

LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT, PLEASE BE SEATED.  
>> NEXT ON OUR DOCKET, WE HAVE THE CONSOLIDATED CASES

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OF BENNET VS. ST. VINCENT'S MEDICAL CENTER IN THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, VS. ST. VINCENT'S.

>> MAY IT PLEASE THE COURT, REBECCA LEE ON BE HALF OF ROBERT AND TAMMY BENNET. AND WE WILL ARGUE ON BE HALF OF NICA.

>> PLEASE MAKE SURE YOU SPEAK INTO THE MICRO PHONE.

>> WE ASKED COURT TO SQUASH THE OPINION OF THE FIRST COURT OF APPEALS, AND THEY SHARE 3 OF THE REASONS.

IT CONFLICTED AS TO THE INTERPRETATION OF THE TIMING OF THE INJURY THAT RENDERS THE INFANT NEUROLOGICALLY IMPAIRED, AND THE CONFLICT WITH ORLANDO REGIONAL AS TO THE POST-TRAUMATIC FULL-TIME PERIOD.

IT'S PART POOF THE DEFINITION OF THE NEUROLOGICAL DEFINITION. ISSUED 1 AND 2 IN OUR BRIEFS RELATE TO THE FIRST DISTRICTS INTERPRETATION OF

THE STATUTORY PRESUMPTION WHICH IS A DIFFERENT SECTION.

IF I MAY, I'D LIKE TO REVERSE THE ORDER THAT I ARGUED IN MY BRIEF, AND AGAIN WITH THE NAGE ISSUE AND THE ORLANDO ISSUE. THE FIST DISTRICT'S OPINION CONFLICTS WITH THE TIMING OF THE INJURY.

THEY FIND IT'S OXYGEN DERIVATION OCCURS WITH THE IN FACTS OF IT TO OCCUR IN LABOR DELIVERY AND RESUSCITATION IN THE IMMEDIATE FOLLOWING PERIOD. UNDER THE DEFINITION OF A BIRTH RELATED NEUROLOGICAL

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INJURY, THERE'S FOUR ELEMENTS TO BE PROVEN, THERE MUST BE AN INJURY TO THE BRAIN CAUSING OXYGEN THAT OCCURRED DURING LABOR OR RESUSCITATION, AND WILL MAKE INFANT IMPAIRED.

IT'S NOT ENOUGH TO -- IT'S JUST ENOUGH IF THE DERIVATION ALONE OCCURS IN THAT STATUTORY TIME PERIOD. NAGE SAYS THERE MUST BE BOTH THE INJURY AND THE OXYGEN DERIVATION FOR IT TO BRITNEY BRITTANY COMPENSABLE UNDER NICA.

I UNDERSTAND YOUR POINT, AND  
MAYBE THIS IS THE WRONG  
ANALOGY, BUT IN A LAWSUIT  
AGAINST THE DOCTOR, THE ON

--

OBSTETRICIAN YOU WOULD BE  
SUING FOR NEGLIGENCE DURING  
DELIVERY, EVEN THOUGH WHAT  
OCCURRED, THERE WERE TWO  
SEPARATE PERIODS OF OXYGEN  
DERIVATION.

FOR A NEGLIGENT LAWSUIT, THE  
FACT THAT ONE OCCURRED ON  
THE DAY OF BIRTH, AND THEN  
IT WAS A SERIES OF EVENTS,  
AND ANOTHER INCIDENT OF  
OXYGEN DERIVATION, THEY ALL  
RELATE BACK TO THE FIRST  
NEGLIGENT ACT, CORRECT?

>> IN THE MEDICAL

MALPRACTICE SENSE, IN  
THE -- IS NOT WITHIN THAT  
REALM, THIS IS A STATUTE  
THAT LIMITS THE CLASS OF  
INJURIES TO CATASTROPHIC  
INJURIES SUFFERED IN THE  
COURT OF LABOR DELIVERY,  
RESUSCITATION.

BECAUSE YOU HAVE A WHOLE  
SUPPORT GROUP OF PEOPLE THAT  
WOULD HAVE BEEN TREATING  
THIS BABY AFTER BIRTH, AND I  
WOULD ASSUME THEY'RE  
CLAIMING ADDITIONAL ACTS

THEY FAILED TO DO OR

PERFORMED THAT RESULTED IN  
THE ULTIMATE PROBLEMS ON  
OCTOBER 3.

>> IS THAT CORRECT?

>> THAT IS CORRECT, BUT THIS  
IS WHY --

YOU'RE GOVERNED BY THE  
LANGUAGE OF THIS STATUTE  
WHICH LIMITS THE REMEDIES  
COMPENSABLE UNDER THE PLAN  
PRESIDENT THE PLAN PROTECTS  
PARTICIPATING PHYSICIANS,  
AND THE ONES OVER THE  
PETITION IS THE --

IT PROTECTED OBGYNS NOT ALL  
OF THE PHYSICIANS BY ALL THE  
PHYSICIANS IN THE HOSPITAL.

>> I AGREE WITH THE FACT  
THAT THE FIRST DIRECT  
APPEARS TO HAVE INTERPRETED  
THIS PHRASE BEYOND IT'S  
PLAIN LANGUAGE, BUT I'M  
LOOKING AT AND TRYING TO  
UNDERSTAND UNDER THE  
ARGUMENT, THE DOCTOR CAN  
ONLY CONTROL THE  
OBSTETRICIAN WHAT HAPPENED  
IN THE LABOR AND DELIVERY  
PHASE BECAUSE OF AN  
ADDITIONAL ACT OF NEGLIGENCE  
THAT CAUSES FURTHER HARM,  
THAT DOCTOR FROM THE MEDICAL  
MALPRACTICE POINT OF VIEW IS  
RESPONSIBLE, BUT CAN'T GET  
THE PROTECTION OF NICA, IS  
THAT CORRECT?

>> BECAUSE THERE'S OTHER ACTS OF OXYGEN DERIVATION THAT ARE WHAT YOU CLAIM TO BE THE CAUSE OF THE IMPAIRMENT, THAT THE DOCTOR WHO DOESN'T HAVE CONTROL OF WHAT HAPPENS AFTER THE LABOR AND DELIVERY IS NOT ABLE TO GAIN THE BENEFIT OF NICA.

>> THE DOCTOR HAS THE CONTROL TO PROTECT THAT OB TO THE EXTENT THAT THE INJURY OCCURS WITHIN THAT

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COMPENSABLE TIME PERIOD.

>> BUT YOU'RE GOING TO ARGUE IN THE LAWSUIT, BUT FOR THE DOCTOR'S OFFICIAL ACTIONS IN LABOR AND DELIVERY, HE SET IN MOTION WHAT OCCURRED.

