

>> THE LAST CASE ON THE COURT'S
DOCUMENT TODAY.
FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY
COMPENSATION VERSUS DEPARTMENT
OF ADMINISTRATIVE HEARINGS. ET AL.
LET ME SEE IF I UNDERSTAND HOW
WE'RE GOING TO PROCEED HERE TODAY.
WE HAVE ONE ATTORNEY WHO IS
GOING TO APPEAR FOR PETITIONER
MIKE KOCHER.

>> YES, MA'AM.

>> AND YOU'RE GOING TO ARGUE
FOR EIGHT MINUTES?

>> THAT APPEARS TO BE THE CASE,
YOUR HONOR.

>> WE HAVE ANOTHER PETITIONER
WHO WILL ARGUE FOR 10 MINUTES?

>> WHICH IS --

>> EACH RESPONDENT WILL ARGUE
FOR 6.5 MINUTES?

AND YOU WILL DO A REBUTTAL FOR
TWO MINUTES?

>> AT THE END.

>> YOU NEED TO LOOK AT THAT
TIME.

>> YOU NEED TO BE CAREFUL.
IF YOU USE UP MORE THAN YOUR
EIGHT OR 10 MINUTES. THEN
YOUR CO-COUNSEL WILL BE LEFT WITH
VERY LITTLE TIME.

YOU NEED TO BE COGNIZANT BEFORE
TIME IS UP.

>> IN RESPONSE BEFORE MY TIME
STARTS, WE'RE NOT CO-COUNSEL.
WE'RE NOT ALIGNED.

WE FILED A MOTION TO --

>> CO-PETITIONERS.

>> YES, MA'AM.

>> PETITIONER'S SIDE GET 20
MINUTES.

YOU TWO ARE PETITIONER'S.

YOU NEED TO BE AWARE OF YOUR
TIME SO THE OTHER PETITIONER
HAS HIS 10 MINUTES.

OVER HERE, THE THREE
RESPONDENTS NEED TO BE AWARE OF
THEIR 6.5 MINUTES, SO THE OTHER
RESPONDENTS HAVE THEIR TIME.
OKAY.

ALL RIGHT.

>> WE'LL DO THE BEST.

>> YOU'RE EIGHT MINUTES INTO
YOUR ARGUMENT NOW.

>> THANK YOU VERY MUCH.

>> ISN'T THERE ANOTHER
PETITIONER, ACTUAL, OTHER
CLAIM?

>> AGGRIEVED PARTY OR A PATIENT
IF YOU WILL?

>> YES.

>> YES. THE GLENN'S COUNSEL IS
ADDRESSING THAT.

THE WAY THE APPEALS CAME OUT,
MISALIGNED THE STANDARD
APPROACH TO AN APPEAL.

MR. ^BREWTON, WHO REPRESENTS THE
NICA ASSOCIATION IN OPPOSITION
TO OUR POSITION.

>> WILL WE HEAR FROM MR. ^GLENN?
WE'LL HEAR A CONTINUATION OF
YOUR ARGUMENT?

>> PARTIALLY.

THERE IS ONE MAIN --

>> WHO IS MR.^GLENN?

>> THE GLENNS, PARTY OF GLENN.

NOT THE ATTORNEY.

>> OH, THE PARTY OF GLENN,

MR.^RUTH.

>> MR.^RUTH.

>> YOU COULDN'T HAVE GOTTEN

OUR COURT --

>> WE TRIED.

WE FILED A JOINT MOTION TO

REALIGN THE PARTIES BUT IT WAS

DENIED.

>> IT IS NOW UNDERSTANDABLE HOW
YOU GUYS WANT TO DO IT.

WE'LL ARGUE THE CASE THE WAY IT
IS SET OUT HERE.

I WANT ALL OF YOU TO BE AWARE
THAT, YOU NEED TO BE AWARE OF
YOUR TIME.

>> DO THE BEST WE CAN, YOUR
HONOR.

>> ALL RIGHT.

>> GOOD MORNING, YOUR HONORS.

MY NAME IS DINO GALARDI

FROM THE FERRARO FIRM.

I'M HERE FROM THE KOCHER

FAMILY, PARENTS AND NATURAL
GUARDIANS OF THE CHRISTOPHER
KOCHER.

WE ARE HERE TO ERRONEOUS
DECISION BY THE DISTRICT COURT
OF APPEALS.

SPECIFICALLY THE ATHEY CASE OUT
OF THE FIRST AND RUIZ CASE OUT

OF THE THIRD DISTRICT COURT OF APPEALS.

>> DID YOU BRING ANY CLAIMS AGAINST THE PHYSICIANS OR JUST BAYFRONT.

>> NO. WHEN WE FILED CASE 10 YEARS AGO WE KNEW PHYSICIAN GAVEN NOTICE WHICH OPTED BASED ON LANGUAGE. STATUTE ONCE YOU ACCEPT BENEFITS UNDER THE PLAN YOU CAN NO LONGER GO FORWARD.

WE ALSO KNEW THAT BAYFRONT PROVIDED NO NOTICE TO MR.^AND MRS.^KOCHER.

IT IS UNDISPUTED THAT BAYFRONT PROVIDED NO NOTICE.

WE MADE DECISION AT THAT TIME TO GO AFTER HOSPITAL BASED --

>> NOT THE PHYSICIAN.

>> NOT THE PHYSICIAN.

>> WOULD YOU SAY, THAT THAT IS SOMETHING JUST AS A PRACTICAL MATTER IF YOU HAD SUED BOTH IN CIVIL LAWSUIT, IS IT A SEVERABLE SITUATION?

IN OTHER WORDS THAT THE PERSON WHO GIVES NOTICE GETS THE BENEFIT OF GOING UNDER NICA AND THE ONES THAT DON'T GET SUED CIVILLY?

OR DOES THE PERSON, THE DOCTOR WHO GIVES THE NOTICE GET DRAGGED INTO COURT UNDER, UNLESS EVERYBODY WHO IS SUPPOSED TO GIVE NOTICE GIVES

NOTICE?

>> MY BELIEF IS, THAT THE, IT IS AN AFFIRMATIVE DEFENSE WHICH YOU RAISED IN TRIAL COURT AS TO WHETHER OR NOT NICA APPLIES. HOWEVER ONCE SOMEBODY RAISES ISSUE.

NICA THE CASE IS ABATED AND YOU HAVE TO GO THROUGH THE NICA PROCEEDING TO DETERMINE IF THE INJURY IS COMPENSABLE.

>> I UNDERSTAND THAT I'M ASKING A SIMPLE QUESTION.

DOCTOR GIVES THE NOTICE.

HOSPITAL DOESN'T.

YOU ALLEGE BOTH HAVE TO GIVE IT.

DOES THE DOCTOR WHO DONE EVERYTHING HE OR SHE HAS TO DO HAVE TO GO THROUGH --

>> I BELIEVE SO.

I BELIEVE HIS AFFIRMATIVE DEFENSE MOVE FOR SUMMARY JUDGMENT GET OUT BASED --

>> BIFURCATED SITUATION?

>> I BELIEVE IT SHOULD BE.

I'M NOT SURE IF ANYBODY ACTUALLY ADDRESSED THAT.

>> PRETTY IMPORTANT, THAT IS PRETTY IMPORTANT POLICY.

>> NO QUESTION ABOUT IT.

AS THE CASE IS SET FORTH, THE ONE WHO DOES PROVIDE NOTICE IS ALLOWED TO AFFORD ITSELF IMMUNITY UNDER STATUTE.

WHETHER IT IS ADDRESSED AS

AFFIRMATIVE DEFENSE IN TRIAL COURT OR WHETHER IT IS DEALT WITH IN THE NICA WHILE THE TRIAL CASE IS ABATED I WOULD ASSUME MOST GOOD LAWYERS WOULD NOT DRAG SOMEBODY IN THEY KNOW THEY PROVIDED NOTICE JUST TO MAKE THEM GO THROUGH THAT.

>> PATIENT ENDS UP LOSING BECAUSE THE PATIENT CAN'T SUE THE DOCTOR BECAUSE HE GAVE THE NOTICE, BUT, AND CAN SUE THE HOSPITAL, AND YOU CAN'T HAVE A HYBRID OF THAT?

THAT ONE PERSON IS UNDER THE NICA AND OTHER IS NOT?

>> I THINK YOU CAN.

I THINK THE RESULTS DIFFER.

I THINK YOU HAVE CHOICE OF ACCEPTING BENEFITS IF THE ONE PHYSICIAN OR HEALTH CARE PROVIDER PROVIDED THE NOTICE YOU COULD ACCEPT NICA BENEFITS AND THAT'S IT AND YOU'RE PRECLUDED FROM GOING ANY FURTHER.

