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

WILLIAM H. LONG, M.D., et al.,
Appellants,

v.

ROBERT AND TAMMY BENNETT, etc., et al.,
Appellees.

Case No. 1D07-5561
L.T. No. 06-2422N

ST. VINCENT'S MEDICAL CENTER, INC.,
Appellant,

v.

ROBERT AND TAMMY BENNETT, etc., et al.,
Appellees.

Case No. 1D07-5557
L.T. No. 06-2422N

ON APPEAL FROM THE DIVISION OF ADMINISTRATIVE HEARINGS

CONSOLIDATED ANSWER BRIEF OF APPELLEES ROBERT AND TAMMY BENNETT

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PRELIMINARY STATEMENT

In this Answer Brief, Claimants/Appellees Robert and Tammy Bennett, individually and as guardians of Tristan Bennett, a minor, will be referred to as the "Parents." Tristan Bennett is referred to as the "Child."

Intervenor/Appellant, St. Vincent's Medical Center, Inc. will be referred to individually as "SVMC." Intervenors/Appellants, William H. Long, M.D. and North Florida Obstetrical and Gynecological Associates, P.A., will be referred to as "Dr. Long." SVMC and Dr. Long will be referred to collectively as the "Health Care Providers."

Sections 766.301 through 766.316, Florida Statutes (2007), govern Florida's Birth-Related Neurological Injury Compensation Plan, and will be referred to as the "Plan."

STATEMENT OF THE CASE AND FACTS

The Health Care Providers omit the following facts, which are relevant to this appeal:

The Child's mother was not in labor

First, the record reveals that the Child's mother was not ever in labor before the Child's birth. (R-1062, ¶ 17.) "Labor" is "commonly understood to mean the onset of regular contractions that result in cervical changes." (R-1095, n.6 (citing Exh. 23, at 31, 61).) Here, the record reflects that the contraction pattern of the Child's mother was consistent with an "irritable" uterus resulting from a placental abruption, which did not produce cervical change. (T-63-65; Exh. 23, at 33.)

Consistent with the evidence and the experts' testimony, the ALJ found that

> the record reveals that, more likely than not, [the Child's mother] was not in labor, when monitoring was discontinued at 12:47 p.m., or, there being no persuasive evidence to support a contrary conclusion, thereafter.

(R-1062, ¶ 17; *id.* at 1095, n.8 (citing Exhs. 23, 24)); *see also* T-63-65, 90-91 (trial testimony of the Health Care Providers' expert).)

The Child's medical records document the absence of neurological involvement or neurological injury

Next, the Child's medical records during her first seven days reveal no neurological involvement or neurological damage:

> **9/28/01**
> PE: pink, alert, active . . . appears clinically stable.

9/28/01 3:15 p.m.
Neuro grossly intact, symmetrical exam, no focal deficits. Suspect renal failure/ATN, and probably . . . hyponatremia . . . Suspect must have suffered some asphyxia damage in MVA.

9/29/01 7:45 a.m.
Neuro – Active Alert

9/30/01 5:30 p.m.
No evidence of CNS [central nervous system] dysfunction at present.

10/1/01 10:05 p.m.
Neuro grossly intact.
. . .
(8) Asphyxia – Infant [with] S[ymptoms] c[onsistent]/w[ith] asphyxial/hypoxic organ damage. Remains in ATN, oliguric phase, [with] blood, prot[ein] in urine. Creatinine cont to increase.
LFT's also elevated, though actually improving.
No other organ damage evident @ this time.
. . .
(10) CNS – No neuro abnormalities noted. . . .

10/2/01 11:45 a.m.
No focal neuro deficits, Active + alert.
. . .
(8) Asphyxia: Multiorgan failure. . . .

(10) CNS: No obvious neuro abnormalities.

10/3/01 a.m.
(8) Hypoxia: Multiorgan involvement. . . .
No evidence of CNS involvement . . .

(Exh. 9 (cited at R-1066-67, ¶ 24).)

The treating neurologist noted the new onset of seizure activity

On October 3, 2001, the Child suffered a pulmonary hemorrhage. (R-1067-69, ¶¶ 25-28.) On the evening of October 3, 2001, SVMC's staff noted the likely onset of seizure activity. (*Id.* at 1069, ¶ 28; Exh. 9.) The Child's medical records from October 4, 2001 reference a "possible seizure" and state:

#10 CNS: Had no obvious CNS dysfunction till last night.

(R-1069, ¶ 28; Exh. 9.)

SVMC called for a consult by a pediatric neurologist, Dr. Gama, on October 5, 2001. (R-1069, ¶ 29.) The neurologic consult noted the new onset of seizure. Dr. Gama describes the Child's hospital course leading up to the October 3 arrest, and states, in relevant part:

> The baby developed thrombocytopenia and then progressively started bleeding with associated pulmonary bleeding. This was controlled with appropriate ventilatory support; however, a second episode of pulmonary hemorrhage occurred, this time associated with significant decline and requiring some resuscitation. This occurred on 10/3. The patient following this was noted to have some jerking movements of her extremities which were easily controlled with pressure. However because of her clinical decline, it was felt that this represented seizure activity. The baby was bolused with phenobarbital. The level was followed but because of recurrence of these symptoms, the patient was re-bolused today. The patient's phenobarbital is 23 today. An electroencephalogram has been obtained but is still pending in its results. Neurologic consultation is obtained.
>
> . . .

PHYSICAL EXAMINATION:

The patient's examination demonstrates a head circumference of 33.5 cm. The baby is sedated, intubated, and with an umbilical catheter in place. The head demonstrates a normotensive anterior fontanelle. The sutures are unremarkable. There is some scalp edema secondary to slight fluid overload most likely secondary to her renal disease process. Pupils were 1 mm and equal. Doll's eyes were present. The patient's sucking reflex is decreased. Rooting reflex is decreased. She is intubated through her mouth. The patient's motor examination shows that she is floppy with decreased muscle tone throughout, retraction response is absent, head control is absent, motor reflex is absent. The baby withdraws extremities to touch. The deep tendon reflexes are hypoactive. Babinski could not be elicited. Palmar and plantar grasp are decreased. Spine shows no particular abnormalities. . .

IMPRESSION:

1. New onset seizures most likely secondary to multiple factors including:
   a. Status post pulmonary hemorrhage.
   b. Hypoxic ischemic encephalopathy.
   c. Metabolic as well as possible dysmorphogenic causes.
   d. Rule out central nervous system hemorrhage.
2. Acute tubular necrosis secondary to hypotension, metabolic acidosis and possibly hypoxemia.
3. Liver dysfunction.
4. Disseminated intravascular coagulation.
5. Status post metabolic acidosis.
6. Status post hypertension.
7. Status post maternal motor vehicle accident and trauma.

(Exh. 9 (cited at R-1069-71, ¶ 29.)

A CT scan performed October 29, 2001 showed multicystic encephalomalacia of the cortex. (R-1071, ¶ 30.) EEG's performed October 5, October 8, October 17 and November 2, 2001 were all abnormal, each showing diffuse cerebral dysfunction. (*Id.*)

On November 27, 2001, Dr. Gama reported to the Child's pediatrician, Dr. Julie Baker, that:

> [The Child] is status post severe perinatal distress with hypoxic ischemic encephalopathy, metabolic acidosis, associated coagulopathy and complicated with one cardiac arrest requiring resuscitation while at the special care nursery. The result of all of these complications is culminated with what appears to be a severe hypoxic ischemic encephalopathy with multicystic encephalomalacia and seizure disorder. . . .

(Exh. 10 (cited at R-1071-72, ¶ 32).)

Expert testimony supports the ALJ's findings of fact

The Health Care Providers omit any mention of the expert medical testimony that supports the ALJ's findings, instead summarizing only the expert testimony of Dr. Gary Hankins. The Health Care Providers fail to note that Dr. Hankins' ability to testify as to the timing and cause of the Child's neurological injury was questioned, and likewise do not address the expert medical testimony offered by the Parents.