>> YES, BUT THAT'S NOT WHAT PLAN ITSELF REQUIRES, WHICH IS THAT ONLY THOSE INJURIES THAT ARE BIRTH RELATED, NEUROLOGICAL INJURIES, ARE WITHIN THE PLAN, AND IT IS ONLY THOSE INJURIES AS TO WHICH THE PARTICIPATING PHYSICIANS, OBGYN, CAN SEEK

--

>> THE LEGISLATURE COULD HAVE WRITTEN IT MORE BROADLY.

TO TAKE INTO CONSIDERATION MY CONCERN.

>> THE STATUTE IS VERY

SPECIFIC, AND COMMON LAW IT MUST BE CONSTRUCTED AND APPLIED BECAUSE IT DOES DEPRIVE THE PARENTS OF THE COMMON LAW TORT REMEDIES.

>> A REGIONAL CASE, THE 5TH ACA CASE AND SAID THE IMMEDIATE POST-DELIVER TIME PERIOD IS AN EXTENDED PERIOD OF DAYS WHEN A BABY IS DELIVERED WITH A LIFE THREATENING CONDITION.

>> YES I DO, THAT'S OUR SAME ARGUMENT THAT NICA SHARING, THAT CONFLICTING WITH ORLANDO REGIONAL, NOWHERE IN THERE DOES IT ADDRESS THAT INJURY MUST OCCUR DURING RESUSCITATION IN THE IMMEDIATE POSTDELIVERY PERIOD.

IT CAN CONSTRUCT IT'D TO EXTEND TO THIS PERIOD OF DAYS.

IT MAKE IT'S CLEAR THAT RESUSCITATE AND REMEDIATE ARE IMPORTANT QUALIFIERS TO

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THAT POSTDELIVERY TIME PERIOD, AND UNLIKE THE REGIONAL, THERE WAS NO CONTINUOUS RESUSCITATION. THERE WAS A TIME PERIOD WHERE IT ENDED WITH TRISTAN BENT, ON DAY OF HER BIRTH,

AND NOT 7 DAYS LATER.

>> THIS CASE, THERE WAS  
RESUSCITATION IMMEDIATE  
POSTDELIVERY PERIOD WHERE  
THE CHILD WAS STABILIZED.

>> THE CHILD WAS STABILIZED.

ON THAT EVENING ON THE DAY  
OF HER BIRTH, HER RES

PICTURE RATION WAS NORMAL,

>> SHE WAS FIRST SENT TO THE  
REGULAR NURSERY, AND SHE WAS  
TRANSFERRED.

>> THERE WAS A TIME THOUGH  
THAT AFTER BIRTH HER APGAR  
ROSE TO EIGHT, WHICH IS  
WITHIN THE NORMAL RANGE,  
THAT SHE THEN, HER  
RESPIRATION WAS NOTED AS  
UNLABORED.

WAS SHE GIVEN BREASTING AIDS  
DURING THAT TIME PERIOD, OR  
IS THAT REFLECTED IN --

>> THAT IS --

SHE WAS GIVEN SOME  
RESPIRATORY EXPERIENCE, BUT  
THERE'S NOTHING TO INDICATE  
THAT AT THAT POINT, SHE WAS  
STILL BEING ASSISTED.

IN ANY EVENT, EVEN IF SHE  
MAY HAVE --

IT'S NOT THE SAME AS THE  
DEFINITION AS RESUSCITATE.

RESUSCITATE MEANS ARTIFICIAL  
MEASURES OF RES PICTURE  
RATION, THERE'S NO EVIDENCE  
THAT WAS ONGOING AND

CONTINUOUS.

>> THE LAW JUDGE FOUND TO THE CONTRARY, AND THIS IS THE REASON I'M CONCERNED ABOUT THE FIRST DISTRICT OPINION.

IT SAID THAT TRISTAN WAS,

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THE LAW JUDGE SAID SHE WAS DRIVING A.-DRAMATICALLY, SHE RESPONDED IMMEDIATELY AFTER DELIVERY, HER NEUROLOGICAL EXAM IN FIRST 7-DAYS OF LIFE WAS NORMAL, AND IT WAS UNLIKELY THAT SHE AND SHE EXPERIENCED PROFOUND EPISODES OF OXYGEN DERIVATION.

WE HAVE TO TAKE THESE FACTS AS BEING --

>> AND THERE WAS NO SIGN BY THE FIRST DISTRICT, THAT THE FINDINGS LIKE LACK SUBSTANTIAL EVIDENCE.

IT OCCURRED BECAUSE OF THE WAY THEY MISINTERPRETED THE STATUTE, IT'S THE EXTENDED PERIOD OF DAYS, BUT THAT IS DIFFERENT FROM THE PLAIN LANGUAGE.

>> YOU SAY THAT THE FIRST DISTRICT CONFLICTS WITH ORLANDO, THE FIRST DISTRICT CITES ORLANDO REGIONAL FOR SAYING IMMEDIATE POSTDELIVERY PERIOD IN A

HOSPITAL HAS BEEN CONSTRUED  
TO AN EXTENDED PERIOD OF  
DAYS WHEN A BABY IS  
DELIVERED WITH A LIFE  
THREATENING CONDITION.  
BUT IN ORLANDO, IT IS  
ONGOING.

, A CRITICAL PART OF THE  
STATUTORY LANGUAGE.

>> YEA, IT CONFLICTS WITH  
ORLANDO REGIONAL, BECAUSE IT  
DOESN'T ADDRESS  
RESUSCITATION, AND THAT  
DEFINITION.

IT'S THE FIRST DISTRICTS  
INTERPRETATION OF THE  
STATUTE THAT CONFLICTING  
WITH ORLANDO REGALS SAME  
STATUTORY LANGUAGE, AND THE  
FACTS ARE VERY DIFFERENT IN  
THOSE TWO CASES, THERE'S NO  
EVIDENCE FOR 7 DAYS HERE AS

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THERE IS IN ORLANDO  
REGIONAL.

>> I'M STILL STRUGGLING WITH  
THE NOTION THAT THE FIRST  
MISINTERPRETED STATUTE IN A  
WAY, WHETHER IT'S A LEGAL  
ERROR AS TO A DIFFERENT IN  
VIEW AS TO A FACTUAL FINDING  
IN THIS CASE.

>> I'M SORRY COULD YOU  
REPEAT THAT.

>> I'M SORRY.

HOW DID THE FIRST DCA GET

THE LAW WRONG ON THE  
STATUTE?

I UNDERSTAND WHAT YOU'RE  
SAYING ABOUT THE --

BUT THEY'RE LOOKING AT THE  
IMMEDIATE PERIOD OF TIME.