IN THAT INSTANCE --

>> AGAINST THE HOSPITAL?

>> CORRECT.

THAT IS WAY STATUTE READS. STATUTE IS INARTFULLY DRAFTED IN MY OPINION.

>> THE SIMPLE ISSUE HERE OR MAYBE NOT SO SIMPLE ISSUE HERE IS, WHETHER OR NOT BOTH PARTIES HAVE TO GIVE, BOTH THE HOSPITAL

AND DOCTOR HAVE TO GIVE NOTICE,
IS THAT CORRECT?

>> THAT'S THE PRIMARY
UNDERLYING THEME.

I THINK MAIN ISSUE IS, THAT, IF
ONE GIVES NOTICE THE OTHER ONE
CAN'T AFFORD ITSELF TO
LIABILITY IF IT DIDN'T GIVE
NOTICE AND THAT'S THE ISSUE IN
THIS CASE.

WHAT THE SECOND DISTRICT COURT
OF APPEALS DID AFTER ALL THE
ISSUES WHETHER ALJ HAD
JURISDICTION TO DETERMINE
NOTICE PROVISIONS AND BACK AND
FORTH TO THE SECOND AND BACK
AND FORTH TO THE SECOND THIS
COURT ULTIMATELY DECIDED YES,
THE DLJ HAS JURISDICTION TO
DETERMINE THE ISSUE AND THE
CASE WENT UP ON APPEAL AFTER
ITS DECISION WAS QUASHED.

RATHER THAN REVERSING DECISION
AND GIVING US OPTION TO ELECT
OUR REMEDIES AND REJECT NICA
BASED ON FACT HOSPITAL DIDN'T
GIVE NOTICE OR ACCEPT IT BASED
ON FACT THE DOCTOR DID GIVE
NOTICE IT SAID NO.

YOU DON'T HAVE THAT POTENTIAL
CHOICE.

YOU CAN NOT HAVE THAT BECAUSE
THE DOCTOR GIVING NOTICE
INNURSE TO THE BENEFIT OF THE
HOSPITAL AND THAT IS
INCONTRAVENTION TO THE EXPRESS

AND PLAIN LANGUAGE OF THE
STATUTE THIS IS ALL YOUR
ARGUMENT, NOT ALL IT IS BUT IT
IS A STATUTORY CONSTRUCTION
ARGUMENT?

>> I DON'T THINK IT IS
NECESSARILY A STATUTORY
CONSTRUCTION ARGUMENT.

IT IS AMBIGUOUS.

IT DOESN'T SAY AND.

IT SAYS OR.

>> WE'RE REFERING TO THE
LEGISLATURE AS THE LEGISLATURE
WHEN IT SAID EACH HOSPITAL WITH
A PARTICIPATING PHYSICIAN ON
ITS STAFF AND EACH
PARTICIPATING PHYSICIAN SHALL
PROVIDE NOTICE?

>> THAT'S CORRECT, YOUR HONOR.

>> AND YOUR ARGUMENT IS, NOT
EACH HOSPITAL WITH A
PARTICIPATING PHYSICIAN ON ITS
STAFF, DOESN'T MEAN THAT
SOMEONE HAS STAFF PRIVILEGES.
NOT JUST EMPLOYEES OF THE
HOSPITAL, IS THAT CORRECT?

>> WELL, BOTH --

>> IT SAYS EACH HOSPITAL WITH A
PARTICIPATING PHYSICIAN ON ITS
STAFF.

>> WHEN THEY MEAN PARTICIPATING
THEY DEFINE PARTICIPATING
PHYSICIAN, PARTICIPATING
PHYSICIAN UNDER THE STATUTE IS
DEFINED SOMEBODY WHO IS UNDER
THE NICA PLAN.

NOT SOMEBODY INVOLVED IN THE
BIRTH NECESSARILY.

SO I THINK THE DISTINCTION
COMES IN AS FAR AS NOT JUST
NOTICE --

>> IS THE DOCTOR, WAS THE
DOCTOR HERE, WHO WAS YOUR
OBSTETRICIAN.

>> DR.^MASTER.

HE IS NOW IN AUSTRALIA.

>> WAS HE IS PARTICIPATING
PHYSICIAN ON THE STAFF OF THE
HOSPITAL?

>> NO, HE WAS NOT ON THE STAFF
OF THE HOSPITAL.

HE WAS INDEPENDENT CONTRACTOR
UNAFFILIATED WITH BAYFRONT.

HE WAS ON STAFF PRIVILEGES BUT
THAT DOESN'T EQUATE TO BE AN
EMPLOYEE OF THE HOSPITAL.

THE DOCTOR IN THIS INSTANCE
DOES NOT FALL UNDER THE
UMBRELLA OF OTHER EMPLOYEES BUT
THERE ARE OTHER CASES SAY EVEN
EMPLOYEES OF THE HOSPITAL HAVE
TO GIVE NOTICE THEY'RE
PARTICIPATING PHYSICIAN.

>> IS THERE A SEPARATE STATUTE
THAT SAYS MEDICAL STAFF
INCLUDES DOCTORS WITH
PRIVILEGES?

395.002?

>> I'M NOT AWARE THAT STATUTE.

>> MEDICAL STAFF INCLUDES
LICENSED PHYSICIANS WITH
PRIVILEGES IN A LICENSED

FACILITY.

>> THAT IS NICA STATUTE?

>> NOT A NICA STATUTE.

BUT SEPARATE STATUTE.

I'M TRYING TO FIND, SECOND

DISTRICT COURT OF APPEALS THAT

DECIDED THIS ON WHAT YOU

ARGUED.

BASICALLY THAT THIS DOCTOR HAS

PRIVILEGES.

AND DOESN'T NECESSARILY MEAN HE

IS ON STAFF.

>> WELL THERE'S A CASE, ONE OF

THE CASES STAND FOR THAT SAME

PROPOSITION EVEN IF HE IS ON

STAFF, OR EVEN IF HE IS AN

EMPLOYEE OF THE HOSPITAL AND HE

IS PARTICIPATING PHYSICIAN HE

STILL HAVES TO GIVE SEPARATE

AND INDEPENDENT NOTICE EVEN

THOUGH HE IS EMPLOYED BY THE

HOSPITAL.

>> WHAT IS THE INDUSTRY

STANDARD?

WHAT DO HOSPITALS LIKE MY

FATHER-IN-LAW WAS A DOCTOR.

HE HAD

PRIVILEGES IN LIKE FOUR OR FIVE

DIFFERENT HOSPITALS IN MIAMI.

>> HE WAS NOT AN EMPLOYEE OF

ANY OF THOSE HOSPITALS.

>> UNDER YOUR THEORY.

>> NOT UNDER THEORY.

UNDER CASE I CITED IN MY

BRIEF.

OVER 50 YEARS, HOSPITALS AND

PHYSICIANS CREATED THAT SPLIT
OF DICHOTOMY OF LIABILITY.
NOW THEY'RE SEEKING TO SAY OH,
NO, WE FALL UNDER THE SAME
UMBRELLA.

YOU CAN'T HAVE IT BOTH WAYS.

>> ARE THERE ANY CIRCUMSTANCES
UNDER WHICH A HOSPITAL WOULD
HAVE A DOCTOR ON STAFF?

>> IF HE IS EMPLOYED BY THE
HOSPITAL. HE IS ON STAFF.

>> SAME HOSPITAL DOESN'T EMPLOY
ANY DOCTORS?

>> I THINK COURT IS BEING
CONFUSED BY THE TERM, ON STAFF.
ON STAFF, VERSUS STAFF
PRIVILEGES IS A ENTIRELY
SEPARATE SITUATION.

ON STAFF MEANS THAT HE IS
EMPLOYED BY THE HOSPITAL.
HOSPITAL HAS RIGHT TO CONTROL
HIM.

>> IT SEEMS TO ME, WHEN I WAS
ASKING THE QUESTION, I THOUGHT
IT WAS FRIENDLY QUESTION FOR
YOU, IF IT WAS, I THOUGHT THAT
IS WHAT JUSTICE LABARGA WAS
SAYING TOO, IF IT WAS HOSPITAL
WITH PARTICIPATING PHYSICIAN ON
ITS STAFF, MEANING SOMEONE
PARTICIPATING IN A NICA WITH
STAFF PRIVILEGES THEN THAT
WOULD REQUIRE THAT HOSPITAL TO
GIVE NOTICE.

YOU'RE SAYING NO, NO, CAN'T
MEAN THAT.

I DON'T THINK THAT HOW THAT HELPS YOU.

