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## **Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Dept. of Administrative Hearings**

MARSHAL: PLEASE RISE. HEAR YE. HEAR YE. HEAR YE. THE SUPREME COURT OF FLORIDA IS NOW IN SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THIS GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING, LADIES AND GENTLEMEN, AND WELCOME TO THE FLORIDA SUPREME COURT. THE FIRST CASE ON THIS MORNING'S DOCKET IS FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION OR NICA, VERSUS, AN INTERESTING STYLE, VERSUS THE FLAT DEPARTMENT OF ADMINISTRATIVE HEARINGS, AND WE HAVE, HERE, MR. BRUTON.

YES.

CHIEF JUSTICE: I WANT TO MAKE SURE I UNDERSTAND THE TIME. YOU WILL TAKE 8 MINUTES, AND THEN MR. HUNTER WILL TAKE 7, AND THEN YOU WILL BE RESERVING

FIVE FOR REBUTTAL.

CHIEF JUSTICE: ALL RIGHT. THANK YOU. IF YOU GO OVER YOUR 8, YOU ARE INTO HIS TIME. THANK YOU. MAY IT PLEASE THE COURT. MY NAME IS WILBUR BRUTON AND I REPRESENT NICA AS GENERAL COUNSEL. THE BRIEF STATEMENT OF THE FACTS OF THESE TWO CASES IS FURIOUS ON OF NICA CHALLENGED THE ADMINISTRATIVE LAW JUDGE'S DETERMINATION OF FACT, AS CONTRASTED TO THE NOTICE, ITSELF. BELOW ONE ENTITY HAD GIVEN NOTICE, IT WAS FOUND, AND ONE HAD NOT AND THEREFORE NO ONE WAS CAST WITH IMMUNITY. OUR APPEAL WAS STRICTLY TO THE EFFECT AND NOT TO THE JURISDICTIONAL NOTICE OF NOTICE. SUASPONTE, THE APPEAL COURT.

BOTH THE HOSPITAL AND DOCTOR HAD TO GIVE NOTICE AND NOT THAT IT COULDN'T HAVE BEEN DECIDED BY THEM, THAT IS YOUR ISSUE?

NO. OUR ISSUE WAS THAT WE HAD A CASE WHERE THE HOSPITAL DID NOT GIVE NOTICE, AND THE DOCTOR DID.

OKAY.

THE ALJ COMMENTED ON THE EFFECT OF THAT FINDING AND THAT IS WHAT WE CHALLENGED, BECAUSE OUR POSITION HAS BEEN, AND IT HAS BEEN UPHOLD IN OTHER DISTRICT COURTS, THAT THE HOSPITAL HAS TO GIVE THE NOTICE, THE DOCTOR HAS TO GIVE THE NOTICE. AND THE ONE THAT DOESN'T, DOESN'T GET THE IMMUNITY IN A COMPENSABLE CASE.

WHAT IS YOUR STATUTORY BASIS FOR THE ALJ HAVING AUTHORITY TO MAKE A DECISION TOO NOTICE?

WELL, I THINK THE STATUTE IS CLEAR, BECAUSE IT SAYS THAT THE ALJ HAS JURISDICTION OVER 766.301 TO 766.316, TO MAKE ALL DETERMINATIONS AND 766.316 IS ONLY THE NOTICE PROVISION. AND IF THAT DIDN'T GIVE HIM JURISDICTION, YOU KNOW, THEN I DON'T KNOW WHAT DOES, BUT IN ADDITION TO THAT, IN 2003, THIS STATUTE WAS AMENDED, IN ORDER TO ADDRESS ANOTHER ISSUE OF BIFURCATION OF AWARDS, AND THE LEGISLATURE SPECIFICALLY SAID THAT THE ALJ, IN

2003, COULD BIFURCATE THE ISSUE OF NOTICE AND SPECIFICALLY REFERRED TO 766.316, AND COMPENSABILITY, SO THAT WE DIDN'T GO THROUGH A LOT OF STEPS YOU DIDN'T NEED TO, TOGETHER THERE.

CHIEF JUSTICE: SO ARE WE IN A SITUATION WHERE THIS DECISION, ASSUMING WE UPHOLD THE SECOND DISTRICT'S DECISION, WOULD HAVE BEEN OF LIMITED APPLICABILITY?

NO. WE WOULD HAVE REAL MESS.

CHIEF JUSTICE: BUT YOU JUST SAID IN 2003, THEY AMENDED TO MAKE CLEAR THAT NOTICE WOULD BE, WAS PART OF THE DETERMINATION.

YES. IF YOU, IF YOU HELD THE ALJ HAS THE AUTHORITY TO DETERMINE FACTUALLY WHETHER NOTICE WAS OR WAS NOT GIVEN, THEN THE ONLY THING YOU HAVE DONE IS MOST OF THE CASES, ALL OF THE CASES ARE IN THE SECOND DISTRICT, BUT I THINK WE CLEAR UP A LOT OF BACKLOG THAT IS SETTLING IN THE CIRCUIT COURT RIGHT NOW, DOWN IN THE SECOND DISTRICT, THE AREA WHERE

CHIEF JUSTICE: I DON'T KNOW ABOUT BACKLOG OR WHATEVER. I AM TALKING ABOUT LEGALLY. I WANT TO UNDERSTAND.

LEGALLY THERE ARE ABOUT FIVE CASES INVOLVED.

CHIEF JUSTICE: BUT IN 2003, IF WE DECIDE THE 2003 AMENDMENT CLEARLY GAVE THEM JURISDICTION, SO THIS CASE WOULD HAVE, THIS SECOND DISTRICT CASE WOULD HAVE LIMITED APPLICABILITY.

I AM SO RRY AND I MISUNDERSTOOD YOUR QUESTION. YES.

THEN WHAT DO YOU DO WITH 766.304 THAT SAYS THE FINDINGS OF FACTS AND CONCLUSIONS OF LAW OF THE ADMINISTRATIVE LAW JUDGES SHALL NOT BE ADMISSIBLE IN ANY SUBSEQUENT PROCEEDING. HOW WOULD THAT AFFECT THE CIRCUIT COURT PROCEEDINGS ON THE IMMUNITY QUESTION?

WELL, THE, ON THE NOTICE ISSUE?

YES. IF THE ALJ SAYS THAT NOTICE WAS ADEQUATE AND THERE IS A CIVIL PROCEEDING.

THEN IF THEY FIND THAT NOTICE WAS ADEQUATE, THEN IT CAN BE RAISED IN THE CIRCUIT COURT AND HAS BEEN, AS TO IMMUNITY. THAT WAS WHAT HAPPENED IN THE GOODEMAN CASE DECIDED IN THE FOURTH DISTRICT. THE ELECTION OF REMEDIES IS REQUIRED BY THE CIRCUIT COURT, AND THE CIRCUIT COURT REQUIRES THE ELECTION OF REMEDIES, WHEN IMMUNITY IS ASSERTED DOWN BELOW. NOW, WHAT YOU ARE NOT DOING IS, YOU ARE NOT INTRODUCING THE FINDINGS OF FACT FOR EVIDENCE AND OTHER PURPOSES LIKE THAT, BUT THAT SOMEHOW YOU ARE GETTING YOUR IMMUNITY. IT IS WORKING QUITE WELL.

SO AS A PRACTICAL MATTER, IF ONE CLAIMS IMMUNITY, THEN DO YOU HAVE TO START OUT BY FILING AN ACTION IN CIRCUIT COURT?

YOU ARE NOT SUED TO. BUT THE STATUTE SAYS

IF WE SAY THAT IT IS A CONDITION PRECEDENT AS WAS SAID IN THE BRANDIFF CASE, THEN DO YOU HAVE TO START YOUR PROCEEDING BY FILING A COMPLAINT IN CIRCUIT COURT, TO HAVE A DETERMINATION MADE ON THAT NOTICE ISSUE?

NO , YOUR HO NOR. THE CIRCUIT COURT, OUR OPINION IS THE CIRCUIT COURT IS NOT THE PLAC E FOR THE NOTICE ISSUE , WHEN T HESE CASES ARE FILED , THE GENE RAL PRACTICE RIGHT NOW IS THERE IS A MOTION TO ABATE FILED. THE CIRCUIT COURT AL MOST INVARIABLY ZP DZ A CASE BACK TO THE D I VISION OF ADMINISTRATIVE HEARINGS. THE DIVISION OF ADMINISTRATIVE HEARINGS MAKES A DETERMINATION OF NOTICE AND COMPENSABILITY, AND ONCE THAT IS DONE , IF A CIVIL ACTION ST ILL LIES , IT WILL CONTINUE IN THE CIRCUIT COURT. OTHERWISE IT WILL GETDISMISSED.