>> THEY LOOK AT IF IT WAS  
THE IMMEDIATE POSTDELIVERY  
PERIOD OF TIME, BUT ONLY  
THAT THE INJURIES  
COMPENSABLE IF IT OCCURRED  
DURING RESUSCITATION PERIOD.

YOU LOOK AT THE ACTUAL  
DEFINITION IN THAT IT HAS  
TO, THE OXYGEN DERIVATION  
HAS TO OCCUR DURING THE  
COURSE OF LABOR, DELIVERY,  
OR IN THE POST-DELIVERY  
PERIOD.

ONLY THE PHYSICIANS DIRECTLY  
INVOLVED IN THE IMMEDIATE  
RESUSCITATIVE PERIOD ARE  
UNDER THE PROTECTION OF  
NICA.

YOU CAN'T LOOK AT IT WITHOUT  
THE REQUIREMENT OF  
RESUSCITATION THAT OCCURRED  
IN THAT PERIOD.

>> SO IN THE IMMEDIATE  
POST-DELIVERY PERIOD ONLY  
RELATES BACK TO  
RESUSCITATION.

>> CORRECT, WHAT'S EXACTLY,  
AND BECAUSE IT'S ONLY THOSE  
EVENTS THAT ARE THE  
IMMEDIATE POST-DELIVERY

RESUSCITATION PERIOD IS

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ANOTHER WAY THEY DEFINE IT.

>> THAT FITS IN WITH THE  
GENERAL PURPOSE OF THIS, THE  
OBSTETRICIAN, IS GETTING THE  
BENEFIT OF THIS IMMUNITY,  
AND THE COVERAGE UNDER THIS  
PLAN, AND THE OBSTETRICIAN  
INVOLVED AND THE  
RESUSCITATION NOTING IN THE  
NURSERY DOWN THE ROAD.

>> CORRECT, SEVEN DAYS LATER.

>> IMMEDIATE POST-DELIVERY  
PERIOD COULD NOT BE CONSTRUED  
TO MODIFY LABOR OR DELIVERY.

WHAT YOU'RE SAYING --

>> STANDING IN LINE.

THAT IS AN OR.

>> RESUSCITATION IN THE  
IMMEDIATE POST-DELIVERY PERIOD  
IS THE PHRASE.

>> THAT IS THE PHRASE AND THAT  
IS THE TIME PERIOD AND LABOR  
AND DELIVERY OR RESUSCITATION  
IN THE IMMEDIATE POST-DELIVERY  
PERIOD.

>> IS THERE AN ISSUE IN THIS  
CASE YOU ACTUALLY STIPULATED  
AWAY THE ARGUMENT BY WHAT IS  
CONTAINED IN THE PETITION AS  
WELL AS THE PRETRIAL  
STIPULATION?

>> THE, ANY INTERPRETATION OF  
THE STIPULATION RELATES TO THE

STATUTORY PRESUMPTION ISSUE.  
AND I WILL MOVE ONTO THAT  
ISSUE.

CERTAINLY WE NEVER STIPULATED  
THAT SHE HAD SUFFERED A  
BIRTH-RELATED NEUROLOGICAL  
INJURY AS DEFINED IN THE  
STATUTE AND THE STIPULATION  
MAKES THAT CLEAR.

THAT, WE CONTENDED THROUGHOUT  
THAT ANY INJURY SHE SUFFERED  
OCCURRED WELL OUTSIDE THE  
STATUTORY TIME PERIOD,  
NEUROLOGIC INJURY.

>> DOES IT REALLY MAKE A  
DIFFERENCE?

EVEN IF THE PRESUMPTION ARISES  
IT IS A REBUTABLE PRESUMPTION.  
SO IN YOUR CASE YOU REBUTTED  
THE PRESUMPTION.

SO I MEAN, I UNDERSTAND THAT  
THE, MAYBE THIS IS AN ISSUE OF  
LAW THAT WE OUGHT TO ADDRESS,  
IF, IF THE FIRST DISTRICT GOT  
IT WRONG BUT IT SEEMS TO ME  
THAT IT IS ACADEMIC.

YOU SAID, YES, THIS WOULD HAVE  
BEEN A PRESUMPTION BUT WE ARE  
SHOWING THERE WAS A SEPARATE  
ACT OF OXYGEN DEPRIVATION AND  
THAT'S WHAT CAUSED THE  
PERMANENT IMPAIRMENT AND THAT'S  
WHAT THE ADMINISTRATIVE LAW  
JUDGE FOUND WHO ACTUALLY SAID  
EVEN IF THE PRESUMPTION WAS  
APPLIED YOU REBUTTED IT.

WHY DO WE DECIDE THAT ISSUE IN THIS CASE?

>> WE ASK YOU TO DECIDE IT BECAUSE I DO BELIEVE THE FIRST DISTRICT MISAPPLIED THE RULES OF STATUTORY INTERPRETATION AND CONSTRUCTION IN REACHING THAT RESULT.

>> NOT A BASIS FOR ANY CONFLICT, IS IT?

>> IT COULD BE BECAUSE IT IS MISAPPLICATION OF THIS COURT'S BELL IN BELLSOUTH COMMUNICATIONS. AS TO DIFFERENT INTERPRETATION.

>> BE PERFECTLY HONEST FROM JURISDICTIONAL POINT OF VIEW, THAT WOULD NEVER BE A BASIS WE WOULD TAKE THIS CASE.

>> RECOGNIZING THAT THE COURT MAY IN ITS DISCRETION DECIDE THE STATUTORY PRESUMPTION ISSUE BECAUSE IT IS AN ISSUE THAT ARISES BECAUSE --

>> WHAT ASPECT OF THAT? SEEMS TO ME THAT THE FIRST DISTRICT WAS CORRECT IN WHAT PRESUMPTION REQUIRES. SO WHAT ASPECT OF THE PRESUMPTION YOU WANT US TO DECIDE? WHETHER OR NOT IT IS APPLICABLE ONLY TO CLAIMANTS?

>> YES, THAT'S THE QUESTION OF LAW THAT THE FIRST DISTRICT GETS WRONG BECAUSE THE STATUTE, THE STATUTORY PRESUMPTION

REQUIRES IF A CLAIMANT HAS  
DEMONSTRATED REQUISITE  
ELEMENTS, THEN THE PRESUMPTION  
ARISES AND WHAT THE FIRST  
DISTRICT --

>> IN YOUR CASE, DIDN'T YOUR  
PLEADINGS ACTUALLY DEMONSTRATE  
THE PRESUMPTION?