>> I'M SAYING THERE IS DIFFERENCE, I WAS CONCERNED ABOUT HIS USE OF WORD, STAFF, ON STAFF.

>> YOU'RE DISCUSSING TWO DIFFERENT THINGS.

YOU'RE DISCUSSING LIABILITY AND THEY'RE DISCUSSING A QUESTION OF STATUTORY PROVISIONS.

>> RIGHT.

>> THAT TALK IN TERMS OF ON STAFF.

SO THAT'S WHAT YOU NEED TO UNDERSTAND.

>> NO, I UNDERSTAND.

>> EVERY TIME THEY ASK A QUESTION YOU KEEP RESPONDING WITH REGARD TO A RESPOND SUPERIOR KIND OF SITUATION.

>> DOES IT REALLY MAKE A DIFFERENCE, IF THE PHYSICIAN IS PARTICIPATING PHYSICIAN, THAT IS PARTICIPATING IN NICA, WHETHER THEY'RE ON STAFF OR HAVE STAFF PRIVILEGES.

>> STILL HAVE TO GIVE NOTICE.

>> WOULD THE HOSPITAL HAVE TO GIVE NOTICE.

>> THE PHYSICIAN HIMSELF WOULD HAVE TO GIVE NOTICE.

>> AND THE PHYSICIAN?

>> AND HOSPITAL WOULD HAVE TO GIVE NOTICE.

STATUTE IS CRYSTAL CLEAR.

IT SAYS AND, DOESN'T SAY OR.
DOESN'T SAY EITHER THE HOSPITAL
OR THE PHYSICIAN.

>> YOU ARE INTO YOUR REBUTTAL.
>> THOUGHT I STILL HAD A MINUTE
31.

>> FOR YOUR REBUTTAL.
YELLOW LIGHT IS ON.
THAT MEANS YOUR REBUTTAL.
TOO LET ME FINISH.

ONE SALIENT POINT.
I THINK CRUCIAL ISSUE IN THIS
CASE IS THE SECOND DISTRICT
COURT OF APPEALS HAS LUMPED IN
THE NOTICE OF THE PLAN AND NOT
THE PARTICIPATION OF THE HEALTH
CARE PROVIDER IN THE PLAN.

AND I ACCEPT THEIR ARGUMENT.
SYNERGISTICLY SOUND BY THEIR
PREMISE IS WRONG.

THE PREMISE THAT THE PHYSICIAN
HAS TO GIVE NOTICE OF BOTH THE
PLAN ITSELF, WHETHER INJURY IS
COMPENSABLE AND WHAT THE
LIMITATIONS ON LIABILITY ARE,
BUT ALSO HAS TO GIVE NOTICE OF
HIS OWN PARTICIPATION, OR
HOSPITAL THE SAME.

THERE IS NOTICE OF ITS
PARTICIPATION UNDER THE PLAN.
AND UNDER THE GALEN CASE
THIS COURT RULED THAT IS RIGHT
OF EVERY PATIENT TO THAT
INFORMED DECISION TO MAKE.

>> NOW SINCE YOU'RE ALREADY
USING YOUR REBUTTAL, ONE STATE

DECIDED TO USE THE PARTICULAR
OBSTETRICIAN WHO IS, GOING TO
DELIVER THE BABY AND THAT'S,
THEY KNOW WHICH HOSPITAL
THEY'RE GOING TO, WHAT OTHER
NOTICE DO THEY NEED?

>> THEY NEED A NOTICE, THE
HOSPITAL HAS THAT SAME
LIABILITY CAP.

BECAUSE UNDER THE TRADITIONAL
COMMON LAW, ENTITY, SEPARATE
ENTITIES THAT ARE LIABLE FOR
ANY MALFEASANCE.

IF THE HOSPITAL COMMITS ERROR
AND DOCTOR DOESN'T, JUST
BECAUSE DOCTOR IS IN NICA --

>> BUT --

>> THAT IS TRUE.

YOU COULD HAVE THE MIDWIFE AT
HOME.

YOU COULD GO OUT OF THE STATE.

>> YOU ALREADY PICKED
PARTICIPATING DOCTOR.

>> YOU CAN CHANGE.

WHOLE IDEA OF NOTICE IS PATIENT
CAN MAKE REASONABLE DECISION.
NOT AT TIME OF DELIVERY.

I WOULD AGREE IF YOU'RE
PRESENTING YOURSELF AT TIME OF
DELIVERY THAT WOULD BE IT.
THAT NOT THE CASE.

THE CASE IS YOU NEED TO BE
INFORMED OF THAT NOTICE AND
PARTICIPATION BY EACH HEALTH
CARE PROVIDER THAT IS THE
CRUCIAL DISTINCTION IN THIS

CASE.

>> THANK YOU VERY MUCH.

>> MR. ^BREWTON.

>> PLEASE THE COURT.

MY NAME IS WILBUR

BREWTON.

I REPRESENT THE FLORIDA BIRTH
RELATED NEUROLOGICAL INJURY
COMPENSATION ASSOCIATION.

THE QUESTION, ABOUT
PARTICIPATING PHYSICIAN.

I DON'T THINK THERE IS BUT ONE
CLASS OF PHYSICIAN HERE THAT IS
THE PARTICIPATING PHYSICIAN.

MAKES NO DIFFERENCE WHETHER
THEY'RE ON STAFF OR EMPLOYEE.

THERE IS NO SUCH DEFINITION
WITHIN THE NICA STATUTE.

AND NICA HAS NEVER INTERPRETED
BEING EMPLOYEE VERSUS BEING,
HAVING STAFF PRIVILEGES TO MAKE
PARTICIPATING --

>> IN EITHER EVENT, ARE YOU
SAYING THAT THE HOSPITAL IS
SUPPOSED TO GIVE NOTICE?

>> LET ME GET TO THAT IF YOU
DON'T MIND.

>> WELL IF THERE IS --, OKAY.

>> IN THE DCA CERTIFICATION
THERE IS TWO SEPARATE, YOU HAVE
INTERTWINED LINES OF REASONING
EMPLOYED BY THE SECOND DCA IN
THESE VARIOUS CASES TO REACH
THIS DECISION.

THE FIRST LINE IS BASED ON THIS
COURT'S DECISION IN GALEN

WHEREIN THE COURT HELD PURPOSE OF NICA WAS TO GIVE A PATIENT ABSOLUTE RIGHT TO GIVE OPPORTUNITY TO HAVE INFORMED CHOICE WHETHER OR NOT THEY CONTINUE WITH NICA PHYSICIAN OR CONTINUE WITH NICA HEALTH CARE PROVIDER, OR SOUGHT HELP FROM ANOTHER.

NON-PARTICIPATING.

NOW PHYSICIANS PARTICIPATE IN NICA.

HOSPITALS DO NOT.

HOSPITALS ONLY PAY THE \$50 A LIVE BIRTH.

THUS A HOSPITAL CAN NOT ELECT TO THE PARTICIPATE OR NOT TO PARTICIPATE IN NICA.

>> COULD YOU GIVE US, BECAUSE, I'M YOU CAN SPEND THE REST OF THE POINT ON YOUR REASONING. WHAT IS NICA'S POSITION ON WHAT THE ANSWER IS TO THIS QUESTION?

>> I THINK THE ANSWER TO THIS QUESTION WOULD BE, IF A PARTICIPATING PETITION GIVES NOTICE, AND THE PATIENT ACCEPTS CONTINUATION WITH A NICA PHYSICIAN, THAT ANY ADDITIONAL NOTICE IS DUPLICATIVE AS LONG AS YOU DO NOT DISTINGUISH BETWEEN AN EMPLOYEE OF THE HOSPITAL, OR A PHYSICIAN THAT IS ON STAFF.

>> LET ME ASK YOU THIS THEN. SUPPOSE FOR, SOME REASON I HAVE

A PARTICIPATING PHYSICIAN, BUT,
AT THE TIME THAT I GO TO THE
HOSPITAL FOR DELIVERY, THAT
PHYSICIAN, FOR WHATEVER REASON
IS NOT AVAILABLE, AND A
PHYSICIAN THAT IS AT THE
HOSPITAL, ACTUALLY ENDS UP WITH
A DELIVERY.

SHOULDN'T THE HOSPITAL HAVE
TELL ME, AT SOME POINT, KNOWING
THAT I'M COMING TO THAT
HOSPITAL WHETHER OR NOT THE
DOCTORS ON STAFF AT THAT
HOSPITAL ARE IN FACT
PARTICIPATING PHYSICIANS ALSO?

>> YOUR HONOR, THAT IS SLIPPERY
SLOPE.

