cat				
PROFESSIONAL MALPRAC				

Select Dockets per Page: 100 - Submit

Select Page: 1

40 docket entries displayed of 40, 12/23/2010 to 01/31/2007 New Search

Current Sort is: -Original Sort-

Reset Original Sort	Link To	Activity Code	Docket Date	P/D	Docket Entry	Ver
1		ORDE	12/23/2010	PLAINTIFF	ORDER DENYING MOTION TO LIFT ABATEMENT	F
2		ORGR	12/22/2010	DEFENDANT	ORDER GRANTING MOTION ENFORCING NICA IMMUNITY AS TO DEFT	F
3		NOTH	09/30/2010	PLAINTIFF	NOTICE OF HEARING 122110 2:00	F
4		OPTO	09/24/2010	DEFENDANT	OPPOSITION TO TO MOTION TO LIFT ABATEMENT	F
5		MOTN	09/23/2010	DEFENDANT	MOTION FOR NICA IMMUNITY TO BE ENFORCED	F
6		RESP	09/23/2010	DEFENDANT	RESPONSE TO MOTN TO LIFT ABATEMENT AND	F
7		NFNC	09/16/2010	DEFENDANT	NOTICE OF FIRM NAME CHANGE	F
8		MOTN	09/13/2010	PLAINTIFF	MOTION TO LIFT ABATEMENT	F
9		RESP	12/07/2009	PLAINTIFF	RESPONSE IN OPPOSITION TO NOTICE OF LACK OF PROSECUTION	F
10		NLPM	11/25/2009	CLERK	NOTICE-LACK OF PROS MLD TO PLTF/PLTF ATTY	N
11		NLPS	11/25/2009	CLERK	WEST COAST MEDICAL GROUP INC (REMOVED FROM MASTER ORDER)	N
12		NLPS	11/25/2009	CLERK	TREE OF LIFE MIDWIFERY SERVICE INC	N
13		NLPS	11/25/2009	CLERK	HOLLY MARIA BAUER R N	N
14		NLPS	11/25/2009	CLERK	HELEN ELLIS MEMORIAL HOSPITAL FOUNDATION INC	N
15		NLPS	11/25/2009	CLERK	CHRISTINE HILDERBRANDT R N	N
16		NLPS	11/25/2009	CLERK	NOTICE-LACK OF PROS-DISM 012510-MLD AS TO:	N
17		MOTN	08/04/2008	PLAINTIFF	MOTION TO LIFT ABATEMENT	F
18		NNAV	07/07/2008	PLAINTIFF	NOTICE OF UNAVAILABILITY	F
19		NCAC	06/06/2008	DEFENDANT	NOTICE OF CHANGE OF ADDRESS OF COUNSEL	F
20		NCAC	01/17/2008	DEFENDANT	NOTICE OF CHANGE OF FIRM NAME COUNSEL	F
21		RECC	01/17/2008	DEFENDANT	RECEIVED BY COURT 011708	F
22		COPI	01/17/2008	DEFENDANT	COPY NOTICE OFCHANGE OF FIRM NAME	N
23		AGOR	03/14/2007	DEFENDANT	AGREED ORDER: ABATING MATTER	F
24		ATTY	03/14/2007	DEFENDANT	ATTORNEY COVER LETTER	N
25		MODS	02/27/2007	DEFENDANT	MOTION DISMISS /ABATE	F
26		MODS	02/23/2007	DEFENDANT	MOTION DISMISS/ABATE	F
27		NAPP	02/16/2007	DEFENDANT	NOTICE OF APPEARANCE AS ATTORNEYS OF RECORD	F
28		SURS	02/14/2007	CLERK	SUMMONS RETD SERVED CHRISTINE HILDERBRANDT R N 021207	N
29		SURS	02/14/2007	CLERK	SUMMONS RETD SERVED TREE OF LIFE MIDWIFERY SERVICE INC 021207	F
30		SURS	02/01/2007	CLERK	SUMMONS RETD SERVED WEST COAST MEDICAL GROUP INC 013107	F
31		DUPE	02/01/2007	CLERK	HELEN ELLIS MEMORIAL HOSPITAL FOUNDATION INC 013107	F
32		SURS	02/01/2007	CLERK	SUMMONS RETD SERVED	N
33		SURS	02/01/2007	CLERK	SUMMONS RETD SERVED HOLLY MARIA BAUER R N 013107	F
34		SUIB	01/31/2007	CLERK	SUMMONS ISSUED AT BRANCH	N
35		INTR	01/31/2007	PLAINTIFF	INTERROGATORIES (5)	F
36		REPR	01/31/2007	PLAINTIFF	REQUEST FOR PRODUCTION (5)	F
37		CCST	01/31/2007	PLAINTIFF	CIVIL COVER SHEET	F
38		COMP	01/31/2007	PLAINTIFF	COMPLAINT	F
39		02CI	01/31/2007	PLAINTIFF	CIRCUIT CIVIL FILING FEE PAID $255.00	N
40		SECT	01/31/2007	PLAINTIFF	THIS CASE ASSIGNED BY CLERK TO SECTION 007 BY 6845 - RANDOM PM	N

Select Page: 1

Return to Top of Page: Top of Page

New Search

Ver Verified, F=Filed, N=Not Filed/Notice
There is no case file document associated with a notice

Supp. A - 1