BUT IT IS YOUR POSITIO N THAT THAT CONCLUSION OF LAW BY THE ALJ , LET'S SAY THE ISSUE OF NOTICE GO ES TO THE ALJ. IT IS ABATED IN THE CIRCUITCOURT , AND THE ALJ SAYS NOTICE WAS ADEQUATE.

WELL, NO , WHAT HE IS SAYING IS NOTICE WAS GIVEN. THE ISSUE O F ADEQUA CY IS NOT WHAT WE ARE HERE ON TO DAY. ADEQUACY IS WHETHER OR NOT HE GAVE IT TO THEM AND SO FORTH. THE SUFFICIENCY OF THE NOTICE. WHAT THE ISSUE IS FACT UALLY , DID WE GIVE THE EXPECTANT MOTHER , THE OBSTETRIC PATIENT, NOTICE , NOT, DID WE , DID THE DOCTOR OR THE HOSPITAL GIVE NOTICE. IF IT IS FOUND THAT THEY DID THAT, IS AS FAR AS THE ALJ CAN GO IS TO MAKE THAT FINDING .

BUT WHAT CONCERNS ME IS THAT HE RE YOU ARE T ELLING US THAT THE AM ENDMENT IN 2003 MADE IT CLEAR THAT NOTICE WAS TO BE DETERMINED BY THE ALJ. THE CASE HAS AARENTLY MOOT, IN REGARD TO THE FACT THAT THERE HAS BEEN AN ACCEPTANCE OF NICA BENEFITS , AND SO IF WE COM E OUT WITH AN OPINION , WE HAVE GOT TO COME OUT WITH AN OP INION THAT WOULD MAKE SOME SE NSE GENERALLY , AS TO NOTICE . AND SO THE ADEQ UACY OF NOTICE IS P ART OF THAT OVERALL NOTICE O F THE CASE , ISN'T IT ?

WELL, THE NOTICE IS A BROCHURE THAT IS GIVEN TO THE EXPECT ANT MOT HER.

BUT YOU HAVE GOT ANOTHER ISSUE UN DER 3 16 , AND THAT I S YOU HAVE GOT AN ISSUE O F WHETHER IT WAS , I MEAN , POTENTIALLY WHETHER IT WAS PRACTICAL TO GIVE NOTICE .

THAT

THAT IS NOT IN THIS CASE. I UNDERSTAND.

NO. IT IS NOT IN THIS CASE, AND THE ALJ RULES ON WHE THER OR NOT THERE IS A EMER GENCY SITUATION AND WHETHER IT WAS PRACABLE.

BUT IT DOES HAVE TO DO WITH WH O IS GO ING TO MAKE THE CALL, WHETHER IT IS THE CIRCUIT COURT OR THE ALJ!

WELL , LET ME SAY THIS. I AM RUN NING INTO M R .LUENTER'S TIME - - MR . HUNTER'S T IME AND I WILL BE HAY T O ANSWER THAT VER Y QUICKLY. THE PROBLEM IS THIS IS A STREAMLINED ADMINISTRATIVE AROACH TO THINGS AND O URAROACH IS IDENTICAL TO THE TAB DECISIO N. THEY HI T IT RIGHT ON THE HEAD. IT IS DESIGNED SO THAT YOU SATISFY THIS QUICKLY AND YOUHAVE GOT JUDICIAL REVI EW , AND ANY ISSUE RELATING TOWHAT YOU DO WITH THE FINDINGS OF THE ALJ IS UP INTO THE CIRCUIT COURT U NDERTHE GOOGLEMAN CASE, SO REALISTICALLY THOSE ISSUES HAVE NOT CLOUDED ANY PROCEEDING. I HAVE BEEN GENERAL COU NSEL ORIGINALLY SINCE 19 89 A NDTHEN BACK A GAIN SI NCE, F ORTHE LAST , SINCE 2000, A NDTHESE ISSUES OF NOTICE ARE JUST NOT ISSUES THAT ARE HEAVY WITH THE BAR. EVERYBODY BELIEVES THAT THE ALJ SHOULD DO THE NOTICE ISSUE , AND WE THINK IT IS THE ONLY WAY TO DO IT , TO BE STREAMLINED.I WILL BE HAY TO ANSWER ANY FURTHER QUES TIONS.

CHIEF JUSTICE: THANK YOU.

IF IT PLEASE THE COURT MY NAME IS HOWARD HUNTER. I REPRESENT ALL CHILDREN'S HOSPITAL. I HAVE THE PRIVILEGE OF REPRESENTING THAT INSTITUTION. I WOULD LIKE TO PICK UP WHERE LEARNED COUNSEL LEFT OFF, IF I COULD, JUSTICEWELLS. IT SEEMS TO ME THAT, WHEN THIS COURT DECIDED THE GALENTIN OF FLORIDA VERSUS BRANIFF DECISION, IT ROLLED THE ISSUE OF NOTICE INTO THE ISSUE OF COMPENSABILITY. IT ROLLED THAT NOTICE FORWARD AND THERE HAS NEVER BEEN A DISPUTE ABOUT THAT WHEN THE LEGISLATURE ACTED IN 2003, TO ADDRESS THE ISSUE OF BIFURCATING NICA PROCEEDINGS TO ADDRESS NOTICE AND COMPENSABILITY SEPARATELY, IT DIDN'T MAKE AN EXPRESS DECLARATION THAT NOW IT HAS GOT THE JURISDICTION. IT THOUGHT IT WAS ALREADY HAD THERE. SO

HOW DO YOU, I AM HAVING A HARD TIME FOLLOWING YOUR ARGUMENT THAT THE BRANIFF CASE ROLLED COMPENSABILITY AND NOTICE INTO ONE ISSUE, WHEN THE BRANIFF CASE SAYS SPECIFICALLY, THAT NOTICE IS A FACTUAL MATTER THAT, EVEN SAYS IT SHOULD BE DETERMINED BY A JURY, AND THE STATUTE ITSELF, SAYS COMPENSABILITY IS TO BE DETERMINED BY THE ADMINISTRATIVE LAW JUDGE, SO HOW DO YOU GET TO THESE TWO ARE ROLLED INTO ONE?

WELL, I THINK THE BEHANDSDANTION PROGENY THAT HAVE COME THE BEHAND DECISION AND THE PROGENY THAT HAVE COME AFTER THAT DECISION ARE EXPLICITLY OPERATING, WITH NOTICE OF COMPENSABILITY AND SOMETHING THAT THE ALJ HAS TO DETERMINE, IN ORDER TO DETERMINE WHETHER HE HAS JURISDICTION OR HAS ANY BUSINESS, IF YOU WILL, DECIDING THE NOTICE ISSUE. IT IS

BUT WHAT DOES HE DECIDE ON THE NOTICE ISSUE, IF IT IS NOT EXCLUSIVE IVITY.

I THINK I WOULD LIKE TO DEPART FROM WHAT MR. BROUNT WAS SAYING A MOMENT AGO - - MR. BRUTON WAS SAYING A MOMENT AGO. I THINK WHAT IT WAS SAYING IN 304, WHERE HE HAS GOT THE POWER TO ENFORCE THE ISSUES AND THE FINDINGS HE MAKES REGARDING COMPENSABILITY, HE HAS GOT THE PERTINENT AUTHORITY TO DETERMINE WAS THIS NOTICE ADEQUATE? WAS THIS THE STATUTORY NOTICE THAT WAS APPROPRIATE? WAS IT PRACTICAL TO GIVE NOTICE, AND ONCE HE MAKES THOSE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THEN HE CAN PROCEED TO SAY, THEN, IT IS COMPENSABLE ON A MEDICAL BASIS. IS THIS A NICA BABY. WAS THIS A PARTICIPATING PHYSICIAN, ETCETERA, SO THAT HE CAN DECIDE THIS ENTIRE CONTINUUM OF FACTUAL ISSUES, JUST LIKE THE DISTRICT COURTS HAVE HELD IN THE FIRST, FIFTH, FOURTH CIRCUITS.