>> WELL --

>> THAT WAS MY LAST POINT THAT
I WAS GOING TO MAKE.

THAT'S THE GOOGLEMAN CASE IN
THE FOURTH DISTRICT FOLLOWED
NOW BY THE FIRST DISTRICT.

IT IS WELL-REASONED OPINION IN
THAT INSTANCE THE PARTICIPATING
PHYSICIAN DID NOT GIVE NOTICE
TO THE PATIENT AND THIS CASE
WENT UP TWICE TO THE FOURTH
DCA.

BASICALLY WHAT THE FOURTH DCA
FINALLY SAID, A HEALTH CARE
PROVIDER WHO PROVIDES THE
REQUISITE NOTICE, IS ENTITLED
TO RELIE ON THE EXCLUSIVITY OF
THE PLAN.

THEREFORE THE HOSPITAL, WHICH

GAVE NOTICE WAS ENTITLED.

>> BUT MY QUESTION THOUGH REALLY COMES DOWN TO, I MAY ACCEPT THAT MY PHYSICIAN IS A, IS A PARTICIPATING PHYSICIAN IN NICA BUT I MAY WANT TO CHANGE MY MIND ABOUT THE HOSPITAL THAT I AM GOING TO IF I KNOW WHETHER OR NOT THE HOSPITAL ITSELF IS A HOSPITAL WITH A PARTICIPATING PHYSICIAN ON ITS STAFF?

>> YOU CAN NOT GO TO ANY HOSPITAL, YOU CAN NOT BE BORN IN ANY PLACE IN THIS STATE OTHER THAN A HOSPITAL AND HAVE NICA COVERAGE.

THERE IS NO OTHER BIRTHING AREA IN THE STATE OF FLORIDA.

>> I'M TALKING ABOUT THE ACTUAL PHYSICIAN WHO IS AT THE HOSPITAL?

>> ALL RIGHT.

YOU GET INTO EMERGENCY EXCEPTIONS THERE, AND YOU GET INTO WHETHER OR NOT THIS PHYSICIAN WAS A PARTICIPATING PHYSICIAN OR NON-PARTICIPATING PHYSICIAN, BECAUSE, IF, IF THE HOSPITAL GAVE NOTICE, YOUR HONOR, TO THE PATIENT IN A NON-PARTICIPATING PHYSICIAN IN A NON-EMERGENCY SITUATION ASSISTED IN THE BIRTH, NICA DOESN'T COVER IT.

THAT IS THE ISSUE.

THE PARTICIPATING --

>> AS TO THE PHYSICIAN?

>> IT WOULD BE AS TO THE HOSPITAL.

>> WHY?

THE HOSPITAL HAS GIVEN NOTICE.

>> YOU HAVE TO HAVE A NON-PARTICIPATING PHYSICIAN --

>> WHERE DOES IT SAY THAT IN THE STATUTE?

>> IT GIVES THE EXEMPTION TO EVERYONE CONTAINED I FORGOT WHAT SECTION IT IS, THERE IS ALL ENCOMPASSING SECTION, THAT SAYS IF A PARTICIPATING PHYSICIAN PARTICIPATES IN THE LABOR, DELIVERY, ET CETERA, THAT EVERYONE ASSOCIATED WITH THAT PARTICULAR BIRTH IS COVERED.

>> WE'RE TALKING ABOUT SOMEBODY THAT DOESN'T.

SOMEONE THAT DOESN'T, BUT A HOSPITAL THAT HAS GIVEN THE NOTICE.

>> OUR INTERPRETATION HAS ALWAYS BEEN THAT THERE IS NO NICA COVERAGE.

>> THERE IS OR IS NOT?

>> NONE.

>> AS TO THE HOSPITAL THERE'S NONE?

>> NONE.

BECAUSE THE PARTICIPATING PHYSICIAN IS WHAT TRIGGERS THE COVERAGE.

>> SEE THE PROBLEM, WHAT I'M

HAVING, AND I, WE ARE
INTERPRETING A STATUTE.
THE STATUTE SAYS, AND.
SO, YOU ARE READING OUT OF THE
STATUTE EACH HOSPITAL WITH A
PARTICIPATING PHYSICIAN ON ITS
STAFF.
NOW, IF, IT DOESN'T MATTER,
THEY DIDN'T SAY, AND SAYS EACH
PARTICIPATING PHYSICIAN.
IF THEY ONLY WANTED EACH
PARTICIPATING PHYSICIAN TO GIVE
NOTICE, THEY WOULD HAVE SAID
THAT.
THE HOSPITAL WOULDN'T NEED TO.
AND I DON'T, I GUESS, THE
LEGISLATURE IN ITS WISDOM
THOUGHT IT WASN'T NECESSARY,
THEY WOULD HAVE SAID IT.
THIS IS ENTIRELY
STATUTORY-CREATED SCHEME THAT
SHOULD BE STRICTLY CONSTRUED IN
FAVOR OF THE INJURED PARTY
BECAUSE IT IS ABROGATING THE
COMMON LAW.
SO FOR THE LIFE OF ME, EXCEPT
FOR THE ISSUE AS TO WHAT IT
MEANS, AND I WOULD ASK YOU WHAT
IT MEANS.
EACH HOSPITAL WITH A
PARTICIPATING PHYSICIAN ON ITS
STAFF, SEEMS TO ME IT IS CLEAR,
IN THE CONJUNCTIVE, NOT THE
DISJUNCTIVE.
>> LET ME MAKE IT CLEAR.
THE OTHER FOUR DISTRICT COURTS

OF APPEAL HAVE ALL INTERPRETED
EXACTLY THE WAY YOU SAID IT,
OKAY?

NOW DOES THE STATUTE SAY
EXACTLY WHAT YOU SAID?

YES.

IS THE LANGUAGE CLEAR AND
UNAMBIGUOUS, YES?

MY ARGUMENT HERE TODAY IS TO
SAY THAT YOU CAN, IF YOU WISH,
RECONCILE THE DISTRICT COURT'S
REASONING WITH THE GALEN IN
THIS CASE TO REACH THE END
RESULT BUT THE STATUTE IN MY
OPINION IS CLEAR AND
UNAMBIGUOUS.

BUT I WOULD SUBMIT TO YOU --

>> WHICH WAY?

CLEAR AND AMBIGUOUS WHICH WAY?

>> UNAMBIGUOUS.

>> IT IS UNAMBIGUOUS THAT BOTH
PARTIES HAVE TO GIVE NOTICE?

>> THAT'S THE WAY I READ THE
STATUTE.

>> OKAY.

>> BUT I ALSO READ THE GALEN
CASE WHICH, ORIGINALLY
INTERPRETED THIS STATUTE AS
WHAT THE REASON WAS.

>> BUT WE DON'T, YOU DO KNOW,
AGAIN, IF THE LEGISLATURE WAS
HERE, YOU KNOW, AND MAYBE THEY
WILL CHANGE IT IN MARCH, BUT
THAT WE ARE URGED, AND WE TRY
MIGHTILY TO DO IT,
WHETHER PEOPLE THINK WE DO OR

NOT, IF THE LANGUAGE IS PLAIN
AND UNAMBIGUOUS, WE DON'T GO
BEHIND THE LEGISLATIVE
REASONING.

>> I UNDERSTAND THAT.

I'M HERE, I WANT CLEAR BRIGHT
LINES SO NICA CAN ENFORCE THIS
STATUTE IN ALL FIVE DISTRICTS
COURTS OF APPEAL.

>> HOW EASY IT FOR A HOSPITAL
IN EVERY CASE TO GIVE THE
NOTICE?

>> I THINK --

>> AND THEY GIVE, PROBABLY HOW
MANY FORMS DO THEY GIVE THE
PATIENT TO FILL OUT?

I MEAN THAT IS JUST, HIPAA FORM
AND EVERYTHING ELSE.

I MEAN, --

>> I WOULD LOVE TO BE ABLE TO
SEE BEHIND THE DOORS OF THEIR
RISK MANAGEMENT DEPARTMENT BUT
I CAN'T RIGHT NOW.

LET ME POINT OUT MY LAST POINT
THAT I STARTED OUT EARLIER REAL
QUICK AND THEN I'LL BE DONE,
UNLESS YOU HAVE MORE QUESTIONS.

THE GOOGLERMAN DECISION IS
CRITICALLY IMPORTANT BECAUSE
THAT WAS THE DECISION THAT WAS
MADE A NUMBER OF YEARS AGO IN
THE FOURTH DISTRICT HAS BEEN
FOLLOWED, THIS PAST MONTH, BY
THE FIRST DISTRICT, AND WHAT
THAT BASICALLY SAYS IS ANY
HEALTH CARE PROVIDER, THAT

GIVES THE NOTICE REQUIRED UNDER NICA IS GOING TO GET IMMUNITY IN A NICA CASE.