THE PRESUMPTION DOESN'T REQUIRE  
THAT THE ASPECTS OF THE  
INJURY, DOES IT?

>> THE PRESUMPTION DOESN'T  
ADDRESS THE TIMING.

THAT'S THE DIFFERENCE BETWEEN  
THE PRESUMPTION AND STATUTORY  
CONSTRUCTION.

>> EXACTLY.

SO DIDN'T YOUR PLEADINGS  
ACTUALLY DEMONSTRATE THE  
PRESUMPTION?

>> THAT IS ONE INTERPRETATION.  
THAT IS CERTAINLY WHAT THEY  
HAVE ARGUED.

WE ARGUED IT IS BECAUSE WE  
DIDN'T SEEK THE BENEFITS OF THE  
PRESUMPTION, THAT THE  
PRESUMPTION SHOULD NOT ARISE  
BECAUSE THE PRESUMPTION IS  
THERE TO HELP CLAIMANTS TO  
PROVE A BIRTH-RELATED  
NEUROLOGICAL INJURY.

IT SHOULD NOT BE USED BY  
INTERVENORS LIKE THE HOSPITAL  
AND OB/GYN WHO SEEK TO FIT THIS  
CLAIM WITHIN THE STATUTE IN  
ORDER TO PROTECT THEMSELVES

FROM CIVIL COURT ACTION.

AND SO WHAT THE FIRST DISTRICT FINDS IS THAT THE PRESUMPTION ARISES UPON THE PRESENTATION OF EVIDENCE DEMONSTRATING THE REQUIRED INJURY, NOT IF THE CLAIMANT HAS MADE THAT DEMONSTRATION.

>> YOU MAKE A POINT OF SHOWING THAT THERE ACTUALLY WAS PRIOR STATUTE THAT WOULD SHIFT THE BURDEN DEPENDING ON WHO EITHER ASKED FOR THE PRESUMPTION OR NOT.

UNDER THE, THE LAW NOW, YOU GO IN TO SHOW THAT YOU'RE NOT COVERED.

IS THERE ANOTHER WAY THAT THAT CAN BE RESOLVED WHICH IS THAT YOU GO AHEAD AND INTO COURT AND FILE YOUR LAWSUIT AND THEN THEY SAY NICA -- HOW DOES THAT WORK?

>> THIS IS HOW IT HAPPENED HERE. I WILL AGREE NICA IS WRITTEN IN THE WAY AND THE STATUTE IS WRITTEN IN A WAY ASSUMES IT IS THE CLAIMANT WHO GOES IN AND ASKS FOR COMPENSATION BUT THAT IS NOT THE FACTS HERE.

>> WHERE YOU'RE LOOKING FOR --

>> PRESUMPTION OF BENEFIT OF THAT TO HELP YOU BECAUSE THEY RECOGNIZE DIFFICULTY WHETHER THE PROOF OF INJURY OCCURS --

>> SUBSTANTIAL MONEY COMES FROM NICA.

>> YES.

>> YOU DON'T HAVE TO SHOW  
FAULT.

>> EXACTLY.

IT HELPED EASE THE CLAIMANTS  
BURDEN. IT IS A NO FAULT STATUTE.  
WHAT HAPPENED HERE WAS WE DID  
FILE A CIRCUIT COURT ACTION A  
CIVIL COURT ACTION FOR MEDICAL  
MALPRACTICE AND THEN THE  
DELIVERING HOSPITAL AND THE  
OB/GYN MADE, MOVED TO ABATE THE  
CIRCUIT COURT ACTION UNTIL THE  
DETERMINATION WAS MADE UNDER  
NICA.

THEN WE WENT TO NICA AS WE WERE  
REQUIRED TO --

>> SO THAT IS, WHEN YOU GO TO  
NICA, SINCE YOU'RE NOT SEEKING  
THE BENEFIT, WHY ISN'T IT, THE  
BURDEN ON THE DEFENDANT TO SHOW  
THAT THEY'RE COVERED RATHER  
THAN FOR YOU TO SHOW THEY'RE  
NOT COVERED?

>> WE ARGUE THAT IT IS  
ABSOLUTELY ALWAYS THE BURDEN OF  
THE DOCTOR TO SHOW THAT IT IS A  
BIRTH-RELATED NEUROLOGICAL  
INJURY.

>> HOW IS THAT, IS THAT  
SOMETHING THAT THE FIRST  
DISTRICT ADDRESSED OR YOU  
RAISED?

TO ME THAT IS AN IMPORTANT  
THING, WHO WAS THE BURDEN OF  
PROVING EITHER THEY'RE COVERED

OR NOT COVERED?

>> I DID RAISE IT BECAUSE WHAT I ASKED AND ARGUED WAS THE FIRST DISTRICT RULING IN EFFECT TREATS WITHOUT SO STATING IT, EFFECTIVELY TREAT THIS IS PRESUMPTION AS A CONCLUSIVE ONE BECAUSE IT ENTERS AND REMANDS FOR A FINDING OF COMPENSABILITY. BUT THAT IS AN ARGUMENT THAT WE RAISED AND WE ARGUED THAT THE HEALTH CARE PROVIDERS ALWAYS HAVE THE BURDEN OF PROOFING OF BIRTH RELATED NEUROLOGICAL INJURY BECAUSE THEY ARE THE PARTY ASSERTING THE AFFIRMATIVE.

>> THEY CAN'T SEEK THE BENEFIT OF THE PRESUMPTION?

>> AND THEY CAN'T SEEK THE BENEFIT OF THE PRESUMPTION. THEY NEED TO PROVE THOSE FOUR ELEMENTS OF DEFINITION.

THEY DON'T GET THE SHORTCUT OF A PRESUMPTION THAT'S DESIGNED TO AID CLAIMANTS AND IN PROVING A CLAIM.

THE PARENTS HERE, DID NOT, THEY FILED A PETITION FOR DETERMINATION BUT THEY NEVER FILED A CLAIM SEEKING COMPENSATION UNDER NICA AND THEY NEVER CONCEDED THAT IT WAS A COMPENSABLE INJURY.

>> RED LIGHT IS ON.

>> THANK YOU.

>> YOU HAVE USED YOUR TIME,  
THANK YOU.

>> MR. ^BRUTON.

>> THANK YOU, YOUR HONORS.

I LIKE TO RESERVE THREE MINUTES  
FOR REBUTTAL.

MY NAME IS WILBUR BREWTON. WE  
REPRESENT THE FLORIDA BIRTH-  
RELATED NEUROLOGICAL INJURY  
COMPENSATION.

I WILL CALL IT NICA.

>> IS THAT A STATE AGENCY?