SO YOU AGREE WITH THE OTHER DISTRICT COURTS THAT THAT IS REALLY IN ESSENCE A DETERMINATION OF THE IMMUNITY ISSUE, BECAUSE ONCE THE ALJ MAKES THE DETERMINATION THAT THE NOTICE WAS ADEQUATE, DOESN'T THAT RESOLVE THE CONNECTION PRECEDENT?

IT MAY, YOUR HONOR, UNDER THE SENSE THAT UNDER THE DISTRICT COURT'S DECISION AT THIS POINT, IF FOR EXAMPLE THE HEARING OFFICER MAKES THE DECISION THAT THE OBSTETRICIAN GAVE NOTICE AND THE HOSPITAL DID NOT, HE, THEN, PROCEEDS TO FIND THAT THE CASE IS COMPENSABLE WITH RESPECT TO THE OBSTETRICIAN. NOW

SO YOU REALLY ARE SAYING THAT NOTICE IS A COMPONENT OF COMPENSABILITY NOT JUST EXACTLY. PRECISELY. THAT IS PRECISELY WHAT I THINK THE DISTRICT COURTS HAVE SAID. NOW, IN TERMS OF THE IMMUNITY ALICATION, YOUR HONOR, THAT IS A DECISION FOR THE TRIAL COURT TO MAKE. ONCE THE ALJ DETERMINES THAT THERE IS COMPENSABILITY AS TO ONE PARTY OR ANOTHER, THEN THE CIRCUIT COURT DECIDES WHETHER OR NOT THE ALLEGATION IN THE COMPLAINT, FOR EXAMPLE, RELATE TO BIRTH

CHIEF JUSTICE: LET'S JUST GO BACK , BECAUSE FIRST OF ALL, THIS IS SOMETHING THAT , FOR ME, FROM MY POINT OF VIEW, KNOWING THAT NICA WAS AN ATTEMPT TO STREAMLINE THE PROCESS , IT DOES A FEEL THAT THE WAY THE SECOND DISTRICT WOULD HAVE IT WOULD MAKE IT GO, BE LIKE A , I GUESS WHETHER IT IS A PING-PONG BALL AS JUDGE CANDY SAID , BUT JUDGE KENNEDY'S SAID BURKES NOTICE IS ALSO PRECEDENT TO IMMUNITY. IN OTHER WORDS, IF YOU DON'T GIVE THE NOTICE , THEN YOU ARE NOT IMMUNE. SO IT IS, REALLY , GOES TO TWO ISSUES, DOESN'T IT?

IT, DOES AND I THINK

CHIEF JUSTICE: THAT IS WHERE, REALLY, WE

I THINK THE TRICK FOR THE COURT HERE, IS TO DETERMINE WHERE DOES THE ALJ'S FINDING LEAVE OFF AND WHERE DOES THE CIRCUIT COURT BEGIN, AND TO ME IT SEEMS THAT IT IS A MATTER OF, THAT WHEN YOU START TALKING ABOUT DETERMINING THE IMPACT OF THE ALJ'S RULING, NOW YOU ARE BACK IN THE CIRCUIT COURT.

CHIEF JUSTICE: IS THE CIRCUIT COURT, IF THE ISSUE IS IMMUNITY , FREE TO REVISIT THE NOTICE ISSUE?

I DON'T BELIEVE SO , YOUR HONOR.

CHIEF JUSTICE: AGAIN, THAT IS , BELIEVE SO BECAUSE IS IT A COLLATERAL ESTOPPEL ISSUE, OR IS IT SOMETHING, ARE WE DEALING WITH LEGISLATIVE INTENT HERE?

I THINK YOU ARE DEALING WITH BOTH. OKAY, NUMBER ONE , I BELIEVE IT IS 304 THAT SAYS THAT COLLATERAL ESTOPPEL AND JUDICIAL ESTOPPEL DO NOT APPLY, WITH REFERENCE TO ALJ FINDINGS, IF COMPENSABILITY IS NOT FOUND IF THEY ARE FOUND, I WOULD SUBMIT TO THE COURT AT LEAST BY INFERENCE IF NOT EXPRESSLY, THEY DO APPLY, AND THE ALJ'S RULING WOULD STAND AND COLLATERALLY ESTOP THE CIRCUIT COURT FROM MAKING CONTRARY FINDINGS WITH RESPECT TO NOTICE AND COMPENSABILITY.

WELL , AS TO THE WHOLE ISSUE OF WHAT IS TO BE DECIDED BY THE COURT AND WHAT IS TO BE DECIDED BY THE ALJ , I WOULD ASSUME THAT YOUR ARGUMENT IS BASED UPON THE PROVISION IN THE STATUTE THAT CAME IN IN 1998, WHICH SAYS THAT THE ISSUE OF WHETHER SUCH CLAIMS ARE COVERED BY THIS ACT MUST BE DETERMINED EXCLUSIVELY IN AN ADMINISTRATIVE PROCEEDING.

PRIOR TO THAT IT WAS HELD BY THIS COURT THAT THERE WAS CONCURRENT JURISDICTION.

RIGHT.

AS OPPOSED TO EXCLUSIVE JURISDICTION, AND IT IS MY CONCLUSION AND BELIEF THAT THE '98 AMENDMENT SIMPLY CLARIFIED LEGISLATIVE INTENT. IN MY PARTICULAR CASE, MY CLIENT WAS NOT SUED. MY CASE WAS NOT FILED, UNTIL AFTER THE '98 AMENDMENT TO TAKE EFFECT, SO MY CASE , AS FAR AS I AM CONCERNED , IS CLEARLY COVERED BY THE '98 AMENDMENTS. THERE IS NO QUESTION THAT IT DOES EXACTLY AS YOUR HONOR HAS SUGGESTED, THAT THAT MAKES IT CLEAR THAT THERE IS EXCLUSIVE JURISDICTION TO DETERMINE THESE ISSUES, AT LEAST WITH RESPECT TO POST '98 FILINGS IN THE AL , ON THE PART OF THE ALJ.

DO YOU AGREE OR DISAGREE THAT, IN 309 WHAT IT SAYS THE ADMINISTRATIVE LAW JUDGE SHALL MAKE FINDINGS OF, DOES NOT INCLUDE THE ISSUE OF NOTICE?

I AGREE WHOLEHEARTEDLY , JUDGE, BUT

SO THAT WOULD BE AN OVERLAY IMPOSED ON THIS COURT IN BRANIFF.

I DON'T THINK SO, JUDGE, BECAUSE YOU WOULD HAVE TO READ THE ENTIRE STATUTE IN PARI MATERIA, AND WHEN YOU HARKEN BACK TO SECTION 302, 303 AND 303.303 AND 304, YOU HAVE THE TOOLS TO MAKE THOSE DETERMINATIONS. ANY COURT HAS GOT THE PREROGATIVE TO DETERMINE ITS OWN JURISDICTION, IN ADDITION TO WHICH THE LEGISLATURE FROM THE OUTSET, FROM THE TIME IT PASSED THE STATUTE FORWARD, HAS SAID AS A POLICY MATTER, THAT IT IS ATTEMPTING TO HANDLE THESE VERY EXPENSIVE, VERY HIGH PROFILE CLAIMS, IN A MANNER THAT IS JUDICIALLY AND ECONOMICALLY EFFICIENT, SO I THINK YOU HAVE TO OVERLAY THE PURPOSE OF THE STATUTE AS WELL AS THE OTHER STATUTORY PROVISIONS WITH THE PROVISIONS OF SECTION 319 THAT YOU HAVE - -

CHIEF JUSTICE: I WANT TO REMIND YOU YOU ARE IN YOUR COLLECTIVE REBUTTAL.

I APOLOGIZE, YOUR HONOR. THANK YOU VERY MUCH.

CHIEF JUSTICE: MR. MARSHAL, BECAUSE BOTH PARTIES WENT OVER JUST A FEW, CHANGE REBUTTAL TIME TO SIX MINUTES. ADJUST IT. OKAY. YOU HAVE TEN MINUTES FOR EACH OF YOU.

MAY IT PLEASE THE COURT. I AM HONORABLE ROBERT BIA SOTTI, AND I REPRESENT MARIA FERGUSON. WE ARE OUT OF ORDER. I DISAGREE WITH MR. BRUTON. IT DOESN'T SAY ANYWHERE IN THE STATUTE THAT THE ALJ DECIDES NOTICE. LET ME GIVE YOU THE TIMING OF THE FERGUSON CASE. THE FERGUSONS SUE D THE HOSPITAL, AND MRS. FERGUSON, IN CIRCUIT COURT. AND ASSERTED THEY NEVER GOT NOTICE AND ASSERTED THEY WERE ENTITLED TO A JURY TRIAL ON THE ISSUE OF NOTICE, PURSUANT TO THE BRANIFF CASE OF THIS COURT.