Dr. Hankins is not a pediatrician, a neonatologist or a pediatric neurologist. (T-87.) He is a physician who is board-certified in obstetrics and gynecology and

maternal-fetal medicine. (*Id.* at 38-40.) He does not diagnose or treat cerebral palsy (or any other serious neurologic impairment) in infants and children. (*See* T-107, 109, 111, 114.)

Dr. Hankins conceded that he would defer to the expertise of a neonatologist or a pediatric neurologist, whose competence in performing neonatal exams exceeded his. (*Id.* at 106, 111; *see also id.* at 112 (stating that he would defer to the neonatologist as to whether a pediatric neurologist should have been consulted after the Child's birth).) When asked whether the Child's medical records (which evidenced no neurological abnormalities for the first seven days after her birth) were consistent with neurologic impairments suffered as a result of pre-birth hypoxia, Dr. Hankins testified:

> If one wants to say that [the Child] would have come through all of this being cold stone normal but for, I would be heavily reliant upon the people that addressed what did happen with the cardiac arrest, the pulmonary hemorrhage. Because there's nothing to say that I cannot superimpose a second injury on the existing injury. We all must figure that out. Just because I've got one injury doesn't mean I can't get a second hit. And I am not the person that can decipher all those things.

(*Id.* at 110.)

Dr. Hankins could not testify as to whether the pulmonary hemorrhage that the Child suffered on October 3, 2001 would have caused significant injury. (T-115.) When asked by the ALJ whether he was qualified to answer the question,

Dr. Hankins stated, "No, sir. I mean, I have an opinion but I'm not an expert." (*Id.*)

Dr. Hankins was not the only medical expert whose testimony the ALJ considered. The Health Care Providers stipulated to the admission of the Child's medical records, together with the admission of the deposition testimony of the Child's nurses and treating physicians and the deposition testimony of the Parents' two medical experts, Dr. Richard Fields and Dr. Norman Pryor. (R-1076-77, ¶ 40.) The ALJ specifically noted that in his Final Order that "[t]he medical records, as well as the testimony of the physicians and other witnesses, have been thoroughly reviewed." (*Id.* at ¶ 41.)

The Parents' expert pediatric nephrologist, Dr. Pryor, testified that the Child suffered oxygen deprivation before birth that damaged her kidneys and liver and caused diffuse intravascular coagulopathy. (Exh. 29, at 33-36.) According to Dr. Pryor, not every infant who suffers a hypoxic ischemic injury before birth suffers a brain injury. (*Id.* at 32-33.)

Based on his review of the medical records and his education, training and experience, Dr. Pryor testified, over the Health Care Providers' objection, that the Child did not suffer any significant neurological damage before the October 3, 2001 arrest. (*Id.* at 46.) He stated that in his opinion, the Child suffered a brain or neurologic injury as a result of the October 3, 2001 arrest. (*Id.* at 44-47.)

SUMMARY OF ARGUMENT

The Health Care Providers are not entitled to reversal of the Final Order.

First, the ALJ did not err in interpreting the clear and unambiguous language of section 766.309(1)(a), Florida Statutes, to find that the Health Care Providers were not entitled to the benefit of a rebuttable presumption of "birth-related neurological injury." Section 766.309(1)(a) provides that

> [i]f 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. 766.302(2).

§ 766.309(1)(a), Fla. Stat.

The statute conditions the presumption upon whether the *claimant* has demonstrated that the infant sustained a brain injury caused by oxygen deprivation. The language of the statute is clear and unambiguous. Because the statutory presumption arises only upon proof by a *claimant* of an infant's brain injury, other parties – like the Health Care Providers here – cannot rely on the presumption to satisfy their own burden of proof. The ALJ's narrow construction of the statutory presumption fulfills the Legislature's stated intent to limit the Plan to a narrow class of catastrophic injuries.

Even assuming for the sake of argument that the ALJ erred in interpreting the statutory presumption, the Health Care Providers are not entitled to reversal of the Final Order or to relief on remand. Regardless of the question of statutory interpretation, the ALJ found that credible evidence showed that the Child's profound neurologic injury did not occur during the course of labor, delivery, or resuscitation. Because the Parents sufficiently rebutted any statutory presumption of "birth-related neurological injury," the ALJ determined the question of compensability without regard to the statutory presumption.

The Health Care Providers confuse the burden of producing evidence under the statutory presumption with the burden of proof. Regardless of whether the statutory presumption arises, the Health Care Providers, as the proponents of the issue of compensability, bear the burden of proving that the Child's profound neurologic impairment, more likely than not, occurred during the course of labor, delivery, or resuscitation. It is this burden that the Health Care Providers failed to meet.

Competent substantial evidence supports the ALJ's determination that the Child did not suffer a "birth-related neurological injury." The ALJ is entitled to rely upon all available evidence in determining compensability. He is not limited only to expert medical testimony of causation. Nor did the ALJ err in rejecting the

"unrefuted" testimony of the "only qualified medical expert," as the Health Care Providers contend.

The record before this Court reflects that the ALJ properly relied upon the Child's medical records, along with the testimony of the treating physicians and the medical experts, in concluding that the Child did not suffer a compensable injury under the Plan. The Health Care Providers are not entitled to reversal of the ALJ's well-reasoned findings of fact, which are amply supported by competent substantial evidence in the record.

ARGUMENT

The Parents ask this Court to affirm the Final Order for two reasons: first, the ALJ correctly interpreted the clear and unambiguous language of section 766.309(1)(a) to find that the Health Care Providers were not entitled to the benefit of a rebuttable presumption of "birth-related neurological injury"; and second, even if such a presumption did arise, competent substantial evidence supports the ALJ's factual finding that because the Child's profound neurologic impairment did not occur in the course of labor, delivery, or resuscitation, she did not suffer a "birth-related neurological injury" compensable under the Plan.

I. THE ALJ PROPERLY INTERPRETED THE STATUTORY LANGUAGE OF THE PLAN TO FIND THAT THE REBUTTABLE PRESUMPTION OF "BIRTH-RELATED NEUROLOGICAL INJURY" DID NOT ARISE FOR THE HEALTH CARE PROVIDERS' BENEFIT.

Standard of Review

An administrative law judge's interpretation of the Plan is reviewed *de novo*. *Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 813 So. 2d 155, 159 (Fla. 4th DCA 2002).

Section 766.309(1)(a), Florida Statutes, establishes a rebuttable presumption of "birth-related neurological injury." The statute provides that

> *[i]f 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. 766.302(2).

§ 766.309(1)(a), Fla. Stat. (emphasis added).

Section 766.309(1)(a) conditions the presumption upon whether ("if") the *claimant* has demonstrated that the infant sustained a brain injury caused by oxygen deprivation. *See* § 766.309(1)(a), Fla. Stat. This rebuttable presumption operates for the benefit of claimants alone. (R-1075, at ¶ 39.) The Health Care Providers must satisfy their burden of proof independent of any statutory

presumption of injury. (R-1075-76, ¶ 39 (citing *Balino v. Dep't of Health & Rehab. Servs.*, 348 So. 2d 349, 350 (Fla. 1st DCA 1997).)

For the following reasons, the ALJ did not reversibly err in concluding that the Health Care Providers were not entitled to the benefit of the rebuttable presumption found in section 766.309(1)(a):

A. The ALJ's interpretation of the rebuttable presumption is consistent with both the statute's plain and unambiguous language and the purpose of the Plan.