>> IT IS AN INSTRUMENTALITY OF THE  
STATE. PART OF THE STATE.

IT IS GOVERNED BY A BOARD OF  
DIRECTORS APPOINTED BY THE  
CHIEF FINANCIAL OFFICER AND  
FUNDS THAT MANAGE IT ARE ALL  
STATE FUNDS.

>> ARE WE, SHOULD WE ACCEPT OR  
GIVE SOME DEFERENCE TO THE  
NICA'S INTERPRETATION OF ITS  
STATUTE, OR ARE YOU BASICALLY  
AN ADVERSE PARTY WHEN THESE,  
BECAUSE IT IS COMING BEFORE THE  
ADMINISTRATIVE LAW JUDGE?

>> I DON'T THINK, I DON'T THINK  
YOU GET ANY DEFERENCE TO NICA  
BECAUSE WE DON'T WRITE RULES  
AND REGULATIONS AND SO FORTH.  
BUT I WILL TELL YOU THAT  
OUR POSITION HERE IS THE FIRST DCA  
DECISION DOES EXPAND THE  
ELIGIBILITY ISSUE FOR NICA.  
OUR POSITION IS --

>> THAT IS, THAT IS A CONCERN

BECAUSE THERE IS A POOL OF  
MONEY?

>> YES.

>> NOT AT ISSUE TODAY WE'RE  
REQUIRED TO MAINTAIN ACTUARIAL  
SOUNDNESS.

THAT IS A POOL OF MONEY.

WE ACCEPT THE NARROW CLAIMS.

IT IS ALSO A CONSTITUTIONAL  
ISSUE IN REFERENCE TO THE  
KRUGER v. WHITE, NONE OF WHICH  
IS ADDRESSED TODAY AND IS NOT  
AT ISSUE.

>> WHAT IS AT ISSUE YOU HAVE TO  
CONSTRUE WHO GETS, WHO CAN NOT  
GO TO COURT IN THE NARROWEST  
WAY CONSISTENT WITH THE  
STATUTE.

>> ACTUALLY, WE'RE ADVERSE IN  
GENERAL BECAUSE IT IS ALL THAT  
IS THE DUE PROCESS IN THIS  
PARTICULAR PROCESS.

AND WHAT OUR POSITION IS, WE DO  
AN INITIAL DETERMINATION AS TO  
WHETHER OR NOT WE THINK THE  
INJURY OCCURRED DURING THE  
OPERATIVE PERIOD AND WHETHER IT  
WAS PERMANENT AND SUBSTANTIAL  
MENTAL AND PHYSICAL INJURY  
AND WHETHER IT IS A  
NEUROLOGICAL INJURY, A  
COMPENSATABLE INJURY.

IF THERE IS DISAGREEMENT WITH  
THE CLAIMANT OR ININTERVENOR  
AND WE HAVE ISSUE ON THAT  
PARTICULAR HEARING.

>> YOU INITIALLY DETERMINE THAT THE BRAIN INJURY ACTUALLY OCCURRED IN THE ACCIDENT? IS THAT CORRECT?

>> OR DID NOT OCCUR.

DURING LABOR, DELIVERY AND IMMEDIATE RESUSCITATION.

WE MAKE THAT INITIAL DECISION.

IF THE CLAIMANT --

>> FACTUAL BASIS IN THIS

PARTICULAR CASE FOR THAT

DETERMINATION THAT IT WASN'T

WITHIN THE WINDOW WHEN IT

NEEDED TO BE TO GET COVERAGE

BECAUSE IT ACTUALLY OCCURRED

EARLIER, IS THAT CORRECT?

>> I THINK WE MADE THE DECISION

THAT IT WASN'T COMPENSABLE.

>> I UNDERSTAND.

LET ME IN TERMS OF YOUR

ARGUMENT THAT

STATUTE REQUIRES THE ACTUAL

INJURY TO THE BRAIN OR SPINAL

CORD OCCURRED DURING THE COURSE

OF LABOR, DELIVERY OR

RESUSCITATION IN THE IMMEDIATE

POST-DELIVERY PERIOD, IS YOUR

ARGUMENT HERE REALLY

INCONSISTENT WITH THE ARGUMENT

THAT YOU MADE IN NAGY, IF I

UNDERSTAND THAT CORRECTLY.

>> IN NAGY THERE WAS A

MECHANICAL INJURY.

THERE WAS ISSUE HIPOXIC

EVENT VERSUS MECHANICAL INJURY.

OUR POSITION IN NAGY THERE WAS A

MECHANICAL INJURY OCCURRED.  
WE KNEW THE FACTS. THE CASE  
DEMONSTRATED IT CREATED  
INTERCRANIAL BLEEDING BUT IT  
WAS ON THE ISSUE THAT NEEDED TO BE  
DECIDED.

NAGY DID THE RIGHT THING AND  
SAID THERE WAS NO HYPOXIC  
EVENT THAT OCCURRED DURING  
LABOR OR DELIVERY IN THE  
IMMEDIATE POST-RESUSCITATION  
PERIOD.

IT WAS UNCONTROLLED,  
INTERCRANIAL BLEEDING THAT TOOK  
SEVERAL DAYS BEFORE IT ACTUALLY  
MANIFESTED.

>> YOU LOST IN NAGY, RIGHT?

>> YEAH.

>> SO YOUR POSITION TODAY IS  
DIFFERENT?

YOU THINK NAGY ACTUALLY GOT  
RIGHT EVEN THOUGH YOU ARE  
ARGUING TO THE CONTRARY?

>> I THINK NAGY GOT RIGHT.

I THINK NAGY GOT RIGHT.

>> BUT THAT WASN'T YOUR  
POSITION IN NAGY?

>> NO, NO.

IT WASN'T AND IT IS BECAUSE IT  
WAS A MECHANICAL INJURY AND WE  
NEVER HAD A CHALLENGE ON A  
MECHANICAL INJURY.

WE WERE STILL SORTING THROUGH  
THIS ISSUE.

>> IF YOU, ON THIS, BRUTON YOUR  
POSITION HERE, IF THE OXYGEN

DEPRIVATION HAD OCCURRED AND CAUSE OF PERMANENT AND SUBSTANTIAL IMPAIRMENT HAD OCCURRED DURING LABOR OR DELIVERY, THE FACT THAT THEY ARE, THAT THE CHILD, THE BABY IS LATER PERMANENTLY IMPAIRED, THE PERMANENT IMPAIRMENT DOESN'T NEED TO BE MANIFEST DURING THE SAME PERIOD?

I KNOW YOU MADE THAT OR DISCUSSED THAT.

COULD YOU CLARIFY WHAT YOUR ARGUMENT IS?