IS THE FERGUSON CASE NOW OVER?

NO. IT ISN'T OVER. IT IS, LET ME ANSWER IT THIS WAY. ALL OF THE ISSUES THAT NICA RAISES AGAINST FERGUSON AT THIS POINT ARE MOOT. THE SOLE REMAINING ISSUE IS WHETHER MRS. FERGUSON IS GOING TO COLLECT BENEFITS FROM NICA, WHICH ARE ESSENTIALLY WRONGFUL-DEATH BENEFITS AND ATTORNEYS FEES, BASED ON

THERE ISN'T ANY NOTICE ISSUE IN THIS CASE ANY LONGER.

MRS. FERGUSON ABANDONED THE ISSUE OF NOTICE, PRIOR TO THE SECOND DISTRICT ORAL ARGUMENT. AND I SAID THAT AS MUCH AT THAT ORAL ARGUMENT.

THAT, REALLY, MAKES THIS CASE HARD TO BE ANYTHING EXCEPT SOME KIND OF LAW REVIEW ARTICLE.

JUSTICE WELLS, I CAN'T DISAGREE WITH YOU AND FRANKLY THAT WAS THE SITUATION AT THE SECOND DISTRICT AS WELL, BECAUSE IN OUR CASE, IN THE FERGUSON CASE, THE ALJ SAID THAT, IF THE HOSPITAL DOESN'T PROVIDE NOTICE, YOU CAN SUE THE DOCTOR. WE NEVER SUE D THE DOCTOR. THE DOCTOR WAS NOT A PARTY. THE DOCTOR NEVER INTERVENED. IT WAS NEVER AT ISSUE IN THIS CASE, AND THE ALJ FRANKLY, IT WAS ALL DICTA. AND NICA HAS AEALED THAT. THAT IS DICTA. THAT IS NOT AN ISSUE IN THE CASE.

CHIEF JUSTICE: IT IS A LOT OF DICTA. IF IT IS DICTA, IT IS PRETTY POWERFUL DICTA.

THERE IS NO QUESTION THAT IT IS PROBLEMATIC. THE QUESTION HERE IS, AND WE RAISED THE ISSUE AS TO WHETHER THERE IS EVEN JURISDICTION, BECAUSE THERE REALLY ISN'T A CASE OR CONTROVERSY.

BUT WHAT THAT ALL MEANS TO ME, IS THAT HERE WE HAVE GOT THIS CASE THAT IS SITTING

OUT THERE IN THE SECOND DISTRICT , THAT THE ISSUE, REALLY , ACCORDING T O EVERYBODY, WASN'T THE ISSUE THAT WAS AE ALED TO THE SECOND DISTRICT O R WASN'T REALLY ARGUED THE WAY THATIT CAME DOWN.WE HAVE GOT A DECISION O UTOF THE SECOND DISTRICT , SETTING OUT THERE , AND WE ARE CALLED UPON TO MAKE A DECISION AS TO NOTICE ABOUTA CASE THAT , REALLY , IS MOOT , AND IF WE MAK E A DECISION AS TO NOTICE , WE ARE GOING TO FURTHER COMPLICATE THIN GS, IF WE DON'T MAKE IT ON THE BASIS OF WHAT THE CURRENTSTATE OF THE LAW IS. AND SO THAT PRE SENTS US A DILEMMA, AND THE CURRENTSTATE OF THE LAW HA S GOT TO TAKE INTO CONSIDERATION THE 1998 AME NDMENT TO T HESTATUTE.

I WOULD SUGGEST TO YOUR HONOR, JUSTICE WELLS, THAT THE 1998 VERSION OF THE STATUTE DOES NOT S AYANYWHERE, THAT THE ISSUE OF NOTICE IS RESOL VED BY THE ADMINISTRATIVE

NO, BUT IT DOES SAY THAT THE ISSUE OF WHETHER S UCH CLAIMS ARE COVERED BY THIS ACT , MUST BE DETERMINED EXCLUSIVELY IN ADMINISTRATIVE PROCEE DING , IN 768.301-D.

THE QUESTION BEC OMES , WHEN A PLAINT IFF S UES SOMEONE IN CIRCUIT COURT AND A DOCTOR OR A HOSPITAL ASSERTS, AS AN AFFIRMATIVEDEFENSE, THE ISSUE OF NOTICE , WHO RESOLVES THAT? AND THAT STATUTE , WE WOULD RESPECTFULLY SUGGEST, D OES NOT SAY THAT THE ALJ DOES THAT. I WILL SAY TO THE COURT THAT THAT WAS OUR ARGUMENT BELOW. THAT WAS MRS. FERGUSON 'S ARGUMENT FROM DAY ONE. THIS STREAMLINED SYSTEM , JUST SO WE CAN PUT IT IN PERSPECTIVE, CASEY FERGUSON , WERE SHE STILL ALIVE , WOULD BENIGN Y EARS O LD THIS MONTH THIS. CASE WENT ON FOR MA NY, M ANY YEARS , AND FINALLY WAS SETTLED. FOR EXACTLY THIS REA SON. THIS IS NOT A STREAMLINED SYSTEM, AND I RESPECTF ULLY WOULD ASK THE COURT - -

WOULDN'T YOU AGREE THAT , IF THE ALJ HAS THE AUTHORITY TO DETERMINE ALL OF THESEISSUES THAT WE ARE TAL KING ABOUT , INSTE AD OF HAVING TO GO BACK AND FO RTH FROM AN ALJ PROCEEDING TO CIRCUIT COURT , THAT WE MAY HAVE, I N FACT, A STREAMLINED PROCEEDING HERE?

IF A PLAINTIFF WHO SH OU LDBE THE MA STER O F T HEIRCOMPLAINT IN A STATUTE THAT IS SUOSED TO BE STR ICTLY CONSTRUED , SUES IN CIRCUIT COURT, I DON'T THINK IT IS THAT BIG AFTER PROB LEM TO RESOLVE THE ISSUE OF NOTICE IN CIRCUIT COURT.

IN CIRCUIT COURT.

AND BE ENTITL E O DD T O A JURY TRIA L ON IT, IF THAT IS WHAT THE LAW IS , AND THAT IS WHAT THIS COURT SAID IT WAS. WHETHER IT IS UNDER THE '98 STATUTE OR THE '97 STATUTE.

SO BE FORE ANY PROCEEDING UNDER 7 66 , YOU WOULD, AND IF THERE IS A QUESTION OF NOTICE IF THERE IS A QU ESTION OF NOTICE.

YOU WOULD HAVE TO GO TO CIRCUIT COURT.

THAT IS WHAT WE WOULD SUGGEST.

CAN YOU ADDRESS THEEFFECT OF THE AMENDMENTS TO SECTION 309.4 AND WHETHERTHEY ALY TO YOU ?

THE. 304 AND 309 IN '912348.

309 PAREN 4 WHERE IT SAYS IF IT IS IN THE INTE REST OF JUDICIAL ECONOMY OR RE QUEST OF THE LAW JUDGE TO BIFURCATE THE PROCEEDING ADDRESS COMPENSABILITY AND NOTICE, PURSU

ANT TO 3 16 FIRST AND ADDRESSING AN AWARD PURSUANT TO 31, IF ANY, IN A SEPARATE PROCEEDING. THAT SEEMS TO ME CLEAR LEGISLATIVE INTENT THAT THE ALJ DETERMINED NOTICE.

THAT IS THE '98 VERSION OF THE STATUTE, WHICH WE SUGGEST IT DOESN'T APPLY, AND IN FACT, JUDGE DAVIS IN THE OPINION IN OUR CASE, REFERENCES THE '97 VERSION OF THE STATUTE, SO THAT IS NOT EVEN IN THE '97 STATUTE, BUT RESPECTFULLY, THIS WHOLE SECTION HAS TO DO WITH CLAIMS, AND IN AT LEAST MRS. FERGUSON'S CASE, SHE DIDN'T FILE A CLAIM. SHE FILED A LAWSUIT AND WAS FORCED TO FILE A CLAIM, BUT BECAUSE UNDER THE O'LEARY CASE SHE WAS FORCED TO ABANDON HER DEMAND FOR A JURY TRIAL ON THE ISSUE OF NOTICE AND TO GO FORWARD TO THE ALJ, TO ARGUE NOTICE. DID THAT PREVAIL AND NICASTILL AEALED AND PREVAILED IN THE SECOND DISTRICT, AND IT IS BEING AEALED AGAIN. SO

I AM NOT SURE THAT, EVEN IF YOUR CLAIM WAS FILED BY, IN '97, YOU SAID, IS THIS SOME KIND OF CHANGE THAT CAN'T BE RETROACTIVELY ALIED?