EVEN IF THE OTHER ONE DOESN'T BECAUSE THEY HAVE NO CONTROL OVER THE OTHER PARTY.

THAT CASE IS VITALLY IMPORTANT NOT TO BE TOSSED OUT OR INADVERTENTLY MESSED WITH.

>> YOU'RE SAYING YOU CAN'T DRAG THE PHYSICIAN IN SUPPORT?

YOU EITHER, THEN YOU HAVE AN EITHER OR SITUATION AND, IF YOU ELECT NICA YOU CAN'T GO INTO COURT?

>> VERY BRIEFLY IN THAT CASE --

>> IS THAT RIGHT?

>> YES.

VERY BRIEFLY, IN THAT CASE THE HOSPITAL GAVE NOTICE AND THE PHYSICIAN DIDN'T.

THEY WERE ORDERED TO ELECT A REMEDY.

THEY APPEALED TO THE FOURTH DISTRICT COURT OF APPEAL THE FOURTH DISTRICT COURT OF APPEAL SAID, YEAH, YOU GOT TO.

THEY ELECTED NICA.

>> THAT WAS CONSISTENT WITH WHAT WAS SAID BEFORE.

ARE YOU SAYING EXACTLY WHAT WAS SAID BEFORE?

HERE THERE WAS ELECTION TO GO AGAINST A PARTY THAT DID NOT GIVE NOTICE.

IS THAT HOW YOU INTERPRET THIS

CASE?

>> YEAH, THAT IS THE GOOGLEMAN CASE.

>> RIGHT.

>> CORRECT.

>> OKAY.

>> THANK YOU.

>> ALL RIGHT. THANK YOU.

MR.^NELSON IS NEXT.

>> GOOD MORNING, YOUR HONORS, DAVID NELSON ON BEHALF OF RESPONDENT BAYFRONT.

AT THE RISK --

>> BAYFRONT, IS THERE ANYTHING IN THE RECORD, THIS IS SIX 1/2 MINUTES.

>> OKAY.

>> DOESN'T BAYFRONT AS A REGULAR STANDARD OPERATING PROCEDURE PROVIDE THE NICA NOTICE?

>> BACK IN 1995.

KEEP IN MIND THINGS HAVE CHANGED WITH THE RULINGS OF VARIOUS COURTS OVER THE YEAR, OVER THE YEARS.

THE HOSPITAL LOOKED TO THE PRENATAL RECORDS WHICH WITH MART PART OF THE HOSPITAL RECORDS TO SEE WHETHER IN FACT THE PATIENT WAS ADVISED WAS A PARTICIPANT.

>> AS YOU DID IN THE PAST.

>> IN THIS PARTICULAR CASE THERE WAS INDICATION IN THE PRENATAL RECORDS PART OF THE HOSPITAL

CHART, MRS. ^KOCHER RECEIVED NOT ONLY BROCHURE AND HAD A DISCUSSION WITH THE PHYSICIAN ABOUT WHAT IT MEANT.

>> BUT NOW YOU GIVE NOTICE?

>> YES.

>> THIS ISN'T LIKE, WE ARE, IN, LET ME AGAIN ASK THEN ASK YOU ON THIS QUESTION OF THE CLEAR AND UNAMBIGUOUS.

IT DOES REQUIRE EACH HOSPITAL AND EACH PARTICIPATING PHYSICIAN BUT HOW DO YOU INTERPRET EACH HOSPITAL WITH A PARTICIPATING PHYSICIAN ON ITS STAFF?

>> I INTERPRET IT CONSISTENT IN WHICH THE WAY SECOND DCA INTERPRETED IT AND THE REASON FOR THAT IS, IF YOU GO BACK IN TIME TO 1988 WHEN THE STATUTE WAS FIRST ENACTED, 766.316 SAID EACH HOSPITAL AND EACH PARTICIPATING PHYSICIAN SHALL GIVE NOTICE.

WITHIN A YEAR THE STATUTE WAS AMENDED TO READ, EACH HOSPITAL WITH A PARTICIPATING PHYSICIAN ON STAFF AT EACH PARTICIPATING PHYSICIAN WITH THE EXCEPTION OF RESIDENTS, INTERNS AND SOME OTHER DESCRIBED PHYSICIANS.

>> WELL, IF YOU HAVE ANESTHESIOLOGISTS ON STAFF, I MEAN, IS THAT A FACT-INTENSIVE QUESTION, WHETHER YOU AT THE

TIME, BAYFRONT, HAD,
PARTICIPATING PHYSICIANS ON ITS
STAFF?

>> WELL, I DON'T WANT TO
CONFUSE ANESTHESIOLOGISTS AS
TYPE OF PHYSICIAN.

>> THEY'RE NOT.
THEY DON'T --

>> WITH PARTICIPATING
PHYSICIAN.

THEY WOULDN'T BE AND AREN'T
UNDER THE DEFINITIONS.

>> SO IF IT IS AN
ANESTHESIOLOGIST THAT COMMITS
THE ERROR, YOU, BEEN ON THE
COURT FOR A WHILE, YOU CAN'T,
YOU ARE ABLE TO SUE IN A COURT
OF LAW?

>> WELL, IT DEPENDS.

IF THE BABY IS DELIVERED BY A
PARTICIPATING PHYSICIAN, IN A
HOSPITAL WHICH, BY DEFINITION
HAS TO BE A PARTICIPANT, THEN
EVERYONE INVOLVED IN THE
PROCESS, WHETHER IT IS AN
ANESTHESIOLOGIST, A NURSE, OR
SOME OTHER MEDICAL SPECIALIST
IS COVERED AND NO MALPRACTICE
LAWSUIT IS PERMITTED.

THAT'S WHAT THE STATUTE SAID.
THAT IS WHAT THE BROCHURE HAS
SAID.

>> ARE THEY COVERED ONLY IF THE
HOSPITAL GIVES NOTICE?

>> NO.

THEY WOULD BE COVERED IF, AND

THIS IS WHERE WE REALLY GET BACK TO THE BASIC QUESTION OF STATUTORY INTERPRETATION, IF THE PATIENT HAS BEEN GIVEN A CHOICE OF ELECTING TO HAVE A PARTICIPANT, A NICA PARTICIPANT BE INVOLVED IN THE DELIVERY.

>> WHY, WHY DOES IT SAY AND?

>> IT SAYS AND BECAUSE, AS I MENTIONED, IN 1989 THE STATUTE WAS CHANGED AND IT EXCLUDED FROM THOSE FOLKS WHO HAD TO GIVE NOTICE, RESIDENTS AND INTERNS WHO ARE TYPICALLY EMPLOYED BY HOSPITALS OR AT LEAST ASSOCIATED WITH THEM. AND SO IN THOSE INSTANCES, IN ADDITION TO THE INSTANCE INVOLVING AN EMPLOYED PHYSICIAN, IT'S THE HOSPITAL'S OBLIGATION TO ADVISE THE PATIENT, NOT ONLY OF THE NICA PLAN BUT ALSO OF THE FACT THAT THEIR PHYSICIAN PARTICIPATES.

>> SO IF THE HOSPITAL, IN THIS SAME CASE, IF THE HOSPITAL GAVE NOTICE BUT NOT THE TREATING PHYSICIAN, WHAT IS THE SITUATION?

>> WELL, IT IS INTERESTING YOU ASK, BECAUSE THERE WAS ANOTHER CASE IN FRONT OF THE SECOND DCA, FLORIDA HEALTH SCIENCES CENTER CASE, WHERE IT WAS UNDISPUTED HOSPITAL HAD NOT ONLY GIVEN ONE BUT PROBABLY

SEVERAL BROCHURES TO THE
PATIENT.

THE DISTINGUISHING
CHARACTERISTIC IN THAT
PARTICULAR CASE THAT THE
HOSPITAL HADN'T DONE ANYTHING
TO TELL THE EXPECTANT MOTHER
THAT THE PHYSICIAN WOULD BE
DELIVERING TO HER WAS A
PARTICIPATE.

IN THE FLORIDA HEALTH SCIENCES
CENTER CASE THE SECOND DCA IN
EFFECT ELEVATED THE IMPORTANCE
OF THE PHYSICIAN NOTICED,
MINIMIZED THE IMPORTANCE OF THE
HOSPITAL'S NOTICE AND SAID THAT
IN ORDER FOR A PATIENT TO HAVE
THE RIGHT TO CHOOSE, WHICH WAS
THE UNDERLYING BASIS OF THIS
COURT'S DECISION IN GALEN THE
PATIENT NEEDS TO KNOW THAT HER
PHYSICIAN PARTICIPATES, AND SHE
NEEDS TO GET A COPY OF THIS
BROCHURE.