>> SURE, I DON'T LIKE THE WORD MANIFEST.

IT DOES NOT APPEAR IN THE STATUTE.

THE BOTTOM LINE IS, IF THE INJURY OCCURRED DURING LABOR, DELIVERY AND --

>> YOU MEAN INJURY TO THE BRAIN OR SPINAL CORD, RIGHT?

>> CORRECT.

OCCURRED DURING THE REQUISITE PERIOD, IT DOESN'T MATTER THAT THE PARENTS OR THE DOCTORS OR ANYBODY ELSE DIDN'T KNOW AT THAT PARTICULAR POINT THAT THERE WAS GOING TO BE A SUPER PERMANENT INJURY TO THE CHILD. BUT TO SAY THAT YOU CAN MANIFEST AN INJURY WHICH MAY HAVE OCCURRED LATER, IS WHAT I HAVE A BEEF WITH THE FIRST DISTRICT.

>> SO YOU'RE SAYING, --  
>> WHAT IF THERE WERE A  
CIRCUMSTANCE WHERE THERE WAS AN  
OXYGEN DEPRIVATION WHICH, AND  
THE IN THE COURSE OF EVENTS  
WOULD SUBSEQUENTLY LEAD TO  
INJURY TO THE BRAIN, BUT IF  
THAT ACTUAL INJURY TO THE BRAIN  
DOES NOT OCCUR DURING THE  
COURSE OF THE LABOR OR DELIVERY  
OR RESUSCITATION, IT IS YOUR  
POSITION THAT IT'S NOT COVERED  
BY THE PLAN?

>> THAT IS CORRECT.

IT GOES INTO THE TORT SYSTEM.

>> BUT FOCUS IS, BUT SEEMS LIKE  
TO ME THAT THE LANGUAGE OF THE  
STATUTE FOCUSES ON CAUSE, OF  
WHETHER, AND I REALIZE DEPENDS  
WHAT MODIFIES WHAT, BUT, IT  
FOCUSES ON, LET'S SEE HERE,  
INJURY WHICH, BIRTH-RELATED  
NEUROLOGICAL INJURY AND  
DEFINITION OF GOES ON TO SAY,  
CAUSED BY OXYGEN DEPRIVATION OR  
MECHANICAL INJURY OCCURRING IN  
THE COURSE OF LABOR, DELIVERY  
OR RESUSCITATION.

>> I THINK THE KEY WORD IS  
OCCURRED.

I MEAN IT'S CAUSED BY  
SOMETHING.

IT IS WHEN DID IT OCCUR AND --

>> WHERE IS THE WORD OCCUR IN  
THE STATUTE?

>> RIGHT THERE, SAYS CAUSED BY

OXYGEN DEPRIVATION WHICH  
OCCURRED DURING --  
>> OKAY, I UNDERSTAND THAT.  
BUT THAT'S, ISN'T THAT MOST  
REASONABLE TO UNDERSTAND THAT  
AS MODIFYING THE OXYGEN  
DEPRIVATION OR MECHANICAL  
INJURY?  
JUST LIKE ON THIS OTHER THING  
WE WERE TALKING ABOUT --  
>> SURE.  
>> IT IS MODIFYING WHAT'S RIGHT  
BEFORE IT, NOT WHAT IS UP  
EARLIER?  
>> JUSTICE CANADY, I THINK IT  
IS A LOT SIMPLER THAN THAT.  
I THINK THE ISSUE IS NAGY AND  
ORLANDO REGIONAL HAVE TO BE  
LOOKING AT FROM WHAT THEY  
ARE.  
THEY'RE BOTH CASES THAT  
INTERPRETED THE LAW THAT THE  
INJURY HAD TO OCCUR DURING A  
SPECIFIC TIME PERIOD.  
THEY'RE BOTH BASED ON THE FACTS  
OF THE INDIVIDUAL CASE.  
BOTH CASES INDICATE YOU HAVE TO  
DECIDE THESE ON A CASE-BY-CASE  
BASIS DEPENDING UPON THE FACTS  
BUT THE INJURY MUST OCCUR  
DURING LABOR, DELIVERY AND --  
>> WE CAN DECIDE THIS CASE  
BASED, PERHAPS, BASED ON THE  
FINDING THAT THIS INJURY, THE  
BRAIN INJURY WAS NOT  
CAUSED BY WHAT HAPPENED DURING

BIRTH OR DELIVERY.

>> CORRECT.

>> THIS OTHER QUESTION HERE IS REALLY NOT NECESSARY TO THE RESOLUTION OF THIS PARTICULAR CASE NECESSARILY, IS IT?

>> THIS OTHER --

>> WELL, THERE'S A FINDING OF THE, I PROBABLY WON'T BE ABLE TO FIND HERE.

>> FINDING OF THE ALJ?

>> FINDING OF THE ALJ GIVEN THE PROOF LIKELY MORE SO THAN NOT TRISTAN'S PROFOUND NEUROLOGICAL IMPAIRMENT, I UNDERSTAND THAT TO BE LANGUAGE WHAT IS COVERED BY THE ACT.

>> RIGHT.

>> RESULTED FROM A BRAIN INJURY CAUSED BY OXYGEN DEPRIVATION OCCURRED ON OCTOBER 3, 2001.

>> CORRECT.

>> NOT DURING, LABOR, DELIVERY OR RESUSCITATION IN THE IMMEDIATE POST-DELIVERY PERIOD IN THE HOSPITAL.

SEEMS TO ME THAT IS REALLY KIND OF A SEPARATE BASIS FOR DECIDING THIS WITHOUT DELVING INTO THIS ISSUE WHICH IS YOUR FIRST POINT.

WHAT AM I MISSING?

>> I THINK REVERSING WE'RE GIVING YOU WHAT WE THINK THE FIRST DISTRICT DID WRONG AND BASICALLY BY REVERSING THE

FIRST DISTRICT AND AFFIRMING  
THE ALJ, YOU DECIDED THE CASE  
BECAUSE THE ALJ SAID THE  
PRESUMPTION ONLY APPLIES TO THE  
CLAIMANT WHICH WE BELIEVE IS  
TRUE AND THE FACTS OF THIS CASE  
DEMONSTRATE THE INJURY DID NOT  
OCCUR DURING THE OPERATIVE  
PERIOD.

>> LET ME MAKE SURE I  
UNDERSTAND EXACTLY WHAT YOU  
SAID BECAUSE I THOUGHT YOU HAD  
SAID EARLIER IS THAT YOU COULD  
ACTUALLY HAVE THE OXYGEN  
DEPRIVATION AND YOU DON'T KNOW  
UNTIL LATER THAT IT ACTUALLY  
CAUSED A SUBSTANTIAL AND  
PERMANENT INJURY.