THAT IS WHAT WE SUGGESTED BELOW, ALTHOUGH AGAIN WE ABANDONED IT, BUT WE ARGUED THAT IT CANNOT BE RETROACTIVELY ALIED, BECAUSE MRS. FERGUSON HAD A SUBSTANTIVE RIGHT TO NOTICE, GOT THE NOTICE IN '97, AND YOU CAN'T, THEN, CHANGE HER RIGHTS RETROACTIVELY AND TAKE AWAY HER RIGHT TO A JURY TRIAL.

BUT THE QUESTION OF WHETHER SHE IS ENTITLED TO NOTICE, CERTAINLY IS A SUBSTANTIVE QUESTION. THE QUESTION OF WHO DETERMINES THAT, MAY NOT BE SO SUBSTANTIVE. IT MAY BE MORE PAROLE, AND THAT IS WHAT I AM GETTING AT.

I GUESS THE POINT IS THAT THE NOTICE SHE IS SUPPOSED TO RECEIVE IS TO GIVE HER A CLEAR AND CONCISE STATEMENT OF HER RIGHTS, AND YOU CAN'T GIVE HER A CLEAR AND CONCISE STATEMENT OF HER RIGHTS IN 1996, CHANGE THOSE RIGHTS IN 1998 AND SAY THAT RETROACTIVELY SHE GOT ADEQUATE NOTICE.

WE ARE NOT TALKING ABOUT WHETHER SHE GOT CLEAR AND CONCISE NOTICE. WE ARE TALKING ABOUT WHO DETERMINES WHETHER SHE GOT CLEAR AND CONCISE NOTICE, THE ALJ OR CIRCUIT COURT, WHETHER BY JUDGE OR JURY, IT SEEMS TO ME THAT THE 1998 AMENDMENTS MADE IT PRETTY CLEAR THAT IT IS THE ALJ THAT DETERMINES THAT. WHY CAN'T THAT BE RETROACTIVELY ALIED? WHY DOES THAT CHANGE SOMEBODY'S SUBSTANTIVE RIGHT?

WELL, I HATE TO ANSWER IT THIS WAY, BUT IN FACT, WE ABANDONED OUR RIGHT TO. THAT WE THINK THAT THE RIGHT TO HAVE A JURY DETERMINE WHETHER YOU HAVE GOTTEN NOTICE IS SUBSTANTIVE. AND THAT IS WHAT WE ARGUED. UNFORTUNATELY WE ABANDONED THAT ARGUMENT, BUT WE ARE HERE ARGUING THE CASE THAT WAS PRESENTED TO US.

CHIEF JUSTICE: BUT IT SEEMS TO ME, AGAIN, WHAT WE ARE REALLY TALKING ABOUT, FROM JUSTICE WELL'S'S INITIAL QUESTION, IS WHETHER THE ALJ HAS JURISDICTION TO DETERMINE THAT, WHETHER THE LEGISLATURE INTENDED THAT TO BE PART AND PARCEL. SO IN MATERIALS OF THE SUBSTANTIVE RIGHTS, I MEAN, IF YOU HAVE, YOU KNOW, YOU EITHER, IF ADEQUATE NOTICE IS GIVEN, THEN YOU ONLY HAVE ONE REMEDY, AND SO IT IS A QUESTION OF WHO THE FACT FINDER SHOULD BE. I MEAN, IF THE WHOLE STATUTE IS CONSTITUTIONAL, WHICH HAS BEEN DETERMINED TO BE, IT WOULD BE PRETTY HARD TO SAY THAT ONE PART THAT DEPRIVES YOU OF A JURY TRIAL ON ONE PARTICULAR ISSUE WOULD BE UNCONSTITUTIONAL AS TO THAT PARTICULAR PART.

IT CERTAINLY WOULD BE UNDER THE '97 VERSION OF THE STATUTE, I THINK, BUT IT IS CERTAINLY AN OPEN QUESTION, WITH RESPECT TO THE '98 VERSION OF THE STATUTE AND THE 2003. I WILL SAY THAT JUDGE DAVIS, WHEN WE HAD THIS VERY ARGUMENT IN FRONT OF THE SECOND DISTRICT, LOOKED AT ME AND SAID POINT TO ME THE PLACE IN THE STATUTE WHERE IT

SAYS THE ALJ RESOLVES NOTICE, AND IT IS IN DIRECT AT BEST. IT TALKS ABOUT COMPENSABILITY AND THEN IN 309 IT IDENTIFIES THE FACTORS OF COMPENSABILITY AS JUSTICE BELL POINTED OUT AND NOTICE IS NOT ONE OF THOSE FACTORS, SO THIS IS A VERY INDIRECT WAY TO TAKE AWAY

EXPLAIN TO ME, THEN, HOW AN ALJ IS GOING TO MAKE, HE MAKES A DETERMINATION OF WHETHER OR NOT THERE WAS THE PROPER INJURY, WHETHER OR NOT THE PERSON, THE DOCTOR OR HOSPITAL IS A PART OF THIS GROUP, AND HE MAKES A DETERMINATION OF THE AMOUNT. SO HOW DO YOU GET TO ALL OF THAT, IF IN FACT, THERE IS SOME NOTICE PROBLEM?

YOU DON'T GET, YOUR HONOR, RESPECTFULLY YOU DON'T GET TO IT, UNTIL YOU RESOLVE THE NOTICE PROBLEM.

SO, AGAIN, WHY SHOULDN'T THAT BE A PART OF THE WHOLE ISSUE OF WHETHER THIS INJURY IS COMPENSABLE UNDER THE NICA?

I WOULD ANALOGIZE IT TO A WORKERS COMPENSATION, WHERE IF A PLAINTIFF ASSERTS THAT THEY ARE NOT BARRED BY WORKERS COMP, THAT WOULD GO TO TRIAL. THAT WOULD, IF THERE WERE FACT ISSUES THAT HAD TO BE RESOLVED, IT WOULD BE RESOLVED IN A TRIAL, AND THEN IT WOULD GO, IF THEY WERE RESOLVED ADVERSELY, IT IS THEN BARRED BY WORKERS COMPENSATION, BUT YOU ARE NOT DEPRIVED OF THAT TRIAL IN THE FIRST INSTANCE ON THE FACTS.

SO YOU STILL GET INTO THE EIGHT YEARS IT TAKES TO GO THROUGH THIS PROCEDURE.

JUSTICE QUINCE, IT HAS BEEN NINE YEARS NOW AND WE ARE NOT CLOSE. SO I DON'T KNOW HOW TO RESOLVE IT. THANK YOU.

CHIEF JUSTICE: MR. BIASOTTI?

WE DID IT BACKWARDS.

CHIEF JUSTICE: I AM SORRY. MR. RUTH.

MR. RUTH, I AM HERE ON BEHALF OF MY MY CLIENT, COURT ANY LYNN GLENN MINOR. LET ME PICK UP ON JUSTICE CANTERO'S COMMENT EARLIER, HIS QUESTION CONCERNING THE EFFECT OF THE ACTUAL 2003 AMENDMENT AND AS IT PERTAINS TO LANGUAGE, ALLOWING BIFURCATION OF NOTICE AND COMPENSABILITY AND WHETHER THAT WOULD BE HELPFUL IN RESOLVING THIS COURT'S DILEMMA. I THINK ESSENTIALLY, THAT CAN GO BACK AND BE USED AS AN INTERPRETATION OF THE PRIOR STATUTE. THAT STATUTE IS INTERPRETING CASE LAW AND INTERPRETING THE INTENT OF THAT STATUTE, THAT NOTICE IS ACTUALLY PART OF THE JURISDICTION OF THE ALJ, PARTICULARLY AS IT RELATES TO THE FACT OF GIVING NOTICE, WHETHER IT WAS GIVEN, THE ADEQUACY OF NOTICE, CERTAIN EXCEPTIONS THAT DEAL WITH MEDICAL, EMERGENCY MEDICAL CONDITIONS OR WHETHER IT CAN BE GIVEN AS SOON AS PRACTICABLE. THESE ARE ALL ISSUES THAT ARE ACTUALLY, AS INDICATED IN THE TAB DECISION, SORT OF PREAMBLE OR CONDITION PRECEDENT FOR THE ALJ TO MAKE HIS DECISION, WHETHER HE IS GOING TO INVOLVE AN ENTIRE EVIDENTIARY HEARING AND GO THROUGH THE WHOLE PROCESS OF DETERMINING WHETHER THIS BABY QUALIFIES UNDER THE NICA PLAN. THAT IS THE WHOLE JURISDICTION OF THE ALJ. WAS THE PLAN, IS THE BABY ENTITLED, THE PARENTS ENTITLED TO THE PLAN.