First, consistent with the ALJ's ruling, the plain and unambiguous language of section 766.309(1)(a) limits the availability of the rebuttable presumption to claimants seeking to obtain benefits under the Plan. In construing statutory provisions, courts consider the history, the legislative intent, the evil to be corrected, the subject regulated, and the object to be obtained. *State Bd. of Accountancy v. Webb*, 51 So. 2d 296, 299 (Fla. 1951). The polestar for statutory interpretation is the legislature's intent, and that intent is determined primarily from the language used. *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071, 1073 (Fla. 1982). Where a term in a statute is not defined, the courts have looked to the dictionary for the term's common, ordinary meaning. *Cason v. Fla. Dep't of Mgmt. Servs.*, 944 So. 2d 306, 313 (Fla. 2006).

Clear and unambiguous language of a statute should be given effect; unambiguous statutes should not be subject to construction or interpretation.

Robinson v. Sterling Door & Window Co., 698 So. 2d 570, 571 (Fla. 1st DCA 1997). In the absence of ambiguity, the plain meaning of a statute controls. *State v. Dugan*, 685 So. 2d 1210, 1212 (Fla. 1996).

The operative language of section 766.309(1)(a) is the Florida Legislature's use of the conditional clause, "*[i]f the claimant has demonstrated*," to determine when the rebuttable presumption arises. "If," as commonly defined, means "in the event that," "allowing that," or "on condition that." Webster's New Collegiate Dict. 564 (1980 ed.). The Legislature's use of the conditional "if" expresses the condition that must occur before the expected result ("a rebuttable presumption . . . that the injury is a birth-related neurological injury") follows. *See* J. Williams, *Style Second Edition*: *Ten Lessons in Clarity and Grace* 220 (1985 ed.) (defining adverbial subordinate clauses as those that "usually begin with some kind of subordinating conjunction" like "if"; the main, or independent, clause follows).[1]

Consequently, section 766.309(1)(a) specifically conditions the rebuttable presumption upon whether the *claimant* has demonstrated that the infant has sustained a brain injury caused by oxygen deprivation. *See* § 766.309(1)(a), Fla. Stat. The language of the statute is clear and unambiguous. Because the statutory

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[1] Examples of adverbial subordinate clauses include:

Unless *you leave*, I will take action.

Because *you have not left*, I've called the police.

J. Williams, *Style*, at 220.

presumption of "birth-related neurological injury" arises only upon proof by the claimant of the infant's brain injury, other parties – like the Health Care Providers here – cannot rely on the presumption to satisfy their own burden of proof. The statute "must be given its plain and ordinary meaning." *Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank*, 609 So. 2d 1315, 1317 (Fla. 1992).

Nonetheless, the Health Care Providers argue that because nothing in the language of the statute suggests that the presumption "only works in . . . favor of one party to the proceeding," the statutory presumption must apply equally to all parties. (SVMC Init. Br., at 20; *accord* Dr. Long Init. Br., at 20.) According to the Health Care Providers, the statute simply provides that

> once the required demonstration is made, a rebuttable presumption **shall** arise that the injury is a birth-related neurological injury as defined in s. 766.302(2).

(SVMC Init. Br., at 20; *accord* Dr. Long Init. Br., at 20.)

This interpretation ignores the express language of the statute, which gives rise to the rebuttable presumption only *if the claimant* has demonstrated, to the ALJ's satisfaction, that the infant suffered a brain injury caused by oxygen deprivation. § 766.309(1)(a), Fla. Stat. To find that the rebuttable presumption arises "once the required demonstration is made" is to rewrite the statute's clear and unambiguous language. *See id.*; *cf.* Va. Code Ann. § 38.2-5008(A)(1)(a) (stating that a rebuttable presumption "shall arise that the injury alleged is a birth-

related neurological injury where *it has been demonstrated*, to the satisfaction of the Virginia Workers' Compensation Commission, that the infant has sustained a brain or spinal cord injury . . .") (emphasis added).[2] This the Court cannot do. *See State v. J.M.*, 824 So. 2d 105, 111 (Fla. 2002); *accord Univ. of Fla. Bd. of Trustees v. Andrew*, 961 So. 2d 375, 377 (Fla. 1st DCA 2007) (when "interpreting a statute, courts are not at liberty to add words to the statute that were not placed there by the legislature"). To give a statute a broader definition than its plain meaning or to add words not chosen by the legislature is to improperly abrogate legislative power. *Donato v. Am. Tele. & Tele. Co.*, 767 So. 2d 1146, 1150-51 & 1154 (Fla. 2000); *accord Andrew*, 961 So. 2d at 377.

As the plain meaning of the statute demonstrates, the Florida Legislature enacted the rebuttable presumption to assist claimants in seeking benefits under the Plan. *See* § 766.301(2), Fla. Stat. (expressing legislative intent to "provide compensation, on a no-fault basis, for a limited class of catastrophic injuries"); *see also Wolfe v. Va. Birth-Related Neurological Injury Comp. Program*, 580 S.E.2d 467, 473 (Va. Ct. App. 2003) (interpreting Virginia Birth-Related Neurological

[2] This provision of Virginia's Birth-Related Neurological Injury Compensation Act – unlike Florida's Plan – specifically provides that "[i]f either party disagrees with such presumption, that party shall have the burden of proving that the injuries alleged are not birth-related neurological injuries within the meaning of the chapter." Va. Code Ann. § 38.2-5008(A)(1)(a). Given this express language, the Virginia Court of Appeals has ruled that the rebuttable presumption applies equally to claimants and medical providers. *See Cent. Va. Obstetrics & Gynecology Assocs. v. Va. Birth-Related Neurological Injury Comp. Program*, 590

Injury Compensation Act, Va. Code Ann. §§ 38.2-5000 – 2-5021, to find that the Virginia legislature recognized "the difficulty in proving when, but not whether, such an injury was sustained," and "enacted a presumption to assist potential claimants in obtaining benefits").[3] To allow the Health Care Providers to rely upon the rebuttable presumption to limit their own liability is contrary to the purpose of this statutory provision.

Moreover, in construing statutory language, courts consider "not only . . . the literal and useful meaning of the words, but also . . . their meaning and effect on the objectives and purpose of the statute's enactment." *Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings*, 686 So. 2d 1349, 1354 (Fla. 1997); *accord Cason*, 944 So. 2d at 313. The Florida Legislature enacted the Plan to "provide no-fault compensation for birth-related neurological

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S.E.2d 631, 636 (Va. Ct. App. 2004).

[3] Florida's Plan was proposed by the 1987 Academic Task Force for Review of the Insurance and Tort Systems (the "Task Force"). *Galen of Fla., Inc. v. Braniff*, 696 So. 2d 308, 310 (Fla. 1997). The Task Force recommended that Florida adopt "a no-fault compensation plan for birth-related neurological injuries similar to the then newly enacted Virginia plan." *Id.* (citing Academic Task Force for Review of the Insurance and Tort Systems, *Medical Malpractice Recommendations* 31 (Nov. 6, 1987)). The Plan enacted by the Florida Legislature, although similar to Virginia's Act, was not identical. *See, e.g., Galen*, 696 So. 2d at 310 (noting that Florida's Plan, unlike Virginia's, requires notice). Where the language of the two statutes is similar, Florida courts have looked to the Virginia Court of Appeals' statutory interpretation. *See, e.g., Romine v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 842 So. 2d 148, 155, n.7 (Fla. 5th DCA 2003) (noting that its interpretation of Florida's Plan was consistent with the analysis of the Virginia Court of Appeals).

injuries to infants." *Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 813 So. 2d 155, 159 (Fla. 4th DCA 2002) (citing *Fla. Birth-Related Neurological Injury Comp. Ass'n v. McKaughan*, 668 So. 2d 974, 978 (Fla. 1996)); *accord* § 766.301(2), Fla. Stat. The Legislature sought to

> provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation.

§ 766.301(2), Fla. Stat.