IS THAT WHAT YOU ARE, DO I  
UNDERSTAND THAT?

>> NO. WHAT I SAID YOU CAN ACTUALLY  
HAVE THE OXYGEN DEPRIVATION OR  
INJURY TO THE SPINE AND CORD  
THAT CREATED A NICA INJURY BUT  
THE PARENTS OR SOME OTHER  
DOCTORS MIGHT NOT REALIZE THE  
SEVERITY OF IT UNTIL LATER.

THAT IS DIFFERENT ISSUE BECAUSE  
YOU CAN ALWAYS GO BACK AND  
DETERMINE WHEN IT OCCURRED.

>> I THOUGHT YOU WERE MAKING  
TWO DIFFERENT POINTS --

>> NO.

>> -- BETWEEN YOUR QUESTION AND  
YOUR EARLIER STATEMENT.

I ONLY DID THAT IN THE NAGY

CASE AND NOW WE'RE UP HERE.

>> MAY IT PLEASE THE COURT.

MY NAME IS WILLIAM JACKSON.

I'M HERE ON BEHALF OF

DR. WILLIAM LONG AND NORTH

FLORIDA OBSTETRICS AND

GYNECOLOGY.

SEATED AT COUNSEL TABLE IS

COUNSEL FOR ST. VINCENT'S

MEDICAL CENTER IS MR. TACKTILL

WITH THE COURT'S PERMISSION I

WILL ADDRESS MY ARGUMENT TO THE

FIRST AND SECOND ISSUE OF THE

BRIEFS AND HE WILL ADDRESS THE

SECOND AND THIRD AND FOURTH

ISSUES.

>> SO, WHAT --

>> THIRD AND FOURTH ISSUES ARE

NAGY AND ORLANDO REGIONAL AND

ALLEGED CONFLICT.

>> WHAT ARE YOU GOING TO ARGUE?

>> I'M GOING TO ARGUE THE

PRESUMPTION AND WHAT WE BELIEVE

IS A LACK OF COMPETENT

SUBSTANTIAL EVIDENCE BY --

>> YOU'RE ADDRESSING THE

NONCONFLICT ISSUES?

>> CORRECT.

JUSTICE CANADY IS CORRECT, BY

ARGUING OR BY ADDRESSING THE

NAGY AND ORLANDO REGIONAL CASES

FIRST, WE'RE PUTTING THE CART

BEFORE THE HORSE.

THIS CASE CAN BE RESOLVED BASED

SOLELY ON THE FIRST TWO ISSUES.

THE ISSUES OF THE PRESUMPTION

AND WHETHER THERE WAS COMPETENT  
SUBSTANTIAL EVIDENCE TO SUPPORT  
THE ALJ'S FINDING OF  
NONCOMPENSABILITY.

>> IS THAT THE SAME AS WHETHER  
OR NOT THERE WAS SUBSTANTIAL  
AND COMPETENT EVIDENCE TO  
OVERCOME THE PRESUMPTION?

>> CORRECT.

THAT'S EXACTLY WHAT I'M SAYING.  
THIS CASE IS NOT AS COMPLICATED  
AS IT SEEMS.

THERE WERE TWO ISSUES THAT WENT  
UP TO THE FIRST DISTRICT COURT.  
THE FIRST WAS WHETHER THERE WAS  
A PROPER APPLICATION OF THE  
REBUTTABLE PRESUMPTION BY THE ALJ  
OR FAILURE TO APPLY THE  
REBUTTABLE PRESUMPTION OF  
COMPENSATION BY THE ALJ BASED  
ON THE FACTS AND STIPULATIONS  
OF THE PARTIES.

THE SECOND ISSUE WAS WHETHER  
THERE WAS COMPETENT SUBSTANTIAL  
EVIDENCE TO SUPPORT THE FINDING  
OF THE ALJ THAT THIS INJURY WAS  
NOT COMPENSABLE UNDER THE NICA  
PLAN.

IN THE PETITIONER'S  
PETITION, WE'VE GONE OVER THERE  
IN THE PETITIONER'S POSITION  
THEY ALLEGED BY THE TIME OF HER  
BIRTH BY CAESAREAN SECTION SHE  
SUFFERED A HYPOXIC EVENT THAT  
CAUSED BRAIN INJURY.  
SHE SUFFERED FURTHER INJURY TO

HER BRAIN DURING THE FIRST  
SEVERAL DAYS OF LIFE WELL AFTER  
THE IMMEDIATE POST-DELIVERY  
RESUSCITATIVE PERIOD.

AT THE HEARING, THE PARTIES  
STIPULATED INCLUDING THE  
PETITIONER'S, THAT THERE WAS NO  
DISPUTE THAT TRISTAN HAD  
SUFFERED AN INJURY TO THE BRAIN  
CAUSED BY OXYGEN DEPRIVATION  
THAT RENDERED HER  
PERMANENTLY AND SUBSTANTIALLY  
MENTALLY AND PHYSICALLY  
IMPAIRED.

THOSE ARE THE REQUIREMENTS OF  
THE PRESUMPTION STATUTE.

>> REBUTABLE, LET'S  
TAKE WHAT I ASKED PLAINTIFF'S  
COUNSEL, THE PRESUMPTION, FIRST  
OF ALL THEY WERE COMING IN TO  
DEMONSTRATE THEY WEREN'T  
COVERED.

THEY WERE TRYING TO SEEK THE  
BENEFIT, WOULD YOU AGREE WITH  
THAT?

>> I WOULD AGREE WITH THAT.

>> SO UNDER THAT CIRCUMSTANCE  
DOESN'T THE DOCTOR, DON'T YOU  
BEAR THE BURDEN OF SHOWING THAT  
TRISTAN WAS COVERED?

>> THE OVERALL BURDEN, YES.

>> OKAY.

>> AND THERE ARE OCCASIONS WHEN  
PETITIONER DOES HAVE THE  
BURDEN WHERE THE PETITIONER  
IS SEEKING BENEFITS UNDER NICA.

>> UNDER THAT IS WHEN THE PRESUMPTION APPLIES. THEY'RE NOT, SINCE, THE IDEA IS FOR THIS TO BE A SIMPLE SCHEME SO YOU DON'T HAVE, MIGHT NOT HAVE EXPERTS, JUST SAY LISTEN, ALL I KNOW IS MY BABY WAS BRAIN-DAMAGED AND I CAME OUT OF THE HOSPITAL WITH A BRAIN-DAMAGED BABY, THAT PRESUMPTION THEN APPLIES. THEN IT IS UP TO YOU TO SHOW THAT WHY I GUESS, MAYBE YOU WOULDN'T, WHY IT WOULDN'T BE COVERED.