LET ME ASK YOU A QUESTION ON THAT. YOU AGREE THAT, OR DO YOU DISAGREE, IF NOTICE NEVER GETS RAISED AS ISSUE. YOU HAVE AN INJURY. IT IS FILED WITH NICA. NOBODY EVER QUESTIONS NOTICE. THE ALJ WOULD GO AHEAD AND MAKE THE DETERMINATIONS, WHETHER IT IS COMPENSABLE INJURY, PARTICIPATING PERSON AND COMPENSABILITY. CORRECT?

THAT IS CORRECT.

SO THE ONLY WAY THIS, REALLY, BECOME AN ISSUE, IS IF A CIVIL ACTION IS FILED, AND THE NOTICE ISSUE IS RAISED AS AN AFFIRMATIVE DEFENSE.

IT CAN BE RAISED AS IT HAS IN BOTH THIS CASE AND MANY OTHER CASES, I AM SURE, WHERE ONE OF THE PARTIES, A HOSPITAL, PARTICIPATING PHYSICIAN OR OTHER PERSON INVOLVED, INTERVENES INTO THE PROCEEDINGS OF THE ADMINISTRATIVE LAW COURT PROCEEDINGS, AND IS ARGUING, ALSO, THE NOTICE PROVISION, OR THE PARENTS ARE SUGGESTING THAT THEY DON'T HAVE NOTICE.

WHY WOULD A PHYSICIAN OR A HOSPITAL INTERVENE AND TRY TO GET A CASE LIKE THIS REMOVED TO CIRCUIT COURT?

NOT INTERVENE TO GET REMOVED. THEY ACTUALLY INTERVENE AS THEY DID IN THIS CASE, ALL CHILDREN'S HOSPITAL, TO PARTICIPATE.

TO PARTICIPATE.

ON THAT ISSUE, ARGUING, OBVIOUSLY, NOTICE WAS GIVEN, AS OPOSED TO PARENTS SAYING NOTICE WAS NOT GIVEN. AT THE END OF THE DAY, ON THE ISSUE OF THOSE PRACTICALITIES OF NOTICE, IF THE ALJ JUST MAKES A FINDING THAT NOTICE WAS NOT GIVEN, UNDER THE PLAN, THE PARTICIPANTS CAN SAY, WELL, WE HAVE DECIDED WE DON'T CARE ABOUT THE NOTICE. IT WASN'T A BIG DEAL. WE ARE STILL GOING TO STAY WITH THE PLAN. OR THEY CAN SAY, NO, THANK YOU VERY MUCH FOR THAT DECISION, FOR THE ALJ, NO NOTICE WAS EFFECTIVE. WE ARE NOW GOING TO PURSUE, AND THE LANGUAGE OF THE STATUTE IS YOU CANNOT PURSUE YOUR ACTION, UNTIL THE, UNLESS THE ALJ DETERMINES THAT THE PLAN IS NOT IN EFFECT, THEN THEY PURSUE IT, AND THEN THAT ISSUE OF THE EFFECT OF THE INADEQUACY OF NOTICE OR THE LACK OF GIVING NOTICE, IF THAT IS GOING TO BE RAISED AT THAT TIME, IT CAN BE RAISED IN CIRCUIT COURT, AND AS A DEFENSE. THE ACTUAL FINDINGS OF THE ALJ AS TO WHETHER NOTICE WAS GIVEN OR NOT GIVEN, I THINK THEY WOULD BE BOUND AND THEY WOULD BE CONCLUSIVE ON THAT PROCEEDING. THE LEGAL EFFECT OF IMMUNITY FOR A TORT IN THAT ACTION

HOW DOES 304 APPLY WHERE IT SAYS FINDINGS OF FACT AND CONCLUSIONS OF LAW SHALL NOT BE ADMISSIBLE IN ANY SUBSEQUENT PROCEEDING?

THAT, I THINK, HAS MORE TO DO WITH THE FACTS OF THE CASE, AS FAR AS THE INJURY, ITSELF. IF THERE IS GOING TO BE A FINDING ON COMPENSABILITY, THEN, ALL THE ISSUES

WHY WOULDN'T THE ISSUE OF NOTICE, IF THE FINDING OF FACT IS RELATED HOW CAN WE BIFURCATE THE NOTICE OF FINDINGS OF HOW CAN WE BIFURCATE THE NOTICE OF FINDINGS OF FACT ON NOTICE AS REGARDS TO THE FINDINGS OF FACT ON INJURY?

AGAIN, IF THE PLAN IS NOT IN EFFECT AND THE ALJ MADE THAT DECISION THAT THERE IS NO EFFECTIVE PLAN, THEN THOSE FINDINGS, BECAUSE THE PLAN IS NOT GOING TO PUT INTO EFFECT, DON'T COUNT AT ALL, AND YOU CAN START A NEW IN CIRCUIT COURT. NOW, IF AND YOU START ANEW IN CIRCUIT COURT. YOU ASK THE QUESTION ABOUT NOTICE, DO YOU REJECT THAT, TOO, AND YOU HAVE GOT TO REDO THE NOTICE ISSUE, I DON'T HAVE AN ANSWER ON THAT, WHEN YOU LOOK AT THE CONSTRUCTION OF LANGUAGE, AS IT SAYS FACTS AND CONCLUSIONS

IS THAT ONLY RELEVANT IF WE ARE IN THE ADMINISTRATIVE PROCEEDING, AS OPPOSED TO, IF YOU HAVE THE RIGHT TO BRING A REGULAR LAWSUIT AS OPOSED TO GOING IN AN ADMINISTRATIVE PROCEEDING, THAT NOTICE PROVISION, THEN, IS NO LONGER APPLICABLE.

WELL, IT SHOULDN'T BE. IT IS ONLY APPLICABLE IN THE CONTEXT, IN CIRCUIT COURT, BECAUSE A

PARTICIPANT IN THE PLAN FAILS TO GIVE NOTICE , THEN THEY ARE NOT ENTITLED TO THE IMMUNITY. SO NOTICE BY IMPLICATION WILL HAVE TO BE RAISED TO HAVE THAT DEFENSE RAISED. IF I ANSWERED THAT QUESTION , I APOLOGIZE ON THAT , BUT I WOULD URGE THAT THE COURT LOOK CAREFULLY AT THE TAB AND THE GOOGLEMAN DECISION THAT SENT RESTING THE LINE-UP OF CASES THAT DECISION. IT IS INTERESTING THE LINE-UP OF CASES THAT HAVE COME OUT AS APPEALS TO JUSTICE DECISION OF AN ALJ TO DETERMINE PRACTICALITIES OF GIVING NOTICE, AS OPPOSED TO THE CONSEQUENCES OF LACK OF NOTICE, THAT, REALLY , ONLY THE O'LEARY CASE OUT OF THE FIFTH DISTRICT COURT NOW , AND THE MIAMI CASE OUT OF THE THIRD, WHICH RELIED ON A VERY, SEEMS TO BE INDICATING THAT THE ALJ HAS JURISDICTION, BOTH AS TO NOTICE, PRACTICALITY , AS WELL AS LEGAL CONSEQUENCE. THE OTHER DISTRICT COURTS HAVE KIND OF BACKED OFF OF THAT, AT LEAST INTERPRETED THEMSELVES AS SAYING IN THE GOOGLEMAN, MARY CRY DECISION , AS WELL AS THE ALJ DOES NOT HAVE JURISDICTION TO DETERMINE THE LEGAL CONSEQUENCES OF FAILURE TO GIVE THE NOTICE.