The statutory interpretation advocated by the Parents – and accepted by the ALJ – results in a narrower application of coverage under the Plan than that proposed by the Health Care Providers. This narrow interpretation is consistent with the requirement that "statutes which are in derogation of the common law be strictly construed and narrowly applied." *Nagy*, 813 So. 2d at 159. To accept a broader statutory interpretation is to afford the Health Care Providers an opportunity for greater immunity under the Plan, while limiting the Parents' common-law rights. Such an expansive reading of the statute contradicts not only the rules of statutory interpretation, but also the "clearly expressed intention of the legislature that the Plan be limited to a narrow class of catastrophic injuries." *Nagy*, 813 So. 2d at 160; *see also Fla. Birth-Related Neurological Injury Comp. Ass'n*, 686 So. 2d at 1354-55 (emphasizing that "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").

B. The Fifth District's ruling in *Alexander* does not compel a contrary interpretation of the rebuttable presumption.

Notwithstanding the plain and unambiguous language of section 766.309(1)(a), the Health Care Providers ask this Court to find that the rebuttable presumption applies equally to all parties. As support for their argument, the Health Care Providers rely upon *Alexander v. Florida Birth-Related Neurological Injury Comp. Ass'n*, DOAH Case 02-2214N (Div. Admin. Hearings, Feb. 11, 2004), *aff'd in part, rev'd in part*, 909 So. 2d 582 (Fla. 5th DCA 2005).[4] This prior decision by the same ALJ, the Health Care Providers contend, demonstrates that the ALJ incorrectly applied the rebuttable presumption. (*See* SVMC Init. Br., at 24-28; Dr. Long Init. Br., at 22-28.)

Yet *Alexander* does not address the same question of law now before this Court. *Alexander* may be cited only to illustrate the sufficiency of the evidence needed to rebut the statutory presumption – not *whether and when* the presumption arises.

Review of the underlying order on compensability in *Alexander* demonstrates the absence of any issue related to statutory interpretation. (*See*

[4] Copies of both the ALJ's underlying order on compensability and the Fifth District's opinion in *Alexander* are attached to the Appendix filed by SVMC. (*See* SVMC Appendix, Tabs B & C.)

SVMC Appendix, at Tab C.) Nowhere within that order did the ALJ find that the claimant questioned whether the statutory presumption of section 766.309(1)(a) can be used to satisfy the health care providers' burden of proving compensability. (*Compare* SVMC Appendix, Tab C, at 13-14, ¶¶ 15-16 *with* R-1074-76, ¶¶ 37-39; T-173-74.) Thus, there was no need for the ALJ to address, as a matter of law, whether the rebuttable presumption arises for the benefit of the health care providers. (*See* SVMC Appendix, Tab C, at 13-14, ¶¶ 15-16.) *Cf. Universal Underwriters Ins. Co. v. Tucker*, 736 So. 2d 778, 780 (Fla. 4th DCA 1999) (noting that arguments not made in the trial court are waived).

Instead, the ALJ considered only whether credible evidence had been produced to rebut the statutory presumption that the child's injury occurred "in the course of labor, delivery, or resuscitation in the immediate postdelivery period." (SVMC Appendix, Tab C. at 14, ¶ 16.) Finding insufficient credible evidence to show that the claimant was not in labor – or that the child's injury occurred before delivery – the ALJ ruled in *Alexander* that the evidence did not adequately rebut the presumption established by section 766.309(1)(1). (*Id.* at 15-16, ¶¶ 18-20.) The ALJ concluded, then, that the child suffered a compensable birth-related neurological injury under the Plan. (*Id.* at 26, ¶ 35.)

On appeal, the claimant in *Alexander* likewise did not contend that the rebuttable presumption of section 766.309(1)(a) arises only for the benefit of

claimants. *Orlando Regional Healthcare Sys., Inc. v. Alexander*, 909 So. 2d 582, 586-87 (Fla. 5th DCA 2005). Instead, the claimant appealed the findings of fact. The claimant argued that, contrary to the ALJ's findings, she had "provided sufficient competent evidence to demonstrate that [the child's] injuries did not occur during labor, delivery or resuscitation." *Id.* at 586. The claimant also challenged the constitutionality of section 766.309(1)(a) on two grounds: first, that "she presented sufficient evidence to overcome the statutory presumption, and therefore, it was unconstitutional for the ALJ to apply the presumption against her"; and second, that the statute should be declared unconstitutionally vague. *Id.* at 587. Ruling that competent substantial evidence supported the ALJ's findings – and that the terms used in the statute "are not so vague as to permit the ALJ to 'guess' at their meaning" – the Fifth District rejected the claimant's appeal. *Id.*

Nowhere within its opinion in *Alexander* did the Fifth District address whether and when the statutory presumption under section 766.309(1)(a) arises. *See id.* at 586-87. The Fifth District stated only that

> [t]he ALJ recognized that . . . once it is established that a newborn suffered an injury to the brain caused by oxygen deprivation that rendered the child permanently and substantially mentally and physically impaired, then a rebuttable presumption arises that the injury is a "birth-related neurological injury" which is covered under NICA.

Id. at 586. This simple summary of the ALJ's finding does not demonstrate that the Fifth District even implicitly ruled that the statutory presumption operates equally for the benefit of all parties. *See id.* Instead, the Fifth District properly confined its review to the matters that had been presented to the ALJ. *See, e.g.*, *Mariani v. Schleman*, 94 So. 2d 829, 831 (Fla. 1957) (ruling that "[m]atters not presented to the trial court by the pleadings and evidence will not be considered by [the] court on appeal"); *accord Bennett v. State*, 641 So. 2d 938, 939 (Fla. 5th DCA 1990).

Thus, the claimant in *Alexander* questioned the sufficiency of the evidence needed to rebut the statutory presumption – not whether and when the presumption arises. For this reason alone, the Health Care Providers cannot rely on *Alexander*. Neither the ALJ's ruling nor the Fifth District's opinion in *Alexander* supports the Health Care Providers' interpretation of the rebuttable presumption set forth in section 766.309(1)(a).

In any event, the facts of *Alexander* are distinguishable. Unlike the claimant in *Alexander*, the Parents produced credible evidence to rebut any presumption of a "birth-related neurological injury," and to "require resolution of the issue without regard to the presumption." (R-1076, at ¶ 39). Competent substantial evidence in

the record supports the ALJ's findings of fact in this case. The Health Care Providers fail to show otherwise.[5]

C. Even assuming *arguendo* that the ALJ misinterpreted section 766.309(1)(a), the Health Care Providers are not entitled to reversal of the Final Order or to relief on remand.

Regardless of whether the ALJ may have erred in interpreting the rebuttable presumption, the Health Care Providers are not entitled to reversal of the Final Order or to relief on remand. The ALJ's statutory interpretation, even if erroneous, did not affect the presentation of evidence so as to require a new administrative hearing.

1. A shift in the burden of producing evidence does not shift the burden of proof.

First, in an effort to persuade this Court of the harmful effect of the ALJ's statutory interpretation, the Health Care Providers confuse the burden of producing evidence under section 766.309(1)(a) with the burden of proof. For example, the Health Care Providers argue that in "failing to apply the rebuttable presumption," the ALJ incorrectly "placed the initial burden of proof" on them. (SVMC Init. Br., at 27.) In fact, the Health Care Providers always bore the burden of proof in this proceeding. *See Tabb v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 880

[5] For the same reasons, the Health Care Providers cannot rely upon the ALJ's prior order in *Petersen v. Florida Birth-Related Neurological Injury Compensation Association*, DOAH Case No. 04-1880N (Div. Admin. Hearings, Sept. 8, 2005). (*See* SVMC Init. Br., at 24, n.7 (citing SVMC Appendix, Tab D).)

So. 2d 1253, 1260 (Fla. 1st DCA 2004) (citing *Fla. Birth-Related Neurological Injury Comp. Ass'n v. McKaughan*, 668 So. 2d 974 (Fla. 1996), to find that the assertion of NICA exclusivity is an affirmative defense).