ALL THE HOSPITAL NEEDS TO DO
UNDER THAT CIRCUMSTANCE, IF IT
IS TO DO ANYTHING IS GIVE THE
PATIENT A SECOND COPY OF THE
BROCHURE, AND UNDER THOSE
CIRCUMSTANCES EVERYONE INVOLVED
IN THE PROCESS IS COVERED BY
NICA IMMUNITY IN THIS PARTICULAR
CASE AS THE SECOND DISTRICT
POINTED OUT, THE ONLY THING
MISSING FROM THE NICA NOTICE
PROCESS IN CONNECTION WITH THE

DELIVERY OF MRS. ^KOCHER WAS SHE
DIDN'T GET A SECOND COPY OF
WHAT SHE ADMITTED SHE ALREADY
HAD.

IT'S THE BROCHURE THAT EXPLAINS
THE PLAN.

IT EXPLAINS THAT NO MALPRACTICE
LAWSUITS ARE PERMITTED.

ONLY HOSPITAL BIRTHS ARE
COVERED AND ONLY INJURIES TO
INFANTS DELIVERED BY
PARTICIPATING PHYSICIANS ARE
COVERED BY THE PLAN.

SO SHE GOT THE BROCHURE.

SHE GOT THE NOTICE.

I WOULD RESPECTFULLY SUBMIT
THAT THE --

>> YOUR POSITION THEN IS
BECAUSE THE PHYSICIAN,
PARTICIPATING PHYSICIAN GAVE
HER NOTICE, THAT THAT
SUFFICIENTLY COVERED THE
HOSPITAL?

>> GAVE NOT ONLY THE BROCHURE
BUT ALSO A DESCRIPTION OF WHAT
THE PROGRAM ENTAILED AND
IMPORTANTLY, ACCORDING TO THE
SECOND DCA AND THE FLORIDA
HEALTH SCIENCES CENTER CASE,
SAYING REASON I'M GIVING THIS
TO YOU, NOT ONLY I BUT EVERYONE
IN MY PRACTICE PARTICIPATES IN
THIS PARTICULAR PLAN AND THERE
WAS AN ACKNOWLEDGEMENT FORM
THAT WAS SIGNED.

THE PURPOSE OF THE STATUTE, THE

PURPOSE OF THE NOTICE, WAS IN THIS CASE SATISFIED.

THE SECOND DCA ALSO RECOGNIZED THAT REQUIRING BAYFRONT TO PROVIDE A SECOND COPY OF THIS IN ORDER FOR EVERYONE, OR ANYONE TO REALIZE, NICA IMMUNITY WOULD LEAD TO AN ABSURD RESULT.

THERE ARE INSTANCES WHERE THE PATIENT DOESN'T GET THE BROCHURE.

>> THAT IS ONLY REASON THEY GOT AROUND PLAIN LANGUAGE.

>> THEY ATTEMPTED TO GIVE MEANING TO THE PARTICIPATING PHYSICIAN ON STAFF LANGUAGE.

IF YOU'RE GOING TO STRICTLY CONSTRUE THE WORDS OF THE STATUTE I THINK WHAT THE SECOND DCA FELT THEY HAVE TO STRICTLY CONSTRUE EACH AND EVERY WORD AND NOT LIFT OUT THE PARTICIPATING PHYSICIAN LANGUAGE.

I WOULD ALSO POINT OUT IN 1998 THE STATUTE WAS ACTUALLY CHANGED IN ORDER TO WHAT I WOULD SUBMIT COUNTENANCE WHAT HAPPENED IN THIS PARTICULAR CASE.

>> WITH THAT TIME IS UP.

>> THAT PARTICULAR AMENDMENT ALLOWED EITHER THE DOCTOR OR HOSPITAL HAVE A PATIENT SIGN THE FORM AND SIGNATURE ON THE

FORM CREATED A REBUTABLE
PRESUMPTION THAT EVERYONE WAS
COVERED UNDER NICA.

I THINK THIS COURT AND SHOULD
CONSIDER THAT AMENDMENT IN
RESOLVING THE QUESTION BEFORE
IT.

>> ALL RIGHT. THANK YOU.

MR. ^HUNTER?

>> YES, MA'AM.

MAY IT PLEASE THE COURT.

MY NAME IS HOWARD HUNTER. I HAVE
THE PRIVILEGE OF REPRESENTING
ALL CHILDRENS HOSPITAL.
WITH FIRM OF HILL, WARD AND
HENDERSON IN TAMPA.

I HATE TO THROW ANOTHER
CURVEBALL IN THIS DISCUSSION,
BECAUSE MY CLIENT IS IN UNIQUE
POSITION IN THIS CASE.

WE ARE A PEDIATRIC INSTITUTION.
WE DO NOT PROVIDE ON STREET
CALL SERVICES.

A PARTICIPATING PHYSICIAN, FOR
THE PURPOSE OF THE STATUTE, AND
INCIDENTALLY ONLY A
PARTICIPATING PHYSICIAN CAN
TRIGGER NICA COVERAGE, ONLY
BIRTHS INVOLVING A
PARTICIPATING PHYSICIAN WHICH
BY DEFINITION IS AN
OBSTETRICIAN OR SOMEONE
PRACTICING OBSTETRICS CAN
INVOKE NICA.

THE LYNCHPIN OF THE STATUTE IS
INVOLVEMENT IN A PARTICULAR

TYPE OF BIRTH BY AN OBSTETRICAL
PHYSICIAN WHO IS A PARTICIPANT
IN THE PLAN.

>> AND HAS GIVEN NOTICE?

>> AND IS GIVEN NOTICE.

OR MORE ACCURATELY I BELIEVE,
YOUR HONOR, NOTICE HAS BEEN
GIVEN.

>> IN MY PARTICULAR HOSPITAL
THEY HAVE NO PHYSICIANS EVEN IN
SENSE OF EMPLOY OR MEDICAL
STAFF.

WE PROVIDE NEONATAL SERVICES.

>> WHAT NEONATAL SERVICES ARE
NEGLIGENT?

WHAT IF THAT IS THE SOURCE OF
THE BRAIN DAMAGE?

>> IF THE SOURCE OF BRAIN
DAMAGE IS NEONATAL
SERVICES RENDERED IN THE
IMMEDIATE POSTDELIVERY
RESUSCITATION SERVICES WHICH WE
CONTINUED IS WHAT IS IN THIS
CASE AND PARTICIPATING
PHYSICIAN HANDLED THE BIRTH,
THEN NICA APPLIES.

IF IT IS --

>> DID IT GET TO TRANSFERRED TO
YOUR HOSPITAL AND MEDICAL
MALPRACTICE AND THEN WHAT?

>> IN THAT SITUATION, YOUR
HONOR, I BELIEVE EXCLUSIVITY
CAN APPLY IF THE IMMEDIATE POST
RESUSCITATION PERIOD CONTINUES
BUT THAT SITUATION IS NOT
BEFORE THIS COURT.

>> THERE IS LANGUAGE IN THE
STATUTE THAT TALKS ABOUT THE
RESUSCITATIVE PERIOD.

>> YES. I GO BACK TO THIS.
WE WERE NEVER REQUIRED TO GIVE
NOTICE.
THAT IS UNCONTESTED.
WE'RE IN A SITUATION IN WHICH
WE HAVE NO ONE ON THE STAFF WHO
IS EVER REQUIRED TO GIVE
NOTICE.
AND YET THE WAY STATUTE WAS
APPLIED.
NO ONE GOT BENEFIT OF NICA.
WE BELIEVE THAT IS MISREADING
OF THE STATUTE.
WHEN YOU GO BACK AND LOOK AT
GALEN CASE AND LOOK AT
FUNDAMENTAL PURPOSE.
OF WHAT THE NOTICE REQUIREMENT
WAS TO DO, IT WAS TO GIVE THE
PATIENT A CHOICE.
THE ACADEMIC TASK FORCE THAT
RECOMMENDED THE STATUTE SAID
THAT.
THIS OCCURRED RECOGNIZED THIS
IN THE GALEN CASE AND IS
UNDISPUTED IN MY CASE AND IN --

>> WHO CALLED YOUR CLIENT INTO
THIS SITUATION.

>> WE WERE CALLED IN BY THE
OBSTETRICIAN AT A POINT THAT
THE OBSTETRICIAN NOTED THERE
WAS A DISTRESSED BIRTH.