NOW, CAN YOU DISCUSS THAT , BECAUSE IT SEEMS TO ME IF THE ALJ HAS GOT JURISDICTION , HE HAS GOT JURISDICTION , AND IT IS OVER BOTH THE FACTS AND LEGAL CONCLUSIONS , AND IF WE ARE GETTING TO YOU CAN DETERMINE THE FACTS BUT NOT THE LEGAL CONCLUSIONS, THEN THE PING-PONG EFFECT BECOMES APPARENT AGAIN, AND YOU LOSE ANY KIND OF EFFICIENCIES IN HAVING THE ALJ DETERMINE NOTICE .

I WOULD AGREE WITH THAT , AND THE , IT IS INTERESTING THAT THE GOOGLEMAN DECISION DOES CITE SECTION 120.687 , TALKING ABOUT THE AUTHORITY OF THE COURTS TO SET ASIDE OR MODIFY FINAL AGENCY ACTIONS WHERE THE AGENCY ERRONEOUSLY INTERPRETS THE PLAN OR THE AGENCY EXERCISES DISCRETION SO AFTER THAT DECISION, IF HE DOES TAKE JURISDICTION TO DECIDE THE CONSEQUENCES, THAT OPINION IS AVAILABLE TO THE DISTRICT COURT OF APPEAL. AND IF THEY MISINTERPRET, IF THE ALJ MISINTERPRETED THE PLAN OR CONSTRUED IT INCORRECT OR CONSTRUED IT INCORRECTLY, ACCORDING TO LAW , THE COURT OF LAW CAN REVERSE OR REVERSE THAT ACCORDINGLY, TO MAKE SURE THAT THE DECISION COMPORTS WITH THE APPROPRIATE FLORIDA LAW, SO IF THE ALJ DOES HAVE JURISDICTION TO DECIDE THE CONSEQUENCES AND MAKES THAT DECISION, IT SHOULD NOT, REALLY, THEN BE A JURISDICTIONAL ISSUE. IT SHOULD BE ALLOWED TO GO FORWARD, AND THE APPELLATE COURT CAN REVIEW IT.

WOULD YOU, WHEN YOU ARE TALKING ABOUT THAT ISSUE AND HOPEFULLY ONE OR THE OTHER OF YOU WILL HAVE TIME ON REBUTTAL TO ADDRESS IT , TOO , BECAUSE OF THE WAY THESE THINGS HAVE COME TOGETHER , AS FAR AS THE ALJ'S ORDINARY RESPONSIBILITIES OF DETERMINING COMPENSABILITY AND ELIGIBILITY OF THIS STATUTORY OR ADMINISTRATIVE SCHEME FOR COMPOSITION , SEPARATE FROM THE NOTICE ISSUE , WOULD YOU TELL US YOUR VIEW OF WHAT THE PURPOSE OF THE 2003 AMENDMENTS WERE. OKAY. THAT IS , HOW DID THEY COME ABOUT AND WHAT WAS THE INTENT OF THE LEGISLATURE IN MAKING THOSE 2003 AMENDMENTS? I WOULD REALLY LIKE TO HAVE YOU ADDRESS THAT HEAD ON .

READING THE 2003 AMENDMENT, IT TENDS TO BRING TOGETHER THE TWO ISSUES OF NOTICE AND COMPENSABILITY . THAT IS , IS THE BABY QUALIFIED AS A NICU BABY. NOTICE, AND DOES THE PERSON QUALIFY, THE APPROPRIATE WEIGHT, ET CETERA. THEN IT SAYS YOU CAN BUY FURTHER INDICATE THOSE TWO ISSUES AWAY FROM THE ISSUE OF VALUE , AWARD , ARE THEY , WHAT WOULD BE THE AMOUNT OF MONEY THAT WOULD BE APPROPRIATE FOR THIS PARTICULAR -- THAT WOULD BE APPROPRIATE FOR THIS PARTICULAR CASE AND THEN ALLOWING THE APPEAL TO TAKE PLACE, BETWEEN THE TWO BIFURCATED ISSUES. IT IS HARD TO DETERMINE , LOOKING AT THAT STATUTE. I ASSUME THE ALJ COULD HAVE THE ULTIMATE DISCRETION SAYING I AM GOING TO BIFURCATE OR TRIFURCATE AND DO THE NOTICE ISSUE. IF THAT IS NOT A PROBLEM , THEN I WILL DO THE COMPENSABILITY ISSUE AND THEN FINALLY , I WILL DO THE VALUE ISSUE. I WOULD THINK THAT THE STREAMLINING EFFECT AND THE OVERALL PURPOSE IS, IF YOU TAKE EACH ISSUE BY ITSELF , INSTEAD OF RESOLVING THEM ALL AND THEN COMING BACK AND SAYING THERE

WAS NEVER NOTICE, SO ALL OF THAT TIME AND EFFORT SPENT ON COMPENSABILITY AND VALUE IS A WASTE OF TIME AND TOOK FOREVER, MAYBE AN EXTRA HEARING AND MAYBE WE GO BACK TO CIRCUIT COURT AND START ALL OVER AGAIN IF YOU HANDLE THE NOTICE ISSUE FIRST AND ALLOW THAT TO BE DONE IN THE JURISDICTION OF THE ADMINISTRATIVE LAW JUDGE, THEN HEARING CAN BE TAKEN FROM THAT ISSUE AND THE EFFECT OF THAT AND THE FINDING OF THAT CAN BE DONE, AND THEN THE PARTIES CAN COME BACK AND EITHER RESOLVE THEIR ISSUE AT THE ALJ HEARING OR IMMEDIATELY GO TO CIRCUIT COURT, DEPENDING UPON THAT RULING. THAT WOULD BE MY INTERPRETATION. IF YOU HAVE NOTHING FURTHER.

CHIEF JUSTICE: THANK YOU VERY MUCH. REBUTTAL.

YOUR HONORS IN ANSWERING JUDGE ANSTEAD'S QUESTION, THE PURPOSE OF THE 2003 AMENDMENTS WAS IN RESPONSE TO THE CASE OUT OF FIRST DISTRICT COURT OF HEARING, WHERE THERE WAS A DECISION RELATING TO NO NOTICE, NO COMPENSABILITY. IT WAS HEARD, AND THEY SENT IT BACK BECAUSE THERE WASN'T AN AWARD MADE, AND THERE WAS, IT IS ONLY THE CLAIMANT OR THE ALJ THAT CAN MAKE THE DECISION, NOT NICA, AND SO IF IT IS CLEARLY NOT GOING TO BE COMPENSABLE OR CLEARLY NO NOTICE HAS BEEN GIVEN THERE, IS NO NEED TO GO THROUGH THE JUDICIAL EFFORT TO DECIDE HOW MUCH MONEY TO AWARD PEOPLE, WHEN YOU ARE NOT GOING TO GET AN AWARD. THAT IS WHY THE 2003 AMENDMENT WENT IN THERE, BUT LET ME SPEAK SPECIFICALLY TO THIS ISSUE. THE STATUTE, HAS ALWAYS READ, IN 766.304, THE ADD MIGHT NOT STRAIGHT I HAVE LAW THE ADMINISTRATIVE LAW JUDGE SHALL FILE ALL CLAIMS PRIOR TO 766.301 TO 766.316 AND HAS FULL POWER AND AUTHORITY GRANTED TO HIM OR HER AS NECESSARY TO CARRY OUT THE PURPOSE OF SUCH SECTIONS. YOUR HONOR, THIS NOTICE ISSUE HAS ONLY GOTTEN UP BECAUSE IT IS A CONDITION PRECEDENT TO THE ELIGIBILITY OF NICA, AND FOR, FROM A PRACTICAL PERSPECTIVE, IT HAS NEVER BEEN DISPUTED THAT THIS IS A BIG PROBLEM. AS A MATTER OF FACT, IT IS REAL, REAL EASY AND SIMPLE. YOU GO IN. YOU FILE A NICA CLAIM. THE CLAIMANT RAISES THE NOTICE ISSUE. NICA DOESN'T KNOW ANY THING ABOUT THE NOTICE ISSUE. NICA WILL PAY IF THERE IS NO NOTICE, IF IT IS A QUALIFIED BABY. IT IS A DONE DEAL. THE ISSUE OF NO NOTICE IS USUALLY RAISED BY THE CLAIMANT TO ESCAPE NICA AND GET INTO TORT IT. THE BOTTOM LINE IS WE CAN'T PROVE IT ONE WAY OR THE OTHER BECAUSE NICA DOESN'T GIVE NOTICE. NICA ONLY FURNISHES THE BROCHURES. WE ONLY FURNISH WHAT IS NECESSARY AND IT HAS BEEN THE SAME NOTICE BY THE WAY, SINCE 1999 1989. THE HOSPITALS INTERVENE AND SAY, YEAH, WE DID GIVE NOTICE OR THE DOCTORS DO THE SAME THING, AND THE BOTTOM LINE IS THEY HAVE AN EVIDENTIARY HEARING ON THAT ISSUE. THE ONLY THING NICA CARES ABOUT IS THE FACT THAT YOU HAVE GOT TO HAVE SOME CONSISTENCY. WE CAN'T BE SETTING OUT THERE IN CIRCUIT COURT, TRYING TO STREAMLINE A SYSTEM OF COMPENSATION THE LEGISLATURE PUT INTO EFFECT, AND THE REASON THIS THING TAKES NINE YEARS IS BECAUSE YOU FILE IN CIRCUIT COURT, THEN A CIRCUIT JUDGE ABUSES IT AND SENDS IT BACK TO THE ADMINISTRATIVE LAW FORUM, WHERE YOU GO IN AND HAVE IT, AND WE DIDN'T HEAR THE ISSUE OF COMPENSABILITY INFERRING SON. WE HEARD THE EFFECT THAT IN FERGUSON. WE AFTERNOON OLD THE FACT, THE EFFECT THAT THE ADMINISTRATIVE LAW JUDGE SAID THAT THE NOTICE ISSUE HAD, BECAUSE WE WERE LITIGATING THAT IN THE GOOGLEMAN CASE IN THE FOURTH DISTRICT, AND WE BELIEVE THAT THAT IS A JUDICIAL ISSUE AS TO THE EFFECT.