The Health Care Providers – not the Parents – claim that the Child's profound neurologic impairment is within the category of "birth-related neurological injury" covered exclusively under the Plan. As the proponents of the issue, the burden rests on the Health Care Providers to prove that the Child more likely than not suffered a "birth-related neurological injury." *See Tabb*, 880 So. 2d at 1260 (finding that the burden rested on the health care providers, as the proponent of the issue, to demonstrate that the notice provisions under NICA were satisfied); *see also Balino v. Dep't of Health & Rehab. Servs.*, 348 So. 2d 349, 350 (Fla. 1st DCA 1977) (noting that the "burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal"). To suggest that this burden of proof arose "only after [the Parents] rebutted the presumption with credible evidence"[6] is to misapprehend Florida law. *See Tabb*, 880 So. 2d at 1260.

Even if the rebuttable presumption of "birth-related neurological injury" arises for the Health Care Providers' benefit, this presumption shifted only the burden of producing evidence – not the burden of proof. *See* §§ 90.302(1) &

[6] (Dr. Long Init. Br., at 27; *see also* SVMC Init. Br., at 28-29.)

90.303, Fla. Stat. (2007); W. Eleazer & G. Weissenberger, *Florida Evidence: 2001 Courtroom Manual* § 90.302, at 111 (2001 ed.). The Health Care Providers concede that the statutory presumption found in section 766.309(1)(a) must be classified as a rebuttable presumption under section 90.302(1), which shifts only the burden of producing evidence. (*See* SVMC Init. Br., at 27-28; Dr. Long Init. Br., at 26 (citing § 90.302(1), Fla. Stat.)); (*see also* R-1096, n.12 (quoting § 90.303, Fla. Stat.).)[7] Under this "bursting bubble" theory, once credible evidence "sufficient to sustain a finding of the nonexistence of the presumed fact is introduced," the existence or nonexistence of the presumed fact will be "determined from the evidence without regard to the presumption." § 90.302(1), Fla. Stat.; *accord Dep't of Agric. & Consumer Servs. v. Bonanno*, 568 So. 2d 24, 31 (Fla. 1990). The burden of proof remains with the proponent. *See Florida Evidence: 2001 Courtroom Manual* § 90.302, at 111; *cf. Estate of Brock v. Brock*, 692 So. 2d 907, 912 (Fla. 1st DCA 1996) (interpreting presumption of undue influence).

[7] SVMC asserts in a footnote that the ALJ "incorrectly concluded that the presumption created by Section 766.309(1)(a), is a Section 90.303 presumption." (SVMC Init. Br., at 28, n.8.) SVMC apparently misapprehends the purpose of section 90.303, which simply defines the rebuttable presumption found in section 90.302(1). *See Dep't of Agric. & Consumer Servs. v. Bonanno*, 568 So. 2d 24, 31 (Fla. 1990) (noting that section 90.303 defines the first classification of rebuttable presumption under section 90.302(1)); *see also* C. Ehrhardt, *Evidence* § 302.1 (2008 ed.) (noting that "whether a presumption affects the burden of producing evidence or affects the burden of proof is defined in sections 90.303 and 90.304").

It is this burden of proof that the Health Care Providers failed to meet. Thus, they are not entitled to reversal of the Final Order – regardless of whether the ALJ may have misinterpreted the statutory presumption.

2. The Parents adequately rebutted any presumption of "birth-related neurological injury" with competent substantial evidence.

Next, even if the Health Care Providers were entitled to rely upon a presumption of a "birth-related neurological injury," the Parents sufficiently rebutted this presumption with credible evidence. In his Final Order, the ALJ expressly found that

> there was credible evidence produced (in [the Child's] medical records) to support a contrary conclusion, and to require resolution of the issue without regard to the presumption.

(R-1076, ¶ 39.) Based on the evidence presented, the ALJ concluded that the Child's profound neurological impairment more likely than not "resulted from a brain injury caused by oxygen deprivation that occurred October 3, 2001, and not during labor, delivery or resuscitation." (*Id.* at 1078, ¶ 42.)

The ALJ reached the correct result. Once the Parents introduced sufficient evidence to show that the Child's brain injury did not occur during labor, delivery, or resuscitation (R-1077-78, ¶¶ 41-42; *id.* at 1091, ¶ 63), any statutory presumption of a "birth-related neurological injury" vanished. *See* § 90.302(1), Fla. Stat.; *Dep't of Agriculture & Cons. Servs.*, 568 So. 2d at 31 (classifying rebuttable presumption

under section 90.302(1) and section 90.303 as a "vanishing" or "bursting bubble" presumption); *accord Mallardi v. Jenne*, 721 So. 2d 380, 383 (Fla. 4th DCA 1998). The ALJ properly determined from the evidence, "without regard to the presumption," that the Child's profound neurologic impairments did not occur during the course of labor, delivery, or resuscitation. (R-1076-78, ¶¶ 39-42.)

The Health Care Providers contend that this evidence "was not competent and substantial." Yet they present no compelling justification for this Court to reverse the ALJ's factual findings as to compensability (or the lack thereof) under the Plan, which are "conclusive and binding." § 766.311(1), Fla. Stat.

The findings of fact are amply supported by competent substantial evidence. Any argument by the Health Care Providers to the contrary is nothing more than an unwarranted request for this Court to reweigh the conflicting evidence. *See Jackson v. Granger Lumber Co.*, 275 So. 2d 555, 557 (Fla. 1st DCA 1973). Reversal of the ALJ's ruling is not warranted, even if this Court finds that the statutory presumption applies equally to all parties. *See, e.g., Fla. Birth-Related Neurological Injury Comp. Ass'n*, 686 So. 2d at 1355 (disapproving statutory interpretation, but approving factual findings).

3. The Health Care Providers cannot demonstrate any prejudice that results from the ALJ's ruling. Any decision not to elicit testimony from an expert pediatric neurologist was a tactical decision that does not warrant a new evidentiary hearing.

Finally, the Health Care Providers cannot show that the ALJ's statutory interpretation, even if erroneous, prejudiced the defense's preparation and presentation of evidence. Again, the Health Care Providers always had the burden of proving that the Child suffered a compensable "birth-related neurological injury" under the Plan. Even if, as the Health Care Providers contend, the parties' stipulation gave rise to the rebuttable presumption of "birth-related neurological injury," the defense should have assumed that the Parents could rebut that presumption with competent evidence, including the Child's medical records.[8]

In fact, the Parents did rebut any presumption with competent evidence. The Child's medical records repeatedly document the absence of any neurological injury until after the Child suffered a pulmonary hemorrhage on October 3, 2001. Indeed, SVMC did not even call a pediatric neurologist for a consult until the Child was more than one week old – additional evidence that the Child did not suffer any profound neurologic impairment in the course of labor, delivery, or resuscitation. To now suggest that the Health Care Providers *could* have elicited testimony from

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[8] An administrative hearing under the Plan is not a medical malpractice proceeding in which the Parents must introduce and rely upon expert medical testimony to establish causation. *See, e.g., Fluet v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 788 So. 2d 1010, 1012 (Fla. 2d DCA 2001) (noting that the Plan "does not require the claimant to prove malpractice and provides a streamlined administrative hearing to resolve the claim"); *see also* § 766.303(1), Fla. Stat. (establishing the Plan "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims"); § 766.307(1), Fla. Stat. (requiring a date for hearing to be set no later than 120 days after the filing of a petition).

a pediatric neurologist as to the timing of the Child's serious neurologic impairment is nothing more than speculation.