>> I THOUGHT THERE WAS
SOMETHING IN THE RECORD YOU

WERE ACTUALLY AGENT OF
BAYFRONT, NO?

>> THERE WAS SUGGESTION TO THAT
EFFECT, YOUR HONOR, BUT THAT IS
INTERESTING POINT YOU BRING UP.
THAT WAS NEVER LITIGATED BELOW.
AN ENTIRELY NEW ISSUE THAT WAS
NEVER FACTUALLY OR LEGALLY
RULED UPON BY EITHER OF THE
TRIAL COURTS HERE.

THE INTERESTING POINT ABOUT
THAT IS THE ARGUMENT IS BASED
ON IDEA THAT WE HAVE A
RELATIONSHIP THAT ALL
CHILDREN'S HAS A RELATIONSHIP
WITH BAYFRONT AND THEY WANT TO
IMPUTE BAY FRONT'S FAILURE TO
GIVE NOTICE TO ALL CHILDREN'S.
DR. ^MORLAND, THE OBSTETRICIAN
ALSO HAD A RELATIONSHIP WITH
BAYFRONT.

HE WAS ON ITS MEDICAL STAFF AND
HAD STAFF PRIVILEGES AND THAT
IS UNCONTESTED.

IF YOU'RE GOING TO IMPUTE THE
FAILURE TO GIVE NOTICE TO ALL
CHILDREN'S, WHY DON'T YOU
IMPUTE THE GIVING OF NOTICE BY
DR. ^MORE LAND TO BAYFRONT?
BECAUSE THE PURPOSE OF THE
NOTICE STATUTE MANIFESTLY WAS
SERVED IN THIS CASE.

WHAT I WOULD ENCOURAGE THE
COURT TO DO IN THE FINAL
ANALYSIS IS BASICALLY TWO
THINGS, NUMBER ONE, MAKE THE

DISTINCTION WITH RESPECT TO ALL CHILDREN'S THAT NOTICE WAS GIVEN, AND THE PATIENT HAD THE CHOICE, AND SO, WE SHOULD NOT BE PENALIZED AND BE DENIED THE NICA TO WHICH WE'RE STATUTORILY ENTITLED BY VIRTUE OF THE FACT THAT BAYFRONT DID NOT GIVE NOTICE, FOR WHATEVER REASON.

>> YOU REALLY ARE.

AS YOU'RE ARGUING TODAY, REALLY IN A DIFFERENT POSTURE THAN BAYFRONT.

>> YES, SIR.

THERE IS NO QUESTION.

>> MAY BE A HOSPITAL OR MAY PROVIDE MEDICAL SERVICES SOMEWHERE ELSE BUT YOU ARE REALLY IN A DIFFERENT POSTURE.

>> YES, SIR,.

WE'RE IN A DIFFERENT POSTURE.

>> YOU WOULD NEVER UNDER ANY CIRCUMSTANCE GIVE NOTICE UNDER THE STATUTE.

>> THAT'S RIGHT.

THAT'S EXACTLY RIGHT.

IRONICALLY THE ARGUMENTS THAT THE STATUTE SHOULD BE STRETCHED TO REQUIRE US TO SOMEHOW GIVE NOTICE OR BE IMPUTED TO GIVE NOTICE ARE MANY COMING FROM PEOPLE WHO ARE ARGUING THAT STRICT CONSTRUCTION SHOULD APPLY.

>> IF NOW THE FACTS WERE ALTERED A LITTLE BIT, WE

UNDERSTAND YOUR POSITION IS THAT THE PARTICIPATING PHYSICIAN, IS THE ONE THAT CALLED YOU IN, IF IT WERE NOT, IF IT WERE A HOSPITAL, NOT THE PHYSICIAN, WOULD THAT CHANGE THE ANALYSIS?

>> I DON'T BELIEVE SO, YOUR HONOR.

BECAUSE IN THE FINAL ANALYSIS WE SIMPLY WEREN'T REQUIRED TO GIVE NOTICE.

THE STATUTE, THE STATUTE CARVES OUT SPECIFICALLY WHO MUST GIVE NOTICE.

HOSPITALS WITH A PARTICIPATING PHYSICIAN ON THEIR STAFF.

>> HOW DO YOU, COULD YOU GIVE ME THE BENEFIT OF HOW YOU INTERPRET EACH HOSPITAL WITH A PARTICIPATING PHYSICIAN ON ITS STAFF?

DID BAYFRONT HAVE, WAS BAYFRONT SUCH A ENTITY?

>> YOUR HONOR, THE BAYFRONT RECORD, I MEAN, AS A PRACTICAL MATTER, I KNOW, AND OUR RECORD REFLECTS, THAT DR. ^MORELAND WAS ON MEDICAL STAFF OF BAYFRONT MEDICAL CENTER, NOT AN EMPLOYEE.

I KNOW INTUITIVELY, THAT BAYFRONT HAS PHYSICIANS ON ITS STAFF.

>> SO YOUR --

>> DOES STAFF MEAN EMPLOYEE OR

DOES STAFF MEAN MEDICAL STAFF?

I DON'T KNOW.

>> YOU HAVE TO LOOK SOMEWHERE ELSE TO FIND THAT ANSWER.

>> I THINK WHAT YOU SHOULD DO IS LOOK TO THE LANGUAGE OF THE STATUTE.

LOOK TO THE PURPOSE AND INTENT THE STATUTE.

THE POLESTAR STATUTORY CONSTRUCTION.

BECAUSE IT REALLY IS A MATTER OF WHO GOT THE NOTICE AND WHO HAD THE CHANCE TO ACT ON THE NOTICE.

>> WE CAN'T IGNORE OTHER STATUTES THAT ADDRESS WHAT THE MEDICAL STAFF IS.

>> BUT YOU CAN FOCUS ON RECEIPT.

I WOULD REMIND YOU, YOUR HONOR, THAT IN THE PATRI VERSUS CAPPS CASE 15 YEARS AGO, THIS COURT HAD ANOTHER MEDICAL MALPRACTICE ISSUE BEFORE IT AND IN THAT CASE THE QUESTION WAS, WAS A NOTICE OF INTENT TO INITIATE LITIGATION EFFECTIVE EVEN THOUGH IT WAS DELIVERED BY HAND, AS OPPOSED TO CERTIFIED MAIL RETURN RECEIPT REQUESTED? IN THAT CASE THE DEFENDANTS WERE ARGUING FOR STRICT CONSTRUCTION.

THE PLAINTIFFS, JOINED BY THE FJA, WERE ARGUING, WELL, YOU

SHOULD FOCUS ON THE PURPOSE OF THE STATUTE, AND YOU SHOULD MAKE THAT THE POLESTAR OF YOUR INTERPRETATION AND GIVE THE SUBSTANCE THE EFFECT, NOT THE FORM.

THIS COURT DID EXACTLY THAT. IT FOCUSED ON THE FACT THAT RECEIPT WAS GIVEN AND ACKNOWLEDGED.

AND IT DISREGARDED WHAT THE STATUTE SAID IN TERMS OF THE MANNER IN WHICH THAT NOTICE WAS GIVEN.

WE HAVE VIRTUALLY SAME QUESTION BEFORE US TODAY.

IT BASICALLY BOILS DOWN TO THIS.

DID THE PATIENT HAVE THE OPPORTUNITY TO MAKE THE CHOICE?

>> AND WITH THAT, YOU HAVE, USED YOUR TIME.

THANK YOU VERY MUCH.

MR. ^RUTH.

YOU ARE REPRESENTING THE OTHER PATIENT OR FAMILY.

>> I REPRESENT ANNA GLENN AND DAUGHTER, COURTNEY GLENN. AS RESPONDENT HOWEVER WE ARE ONES INVOLVED WITH ALL CHILDREN'S HOSPITAL SO.

SO MR. ^HUNTER WHO JUST SPOKE. ESSENTIALLY, I WOULD HAVE A FEW THINGS TO SAY ABOUT THE STATUTE FIRST.

GO BACK TO THE STATUTE.