CHIEF JUSTICE: IS THAT STILL OUT THERE AS AN ISSUE?

NO. IT IS DONE. GOOGLEMAN. EVERYBODY IS FOLLOWING GOOGLEMAN.

IF YOU DID IT THE OTHER WAY AND HAD THE CIVIL ACTION THAT IS FILED. NOTICE BECOMES AN ISSUE. YOU BIFURCATE IT AND HANDLE IT AT THE BEGINNING IN THE CIVIL PROCEEDING AND THE CIRCUIT JUDGE, THROUGH A JURY OR HOW EVER, MAKES THE DETERMINATION OF NOTICE, THAT CIRCUIT JUDGE'S DECISION SHOULD BE BINDING, AND IT ADDRESSES THE ISSUE OF IMMUNITY. IF IT GOES IN FAVOR OF THE DEFENDANTS, THEN IT WOULD GO TO NICA, AND NICA DOES

WHAT IT IS TASKED TO DO UNDER THE ACT. IF IT GOES AGAINST THE DEFENDANTS, THEN THE CIVIL PROCEEDING GOES FORWARD, AND YOU ARE NOT WASTING TIME IN THE ADMINISTRATIVE PROCEEDING.

WELL, IF THE PLAINTIFFS WOULD FILE FOR NICA WHEN THIS EVENING THEY HAVE GOT A BIRTH-RELATED INJURY, YOU WOULDN'T HAVE THAT PROBLEM, EITHER, BECAUSE THE LAW, UNDER 766.304 SAYS NO CIVIL ACTION MAY BE BROUGHT UNTIL THE DETERMINATIONS UNDER 766.309 ARE MADE, SO THE BOTTOM LINE IS IT IS NOT NICA AND IT IS NOT THE DOCTORS AND THE HOSPITALS.

NO. I AGREE WITH THAT, BUT IF A CLAIMANT EITHER THINKS THAT IT IS NOT A BIRTH-RELATED INJURY, NOT A PROVIDER OR NOTICE WASN'T GIVEN, WHATEVER THE ISSUES MAY BE AND SEEK TO AVOID NICA AND THE REALITY OF IT IS THEY DO FILE THEM, TRYING TO AVOID THE EXCLUSIVITY.

THAT'S RIGHT.

I THINK YOU HAVE AGREED THAT THE ALJ DOES NOT HAVE TOTAL JURISDICTION OVER THE NOTICE ISSUE.

NO. I DON'T AGREE WITH THAT.

AS FAR AS THE IMPACT ON IMMUNITY.

THE IMPACT IS A CIRCUIT COURT ISSUE. OKAY. BUT HE HAS THE JURISDICTION TO DETERMINE WHETHER NOTICE WAS GIVEN. NOW, LET ME

NOT THE ADEQUACY OF THE NOTICE.

YEAH. THE ADEQUACY OF THE NOTICE AS WELL.

OR THE WAIVER OF THE NOTICE.

ABSOLUTELY HAS THAT RIGHT. HE CANNOT COMMENT ON HERE IS WHERE THAT, YOU CAN'T COMMENT ISSUE COMES IN. IF THE DOCTOR AND THE HOSPITAL, BOTH, GIVE NOTICE, YOU HAVE GOT NO ISSUES. BECAUSE YOU ARE GOING TO BE RIGHT IN NICA, IF IT IS COMPENSABLE. IF THE DOCTOR DOESN'T GIVE NOTICE, WHICH WAS GOING ELLMAN, AND THE HOSPITAL - - WHICH WAS GOOGLEMAN, AND THE PLAINTIFF DOES, AND THE PLAINTIFF WANTS TO SUE BOTH, YOU HAVE GOT TO GO INTO CIRCUIT COURT AND ELECT YOUR REMEDIES. THAT IS WHAT GOOGLEMAN SAID AND YOU EITHER TAKE NICA, OR YOU SUE WHOEVER DIDN'T GIVE YOU NOTICE. NOW, THE BOTTOM LINE IS YOU ARE GOING TO GET AWAY FROM THE STREAMLINED SYSTEM AND WE HAVE PRETTY MUCH TRIED TO PULL THIS THING BACK DOWN TOGETHER. IF THE ALJ CANNOT MAKE THE FACTUAL DETERMINATIONS OF NOTICE, WE HAVE GOT A BIG MESS. EVERYWHERE.

WHAT IS, LET ME, BEFORE YOUR TIME RUNS OUT, WHAT IS THE PRESENT STATUS OF THE GLEN CASE?

RIGHT NOW FERGUSON IS DONE, AS FAR AS WE ARE CONCERNED, AND AS FAR AS GLEN IS CONCERNED, THE ISSUE ON GLEN IS WHETHER OR NOT THEY EVEN HAVE TO GIVE NOTICE, BECAUSE THE ALJ ACTUALLY FOUND OUT THEY DIDN'T, IN THE CASE, AND THE ONLY THING THAT WE ARE ALL UP HERE ON IS A SUA SPONTE DETERMINATION, WHERE NO BODY ARGUED OR BRIEFED IT, AND BY THE WAY, THERE ARE FOUR OTHER CASES THAT ARE SETTING UP HERE BEFORE THE COURT, ALL CERTIFIED ON DIRECT CONFLICT AND QUITE HUMOROUS, IF I MAY JUST FOR ONE SECOND, JUDGE DAVIS ASKED ME IN THE LAST CASE, BAYFRONT TWO, THAT WE ARGUE DOWN IN THIRD DISTRICT, HE SAID WHAT DO YOU THINK WE OUGHT TO DO, AND WITH TO

NGUE IN CHEEK , I SUGGESTED THAT HE RE CEDE FROM THEIR POSITION , AND SPECIFICALLY IN T HAT DECISION, THEY DECLINED MY INVITATION TO REC EDE. BUT WITH ALL DUE RESPECT , I BELIEVE THAT THE STAT E OF THE LAW SHOULD BE THAT THE DECISIONS OF THE FIRST , THIRD , FOURTH AND FI FTH DISTRICTS, RE LATING TO THE ALJ'S AUTHORITY TO DETERMINE NOTICE SHOULD BE THE LAW IN THE STATE. IT IS GOING TO MAKE IT FAR MORE EFFICIENT. IT IS NOT GOING TO HURT THE FERGUSON'S ISSUE IF T HEY STILL THINK THEY HAVE GOT A CLAIM. IT DOESN'T HAVE ANYTHING T O DO WITH NOTE I WITH NOTICE, BECAUSE WE DON'T CARE WHETHER NOTICE WAS GIVEN TO PAY. THANK YOU.

CHIEF JUSTICE: THANK YOU VERY MUCH.