In any event, the decision of the Health Care Providers not to retain an expert pediatric neurologist was a tactical one, made before the ALJ ever ruled on the interpretation of the statutory presumption. The ALJ did not rule on the question of statutory interpretation until after considering all the evidence. (*See* T-254; R-1074-76, ¶¶ 35-39.) The Health Care Providers cannot suggest, then, that the ALJ's interpretation of the rebuttable presumption affected their own preparation and presentation of evidence.

The Health Care Providers made a tactical decision to proceed without a pediatric neurology expert. Having gambled and lost, they must now live with the consequences of that decision. They are not entitled to reversal of the Final Order or to a new hearing on the question of compensability under the Plan. *Cf. Kmart Corp. v. Hayes*, 707 So. 2d 957, 958 (Fla. 3d DCA 1998) (reversing order granting plaintiffs' motion for new trial; although the plaintiff may have been surprised by a witness' changed testimony, she made the tactical decision to proceed with the trial and take her chances with the jury, and "must now live with the consequences of that decision").

II. COMPETENT SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S DETERMINATION THAT THE CHILD DID NOT SUFFER A "BIRTH-RELATED NEUROLOGICAL INJURY."

Even if this Court finds that the ALJ misinterpreted the statutory presumption, the Health Care Providers are not entitled to relief on appeal. Notwithstanding its interpretation of the statutory presumption, the ALJ specifically ruled that credible evidence showed that the Child's brain injury did not occur during the course of labor, delivery, or resuscitation, and thus required "resolution of the issue without regard to the presumption." (R-1076, ¶ 39.)

Standard of Review

Findings of fact related to compensability are considered "conclusive and binding." § 766.311(1), Fla. Stat. Such findings can be reversed on appeal only if those findings are not supported by competent substantial evidence in the record. *Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 813 So. 2d 155, 159 (Fla. 4th DCA 2002).

Here, competent substantial evidence supports the ALJ's determination that the Child did not suffer a "birth-related neurological injury." In her first seven days, the Child suffered from metabolic acidosis, kidney and liver damage, and respiratory distress. While the metabolic acidosis and multi-organ system failure indicate that she suffered a hypoxic insult (like asphyxia or oxygen deprivation) before delivery, the notes of her treating physicians repeatedly document the

absence of any neurological injury. Instead, the Child is described as active and alert, with no neurological abnormalities noted. (R-1066-67, ¶ 24.)

Only on October 3, 2001 – after the Child suffered a pulmonary hemorrhage and profound episodes of oxygen deprivation – did any evidence of neurologic abnormalities appear. (R-1067-69, ¶¶ 25-28; Exh. 9.) By 11:30 p.m. on October 3, 2001, the hospital's staff noted the likely onset of seizure activity. Additional neurological abnormalities are documented in the Child's medical records, including a notation that the Child "had no obvious CNS dysfunction till last night." (R-1069, ¶ 28; Exh. 9.) Only after the onset of seizures did SVMC order a neurological consult by Dr. Gama, a pediatric neurologist. (*See* R-1069, at ¶ 29; Exhs. 9, 10.)

The record amply supports the ALJ's ruling that while the Child suffered multi-system organ failure as a consequence of oxygen deprivation before, during, and immediately after birth, her profound neurologic impairment

> resulted from a brain injury caused by oxygen deprivation that occurred October 3, 2001, and not during labor, delivery or resuscitation in the immediate postdelivery period in the hospital.

(R-1078, ¶ 42.) The ALJ properly ruled, then, that the Child did not suffer a compensable "birth-related neurological injury," as defined by the Plan. (*Id.*)

Nonetheless, the Health Care Providers ask this Court to reverse the ALJ's findings of fact. According to the Health Care Providers, the ALJ must rely on

expert medical testimony to determine when an infant's neurological injury occurred. The Health Care Providers claim that the Parents did not offer qualified expert medical testimony regarding the timing of the Child's neurological injury; in fact, the Health Care Providers contend, their own expert, Dr. Hankins, was the *only* qualified medical expert to testify as to this issue. (SVMC Init. Br., at 33-34, 36; Dr. Long Init. Br., at 35.)

The Health Care Providers are not entitled to reversal of the ALJ's well-reasoned Final Order. The Health Care Providers mistakenly interpret the plain language of the Plan and the record before this Court in suggesting otherwise.

A. The ALJ properly relied on "all available evidence" – including the medical records – to find that the Child did not suffer a "birth-related neurological injury."

First, the Health Care Providers err in comparing the determination of a birth-related neurological injury under the Plan to a determination of causation in worker's compensation or the proximate cause requirement of medical malpractice, which can be proven only with expert medical testimony.

The Health Care Providers' interpretation contradicts the unambiguous language of the Plan. Whether the claimed injury is compensable under the Plan "must be determined exclusively in an administrative proceeding." § 766.301(1)(d), Fla. Stat. The Plan requires an administrative law judge to

determine, "based upon *all available evidence*," whether the infant has suffered a "birth-related neurological injury." § 766.309(1)(a), Fla. Stat. (emphasis added).

Nowhere within the Plan is the administrative law judge's determination limited to expert medical testimony. Instead, the Legislature contemplated that the administrative law judge would determine, based upon all available evidence, whether the infant's injuries were compensable under the Plan. *See, e.g., Fluet v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 788 So. 2d 1010, 1012 (Fla. 2d DCA 2001) (noting that the Plan "does not require the claimant to prove malpractice and provides a streamlined administrative hearing to resolve the claim").

Florida courts have compared the Plan to the worker's compensation system. *See, e.g., Romine v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 842 So. 2d 148, 154 (Fla. 5th DCA 2003). Yet courts look only to cases construing the worker's compensation statutes for "guidance" in construing the Plan. *See id.* Otherwise, this court, in construing the Plan, must be "guided by the plain language of . . . statutes and the Legislature's expressed intent." *Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 813 So. 2d 155, 160 (Fla. 4th DCA 2002).

Here, the plain language of section 766.309(1)(a) controls. *See, e.g., State v. Dugan*, 685 So. 2d 1210, 1212 (Fla. 1996). The Plan expressly allows the ALJ

to make his determination of compensability "based upon all available evidence." § 766.309(1)(a), Fla. Stat. The language of the Plan must be strictly construed. *See Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings*, 686 So. 2d 1349, 1354 (Fla. 1997) (citation omitted). The Health Care Providers cannot suggest, then, that medical records are not competent substantial evidence under the Plan. *Cf. Orlando Regional Healthcare Sys., Inc. v. Alexander*, 909 So. 2d 582, 586-87 (Fla. 5th DCA 2005) (affirming ALJ's findings of fact based on the medical records).

The Health Care Providers likewise err in suggesting that the concept of proximate cause is even relevant to this appeal. Compensation under the Plan is determined "irrespective of fault." § 766.301(1)(d), Fla. Stat.; *see also* § 766.301(2), Fla. Stat. (noting the Legislature's intent "to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries"). Proof of proximate cause is unnecessary. *See Fluet*, 788 So. 2d at 1013 n.5 (noting absence of evidence to suggest that the "decision to administer Pitocin was negligent or that the administration of the drug was the proximate cause of the infant's death"; "[b]ecause the Plan is based upon a no-fault system, this was not an issue addressed by the parties or the administrative law judge"); *see also* Black's Law Dict. 1225 (6th ed. 1990) (defining "proximate cause" as that which, "in a natural

and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred").

By definition, "all available evidence" includes the Child's medical records. *See* § 766.309(1)(a), Fla. Stat. The Plan does not require the ALJ to consider *only* expert medical testimony in determining compensability. *See id.*

B. The ALJ did not err in rejecting the expert testimony of Dr. Hankins.

Next, the Health Care Providers mistakenly contend that the ALJ reversibly erred in rejecting the testimony of Dr. Hankins, the Health Care Providers' expert. Although the Health Care Providers characterize Dr. Hankins as the "only qualified medical expert," the record reflects that, in fact, Dr. Hankins was not qualified to testify as to the timing of the Child's neurological injury. And even if qualified, Dr. Hankins was certainly not the *only* medical expert who testified as to this issue. Once again, the Health Care Providers fail to show that the ALJ's findings of fact are not supported by competent substantial evidence.