I AGREE WITH THE COURT.
IT SAYS AND, IT DOESN'T SAY OR.
IT SAYS AND
THEY SUBSEQUENTLY AMENDED THE
STATUTE TO SAY.
BUT I THINK IF THE TIME WERE
REVERSED WOULD WE BE SAYING OR
EQUALS AND?
I DON'T THINK SO.
AND PROBABLY WAS CHANGED AS A
RESULT OF THE GALEN DECISION.
SO WE GO STRICT CONSTRUCTION OR
THE PLAIN MEANING OF THE
STATUTE THERE IS NO REASON TO
TRY SOME DIFFERENT WAY TO FIND
OUT IF THERE IS A RIDICULOUS
CONCLUSION.
SECOND --
>> BUT HERE WE HAVE THE
HOSPITAL, BAYFRONT.
>> YES.
>> NO NOTICE.
AND ALL CHILDREN'S, IS NOT IN
ANY SENSE A HOSPITAL, NO
MATTER, HOW YOU CONSTRUE IT, A
HOSPITAL WITH PARTICIPATING
PHYSICIAN MEMBERS ON STAFF,
CORRECT.
>> THAT'S CORRECT.
>> NOW, WE DO HAVE A DIFFERENCE
BETWEEN THE TWO HOSPITALS AND
THEN THE NEXT QUESTION IS, THEN
THEY WOULD NEVER GIVE NOTICE.
IT MUST BE A PHYSICIAN.
IF PHYSICIAN GAVE NOTICE.
>> THINK WHAT WE HAVE, IT IS IN

THE BRIEFS AND RECORD, I
DISAGREE WITH MR. HUNTER'S
RESUSCITATION.

THERE IS FACT INTENSIVE ISSUE
CONCERNING ALL CHILDREN'S
RELATIONSHIP TO BAYFRONT.

>> OKAY.

THAT IS NOT BEFORE US TODAY.
THAT IS SOMETHING Y'ALL
DISCOVER LATER ON.

>> THAT'S CORRECT.

IN THE CONTEXT OF THE OVERALL
OPINION WHICH WAS ALSO BROUGHT
UP SO THERE WOULD BE A
SITUATION, IF THE COURT RULED
THAT NOTICE BY, BY THE DOCTOR,
GAVE THEM IMMUNITY, AS OPPOSED
TO NOTICE BY, NO NOTICE BY
BAYFRONT NOT GIVING THEM FORM
IMMUNITY, IT IS
IMPORTANT TO NOTE WE CONTEND
FROM A FACT STANDPOINT THEY ARE
RELATED TO BAYFRONT.

>> THAT COULD MAKE A
DIFFERENCE, DO YOU AGREE?

>> YES, SIR.

>> IN ITS ANALYSIS AND COULD
MAKE A DIFFERENCE ON THE
OUTCOME HERE?

>> YES.

BUT ON THE OVERALL ISSUE
WHETHER NOTICE, I TEND TO AGREE
THAT NOTICE BY THE DOCTOR, OR,
SEPARATE FROM NOTICE FROM THE
HOSPITAL AND EACH GETS A
PROTECTION OF THE IMMUNITY.

I WOULD ALSO SUBMIT THAT THE PURPOSE BEHIND THE INFORMATION REQUIRING BOTH PARTIES TO GIVE NOTICE TO AN INDIVIDUAL IN THIS CASE, A CITIZEN OF THE STATE OF FLORIDA WHO IS AN EXPECTANT MOTHER, PERHAPS IF THEY FELT TO GIVE UP COMMON LAW RIGHTS TO BRING A CLAIM AGAINST A PARTICULAR AT FAULT PARTY AND GO INTO THIS PLAN, THAT THEY WANTED BOTH OF THESE INSTITUTIONS, PARTICIPATING PHYSICIAN AND THE HOSPITAL TO GIVE NOTICE, SORT OF, THIS IS SO IMPORTANT WE WANT TO MAKE SURE YOU ARE REALLY INFORMED. AND THAT IS THE BASIS AND PURPOSE SET FORTH IN GALEN THAT THESE INDIVIDUALS BE GIVEN PROPER NOTICE AND STATUTE IS VERY CLEAR IN HOW THAT NOTICE IS TO BE GIVEN AND WHO IS TO GIVE THAT NOTICE. FROM THE PERSPECTIVE OF AN INDIVIDUAL IN THIS STATE, I THINK IT'S VERY, VERY IMPORTANT THAT THEY BE TOLD BY BOTH PARTIES AND THAT --

>> YOU AGREE, IS IT POST 1998, FOR 11 YEARS THESE STATUTES HAS SAID OR?

>> SINCE WHATEVER DATE.

I SUBMIT THAT WAS CHANGED AFTER THE GALEN DECISION LIKE AS THIS COURT IS FAMILIAR.

>> WHAT WE'RE DECIDING HERE,
ABOUT HOW GOOD IT IS AND
IMPORTANT IT IS TO GIVE NOTICE
IS OF LIMITED APPLICATION.

>> IT IS, YOUR HONOR.

I THINK THAT WAS BROUGHT UP AT
THE LAST TIME WE WERE HERE TWO
YEARS AGO.

HOWEVER, THE STATUTE IS THE
STATUTE.

THE RULES OF CONSTRUCTION
APPLY.

AND BECAUSE THE LEGISLATURE,
FOR WHATEVER REASON DECIDED TO
CHANGE A LAW AND IT HAPPENS ALL
THE TIME, AFTER THIS COURT
RULES IN A PARTICULAR WAY,
SUDDENLY WE HAVE THE
LEGISLATURE AMENDING THAT
STATUTE.

IS THAT BECAUSE THEY WANTED TO
SAY THAT THE PRIOR STATUTE
MEANT SOMETHING ELSE?

NO.

IT JUST THEY DECIDED, LOOKS
LIKE WE WANT TO CHANGE IT, FOR
WHATEVER POLITICAL REASONS OR
WHATEVER INFORMATION THEY HAVE
ABOUT IT, BUT DOES NOT CHANGE
THE CLEAR MEANING OF THE
STATUTE, AND THE ENTITLEMENT TO
THE RIGHTS OF THESE PARTICULAR
INDIVIDUALS INJURED.

>> WHY BY SAYING PARTICIPATING
PHYSICIAN ON STAFF, WHY ISN'T
IT REASONABLE TO ASSUME THAT

MEANS AN EMPLOYEE, VERSUS
ANYBODY WHO HAS STAFF
PRIVILEGES?

>> WELL, I WOULD TAKE THAT FROM
THE INDIVIDUAL LOOKING AT THAT
STATUTE, SUCH AS MY CLIENT WHO
MAY READ THAT KIND OF STATUTE
AND RELY UPON IT REQUIRING BOTH
PARTIES TO GIVE NOTICE AND A
STAFF, A PHYSICIAN COMING INTO
THE HOSPITAL IS THERE.

IT IS A STAFF PERSON FROM THAT
PERSPECTIVE.

IF THERE IS AMBIGUITY, I DO
NOTE THAT NICA TAKE AS POSITION
ON PAGE 17 OF THEIR BRIEF IN
THEIR FOOT NOTE, THAT THE
COURT RULING IN THE INSTANT
CASE SHOULD NOT DISTINGUISH
BETWEEN A HOSPITAL WHICH
EMPLOYS PARTICIPATING PHYSICIAN
OR A HOSPITAL WITH A
PARTICIPATING PHYSICIAN WITH
STAFF PRIVILEGES.

THAT SUCH DISTINCTION DOES NOT
FURTHER THE PURPOSE OF 766.316.

SO I AGREE WITH NICA IN THAT
REGARD.

THERE SHOULD NOT BE A
DISTINCTION IN THAT PARTICULAR
MANNER.

SO, IF THERE IS MORE QUESTIONS,
I'LL SIT DOWN.

GIVE YOU A BREAK.

>> [INAUDIBLE].

>> I'LL GIVE YOU HIS 13

SECONDS.

>> THE AMENDED STATUTE DID NOT CHANGE AND, HOSPITAL AND PHYSICIAN.

IT JUST CHANGED WHO PROVIDES THE FORM NOTICE.

IT COULD BE EITHER THE HOSPITAL OR THE DOCTOR.

THE REQUIREMENT THAT BOTH GIVE NOTICE IS STILL IN EFFECT AND HAS ALWAYS BEEN IN EFFECT.

THE KEY PRINCIPLE IS WHICH HEALTH CARE PROVIDER IS PARTICIPATING UNDER NICA?

THAT IS WHAT GIVES THE PATIENT RIGHT TO MAKE INFORMED CHOICE.

NOT JUST SOME BROCHURE THAT SAYS THIS IS THE NICA PLAN.

I WOULD AGREE THAT WOULD BE DUPLICATIVE IF THAT IS THE CASE.

IT IS NOT JUST THAT.

THE PARTICIPATION OF THIS HEALTH CARE PROVIDER THAT THIS COURT IN GALEN SAID IS THE CRUCIAL DISTINCTION.

>> THANK YOU VERY MUCH.

THANK ALL OF YOU FOR YOUR ARGUMENTS HERE TODAY.

THE COURT WILL NOW BE IN RECESS UNTIL TOMORROW MORNING AT 9:00.

>> PLEASE RISE.

>> SUPREME COURT IS NOW ADJOURNED.