1. Dr. Hankins was not qualified to testify as to the timing or cause of the Child's neurological injury.

The Health Care Providers emphasize Dr. Hankins' testimony that the Child's eventual diagnosis of cerebral palsy was "consistent" with an "intrapartum hypoxic event or insult" and the Child's condition at birth. (SVMC Init. Br., at 33; Dr. Long Init. Br., at 37-38 (citing T-80-81, 110-111).) Yet Dr. Hankins is not a

pediatrician, a neonatologist or a pediatric neurologist. (T-87.) He is a physician who is board-certified in obstetrics and gynecology and maternal-fetal medicine. (*Id.* at 38-40.) He does not diagnose or treat cerebral palsy (or any other serious neurologic impairment) in infants and children. (*See* T-107, 109, 111, 114.)

Dr. Hankins also did not render his opinion as to proximate cause (or causation, for that matter) within a reasonable degree of medical probability: the very standard of proof that the Health Care Providers urge this Court to adopt. (*See, e.g.*, SVMC Init. Br., at 34-35.) At the administrative hearing, Dr. Hankins essentially conceded that he was not qualified to testify as to the timing or cause of the Child's profound neurologic impairment.

For example, when asked whether the Child's medical records (which evidenced no neurological abnormalities for the first seven days after her birth) were consistent with neurologic impairments suffered as a result of prebirth hypoxia, Dr. Hankins criticized the normal neurological examinations evidenced by the records. (T-108-109.)[9] Despite admitting that he was "not an expert here" (*id.* at 109) – and that he did not know what kind of neurologic examinations had

[9] Dr. Hankins testified that this Child deserved a detailed neurologic examination, as if to suggest that the neonatologists were not competent to perform such evaluations. (T-109.) Yet SVMC elected not to consult with a pediatric neurologist until the Child was more than a week old. Given that the decision to call in a consulting pediatric neurologist was for SVMC to make, the Health Care Providers cannot refute the implication: there was no need for consultation with a pediatric neurologist – and no evidence of profound neurologic impairment – until *after* October 3, 2001.

been performed by the treating physicians after the Child's birth (*id.* at 106)[10] – Dr. Hankins stated, "I would not expect a competent person to not find neurologic abnormalities." (*Id.* at 109.) Dr. Hankins then testified:

. . . .

> If one wants to say that [the Child] would have come through all of this being cold stone normal but for, I would be heavily reliant upon the people that addressed what did happen with the cardiac arrest, the pulmonary hemorrhage. Because there's nothing to say that I cannot superimpose a second injury on the existing injury. We all must figure that out. Just because I've got one injury doesn't mean I can't get a second hit. *And I am not the person that can decipher all those things.*

(*Id.* at 110 (emphasis added).)

Dr. Hankins could not explain the normal neurological examinations noted in the Child's medical records for the first seven days of her life. He conceded that he would defer to the expertise of a neonatologist or a pediatric neurologist, whose competence in performing neonatal exams exceeded his. (*Id.* at 111; *see also id.* at 112 (stating that he would defer to the neonatologist as to whether a pediatric neurologist should have been consulted after the Child's birth).)

Likewise, Dr. Hankins could not testify as to whether the pulmonary hemorrhage that the Child suffered on October 3 would have caused significant

[10] Dr. Hankins also testified that he relied upon "people whose specialty it is, the neonatologist, the neuro imaging people, the pediatric neurologist, the pathologists who all assist in helping us gain a larger picture of what happened" to the Child. (T-106.)

injury. (T-115.) When asked by the ALJ whether he was qualified to answer the question, Dr. Hankins stated:

> No, sir. I mean, I have an opinion but I'm not an expert.

(*Id.*)

The Health Care Providers cannot rely on Dr. Hankins' testimony to refute the medical records that the Child was neurologically normal until seven days after her birth. By his own admission, Dr. Hankins was not qualified to render an opinion as to whether the Child's profound neurologic impairment occurred, more likely than not, during the course of labor, delivery, or resuscitation immediately after birth.

The Health Care Providers chose not to elicit expert testimony from a neonatologist or a pediatric neurologist as to the likely timing of the brain injury that rendered the Child profoundly neurologically impaired. (R-1077, ¶ 40.) Accordingly, the ALJ properly found that the Health Care Providers failed to prove that the Child more likely than not suffered a "brain-related neurological injury" during the course of labor, delivery, or resuscitation. (*Id.* at 1090-91, ¶¶ 62-63.)

2. In any event, Dr. Hankins was not the only qualified medical expert.

Even assuming that Dr. Hankins was qualified to render an opinion of the timing or cause of the Child's profound neurologic impairment, he was certainly not the *only* qualified medical expert to testify. In fact, the ALJ considered all

available evidence, including the testimony of the expert physicians, in finding that the Child's injury was not compensable under the Plan.

The Health Care Providers stipulated to the admission of the Child's medical records, together with the admission of the deposition testimony of the Child's nurses and treating physicians and the deposition testimony of the Parents' two experts, Dr. Fields and Dr. Pryor. (R-1076-77, ¶ 40; *see also* R-857; R-861 (Notice of Filing Stipulated Record).) The ALJ specifically noted that in his Final Order that "[t]he medical records, as well as the testimony of the physicians and other witnesses, have been thoroughly reviewed." (R-1077, ¶ 41.) Upon his review of the record evidence, the ALJ concluded that although the Child more likely than not suffered "multi-system failure as a consequence of the oxygen deprivation she suffered between 12:45 p.m. . . . and 1:22 p.m.," she likely did not suffer a "brain injury or substantial neurologic impairment until after she experienced profound episodes of oxygen deprivation on October 3, 2001 . . . ." (*Id.*)

The Final Order is entitled to a presumption of correctness. *See Gongaware v. State of Fla. Unemployment Appeals Comm'n*, 882 So. 2d 453, 454 (Fla. 4th DCA 2004). The ALJ reached his conclusion based upon a thorough review of the medical records and testimony. (R-1077, ¶ 41.) The ALJ's findings of fact can be reversed only if those findings are not supported by any competent substantial

evidence. *See Alexander*, 909 So. 2d at 587; *accord* § 766.311(1), Fla. Stat. (providing that findings of fact as to compensability are "conclusive and binding").

The ALJ properly determined, based upon the expert testimony of the Parents' medical experts and the medical records, that the Child's injuries were not compensable under the Plan. Dr. Fields – like Dr. Hankins – is a physician board-certified in obstetrics and gynecology, while Dr. Pryor is a board-certified pediatrician and pediatric nephrologist. (R-1076-77, ¶ 40.) Accepting the Health Care Providers' contention that Dr. Hankins is qualified to testify as to the timing or cause of the Child's neurological injury, the Parents' experts are likewise qualified to testify as to this issue. *Cf. Meyer v. Caruso*, 731 So. 2d 118, 124-25 (Fla. 4th DCA 1999) (finding, in a medical malpractice action, that a medical expert "credentialed in one discrete specialty" may testify "as to the standard of care of a health care provider credentialed in another").[11]

For example, one of the Parents' experts, Dr. Fields, testified that the Child's mother was not in labor, whether before or during delivery. (Exh. 23, at 30-31.) The ALJ found the testimony of Dr. Fields (and the similar testimony of NICA's expert, Dr. Willis) to be the most persuasive. (R-1062 & 1095, n.8.) The ALJ

[11] The Health Care Providers' criticisms of Dr. Pryor are the same criticisms that may be leveled against Dr. Hankins. (*See* Dr. Long Init. Br., at 31, n.10.) Dr. Hankins admits that he: (a) is not a pediatric neurologist; (b) rendered his opinion based upon his review of selected medical records; (c) is not qualified to practice neurology or pediatric neurology; and (d) would defer to the expertise and competence of those specialists as to neurological issues. (T-87, 107-112, 115.)

relied on this expert testimony to conclude that the Child's mother was not in labor, whether before the fetal monitors were discontinued (at 12:47 p.m.) or at any time thereafter. (*Id.* at 1062, ¶ 17.)

Given this expert testimony – and the ALJ's findings of fact – it became incumbent upon the Health Care Providers to prove that the Child's profound neurologic impairment occurred in the course of delivery or resuscitation. *See* § 766.302(2), Fla. Stat. (defining "birth-related neurological injury"). Once again, the testimony of the Parents' expert is instructive. Dr. Fields defined the "delivery" of an infant by caesarean section to include only "the process of extracting the infant from the uterus." (*Id.* at 56.) Here, the records show that the caesarean section delivery began at 1:16 p.m. and ended at 1:22 p.m. on September 26, 2001. (R-1064, ¶ 20.) The Child was delivered routinely and without complications or trauma. (Exh. 20, at 87-89.) Evidence of a partial placental abruption was noted. (R-1064, ¶ 20.)

At delivery, the Child suffered from profound metabolic acidosis and moderate respiratory distress. (R-1064-65, ¶¶ 21-22.) The Parents' expert pediatric nephrologist, Dr. Pryor, testified that the Child suffered oxygen deprivation before birth that damaged her kidneys and liver and caused diffuse intravascular coagulopathy. (Exh. 29, at 33-36.) According to Dr. Pryor, not every

infant who suffers a hypoxic ischemic injury before birth suffers a brain injury. (*Id.* at 32-33.)

Based on his review of the medical records in this case, and his education, training and experience, Dr. Pryor testified that the Child did not suffer any significant neurological damage before the October 3, 2001 cardiopulmonary arrest. (*Id.* at 46.) Instead, he testified that in his opinion, the Child suffered a brain or neurologic injury as a result of the October 3, 2001 arrest. (*Id.* at 44-47.) According to Dr. Pryor, significant kidney failure caused the October 3, 2001 arrest. (*Id.* at 40.)

The testimony of Dr. Pryor alone is sufficient to refute the testimony of Dr. Hankins as to the timing or cause of the neurological injury. The Health Care Providers cannot contend, then, that the ALJ erred in rejecting the "unrefuted" testimony of their expert, Dr. Hankins. Clearly, Dr. Hankins was not the only qualified medical expert.

C. The Health Care Providers misinterpret the relevance of the treating neurologists' reports.

In a final effort to persuade this Court to reverse based on the purported absence of competent substantial evidence, the Health Care Providers cite the reports of the Child's treating neurologists. According to the Health Care Providers, the records of the treating pediatric neurologists alone fail to establish that the Child's neurological injury did *not* occur in the course of delivery.

Instead, the Health Care Providers argue that the records of the treating pediatric neurologists "more reasonably suggest" that the Child's "ultimate neurological injury cannot be confined or limited to a singular event or one moment in time." (SVMC Init. Br., at 43; *accord* Dr. Long Init. Br., at 40.)

The Health Care Providers again misapprehend the burden of proof. The Parents adequately rebutted any statutory presumption of "birth-related neurological injury" with the Child's medical records, together with the expert testimony of Dr. Pryor, Dr. Fields, and Dr. Willis. Once the Parents rebutted the statutory presumption, it became the Health Care Providers' burden to prove that the Child's neurological injury, more likely than not, occurred during the course of labor, delivery, or resuscitation. § 766.302(2), Fla. Stat.

The Health Care Providers cannot rely on the treating neurologists' reports to satisfy this burden of proof. Any suggestion by the Health Care Providers that the Child's neurologic injuries are compensable as a "birth-related neurological injury" – even if those injuries may have occurred outside the course of labor, delivery, or resuscitation – contravenes the plain language of the Plan. *See Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 813 So. 2d 155, 159-60 (Fla. 4th DCA 2002) strictly construing the definition of "birth-related neurological injury" to find that "[b]ecause the initial injury was to something other than the

baby's brain or spinal cord, by definition, it is not a 'birth-related neurological injury'").

In any event, the Health Care Providers misinterpret the treating neurologists' reports. The Child's treating neurologist, Dr. Gama, attributed the "new onset seizures" to the pulmonary hemorrhage and hypoxic ischemic encephalopathy that occurred on October 3, 2001, as well as metabolic causes. The Child's kidney and liver dysfunction, post metabolic acidosis, and post maternal motor vehicle accident and trauma were listed as separate conditions. (*See* Exh. 10; R-1069-71, ¶ 29).)

Similarly, use of the term "birth asphyxia" by another treating neurologist, Dr. Hammond, does not compel the conclusion that the Child suffered profound neurologic impairment in the course of labor, delivery, or resuscitation. While the Child may have suffered from oxygen deprivation (caused by the partial placental abruption) before, during, and after delivery, this hypoxic insult (or "birth asphyxia") likely damaged her kidneys and liver. (R-1077, at ¶ 41; Exh. 29, at 33-36.) The record does not suggest, however, that this "birth asphyxia" more likely than not caused a brain injury or significant neurologic impairment. (R-1066-67, ¶ 24; *id.* at 1069, ¶ 28; *id.* at 1077, at ¶ 41; Exh. 9; Exh. 29, at 44-47.)

Thus, the treating neurologists' reports are consistent with the documented absence of any profound neurologic impairment to the Child in her first seven days

of life. Only after the Child suffered the pulmonary hemorrhage on October 3, 2001 did SVMC even consider consultation with a pediatric neurologist necessary.

III. THE ALJ DID NOT ERR IN DENYING, WITHOUT COMMENT OR EXPLANATION, SVMC'S MOTION TO COMPEL PRODUCTION OF THE REPORT PREPARED BY NICA'S EXPERT.

SVMC raises one final issue on appeal; specifically, whether the ALJ abused its discretion in denying SVMC's motion to compel production of the report prepared by NICA's expert, Paul Carney, M.D. (SVMC Init. Br., at 43-47.)

Standard of Review

This Court reviews the lower tribunal's ruling on discovery for an abuse of discretion. *Rosaler v. Rosaler*, 442 So. 2d 1018 (Fla. 3d DCA 1984).

The ALJ did not abuse his discretion in denying SVMC's motion to compel production of Dr. Carney's privileged report, which was acquired by NICA after service of its response to SVMC's request to produce. The Parents adopt the arguments of NICA as to this issue. (*See* Answer Brief of Florida Birth-Related Neurological Injury Compensation Association, at 19-23.)

CONCLUSION

For all the foregoing reasons, the Parents respectfully request that the Court affirm the Final Order in its entirety.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY certify that I have delivered a copy of the foregoing to **Brian D. Stokes**, The Unger Law Group, P.O. Box 4909, Orlando, FL 32802-909, attorneys for St. Vincent's Medical Center, Inc.; **William Peter Martin and Craig A. Dennis**, Dennis, Jackson, Martin & Fontela, P.A., P.O. Box 15589, Tallahassee, FL 32317-5589, attorneys for William H. Long and North Florida Obstetrical and Gynecological Associates, P.A.; **M. Mark Bajalia**, Brenna, Manna & Diamond, LLC, 76 South Laura St., Ste. 2110, Jacksonville, FL 32202-5448, attorneys for Florida Birth-Related Neurological Injury Compensation Association; and **Kelly B. Plante**, Wilbur E. Brewton, and Tana D. Storey, Brewton Plante, P.A., 225 S. Adams, Ste. 250, Tallahassee, FL 32301, attorneys for NICA; by United States Mail, this 27th day of May, 2008.

Rebecca Bowen Creed
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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Attorney