SO HERE THOUGH LET'S, WHOEVER BORE THE BURDEN THE ALJ SAID IT WAS REBUTTED BY EVIDENCE THAT THERE WAS A SECOND HYPOXIC EVENT THAT WAS CAUSE OF THE PERMANENT AND SUBSTANTIAL BRAIN INJURY.

SO SEEMS TO ME THE ISSUE OF PRESUMPTION DOESN'T GET YOU VERY FAR UNLESS YOU CAN DEMONSTRATE THAT THERE WAS NOT COMPETENT SUBSTANTIAL EVIDENCED TO SUPPORT THE ALJ'S FINDINGS?

>> CORRECT.

I WOULD AGREE WITH THE GENERAL PREMISE THAT YOU JUST STATED. THE ONE THING WOULD TAKE EXCEPTION TO IS THAT THE PRESUMPTION IS ONLY FOR THE BENEFIT OF THE CLAIMANTS. THE STATUTE DOES NOT SAY THAT

ALL THE STATUTE SAYS IF THE  
PETITIONER DEMONSTRATES.  
THAT'S ALL IT SAYS.

SO IF THE PETITIONER  
DEMONSTRATES BY STIPULATION,  
THEN THE PRESUMPTION APPLIES  
LIKE IT DID OR SHOULD HAVE IN  
THIS CASE.

NOW THEY ADDRESSED THE SECOND  
ISSUE, IF YOU LOOK WHAT THE  
PETITIONER'S ARE RELYING ON AS  
FAR AS COMPETENT SUBSTANTIAL  
EVIDENCE FOR THE FINDING THAT  
THIS BRAIN INJURY OCCURRED ON  
OCTOBER 3rd AS OPPOSED TO AT  
THE TIME OF DELIVERY, THE ALJ  
SAYS THERE WAS CREDIBLE  
EVIDENCE PRODUCED IN MEDICAL  
RECORDS OF TRISTAN.

AND WHAT'S IN THE MEDICAL  
RECORDS OF TRISTAN?

WELL THERE ARE SOME, ADMITTEDLY  
THERE ARE STATEMENTS IN THE  
PROGRESS NOTES THAT SAY THAT  
TRISTAN WAS NEUROLOGICALLY  
GROSSLY INTACT.

THAT SHE HAD NO EVIDENCE OF  
CENTRAL NERVOUS SYSTEM  
DYSFUNCTION OR DEFICIT.

BUT THOSE WERE NOT DONE, THOSE  
COMMENTS WERE NOT MADE BY A  
NEUROLOGIST OR PEDIATRIC  
NEUROLOGIST.

THEY WERE MADE BY OTHER  
PHYSICIANS, NURSES OTHER FOLKS  
WHO WERE CARING FOR THE CHILD

AT THE TIME.

>> THE FACT NOBODY, SHE WAS,  
WHATEVER SHAPE SHE WAS IN,  
NOBODY EVEN SAW THE NEED TO  
CALL IN A PEDIATRIC NEUROLOGIST  
UNTIL AFTER THE EVENTS OF  
OCTOBER 3rd?

>> I CAN'T SPECULATE AS TO  
WHY --

>> IS THAT CORRECT?

>> THAT'S CORRECT BUT I WOULD  
SAY THAT WE DON'T KNOW WHY THEY  
DIDN'T.

WHETHER IT WAS BECAUSE THEY  
THOUGHT SHE WAS NORMAL OR  
WHETHER THEY WERE TRYING TO  
STABLIZE THIS CHILD.

THIS CHILD HAD A LOT OF  
PROBLEMS IN THE FIRST SEVEN  
DAYS OF LIFE.

AND --

>> WHY CAN'T, I'M STRUGGLING  
WITH WHY CAN'T YOU RELY ON  
THOSE NOTES?

>> BECAUSE WHETHER A CHILD HAS  
SUFFERED A BRAIN INJURY DURING  
DELIVERY IS NOT A QUESTION THAT  
CAN BE ANSWERED BY A RUN OF THE  
MILL PHYSICIAN.

>> BUT ISN'T, BUT THE QUESTION  
HERE REALLY IS, ISN'T THAT  
ENOUGH TO OVERCOME THE  
PRESUMPTION?

ARE YOU SAYING THAT IN ORDER TO  
OVERCOME THE PRESUMPTION THEY  
NEEDED TO HAVE A BROUGHT IN

NEUROLOGISTS AND ALL THESE OTHER PEOPLE TO OVERCOME THE PRESUMPTION AS OPPOSED TO RELYING ON THE MEDICAL RECORDS?

>> YES, THAT'S EXACTLY WHAT I'M SAYING. THIS FINDING OF FACT, AND I WILL CITE TO THE ORLANDO REGIONAL CASE, WHICH SAID THAT THE ALJ NEEDED THE, NEEDED EXPERT TESTIMONY TO DETERMINE WHAT THE WORD IMMEDIATE MEANS IN A MEDICAL CONTEXT.

SO CERTAINLY YOU WOULD THINK THAT WHEN A CHILD SUFFERED A BRAIN INJURY, WHETHER OR NOT THEY SUFFERED BRAIN INJURY DURING DELIVERY WOULD REQUIRE SOME EXPERT TESTIMONY.

>> YOU'RE SAYING THEY ALSO NEEDED EXPERT TESTIMONY ABOUT IMMEDIATE?

>> NO, I WAS JUST USING THAT AS AN EXAMPLE.

THEY NEEDED EXPERT TESTIMONY TO DETERMINE WHETHER OR NOT THERE WAS BRAIN INJURY AT THE TIME OF DELIVERY.

>> NOW WE'RE TAKING NICA, FROM FIRST OF ALL SAYING THAT IT IS THEIR BURDEN, NOT YOUR BURDEN AND SAYING THAT THEY WOULD HAVE TO BRING IN EXPERT TESTIMONY TO SHOW THEY'RE NOT COVERED?

>> NO. THEY WOULD HAVE TO, THEY WOULD HAVE TO BRING IN EXPERT TESTIMONY TO REBUT THE

PRESUMPTION THAT'S BEEN

PLACED --

>> THAT THEY CREATED --

>> THEY CREATED BY THEIR OWN  
STIPULATION.

>> LET ME ASK THIS QUESTION  
ABOUT THE STATUTORY CONSTRUCTION.

THE STATUTE THAT NOW APPLIES AS

IF THE CLAIMANT HAS

DEMONSTRATED TO THE

SATISFACTION OF THE ALJ AND

THEN IT GOES ON.

THE PREVIOUS STATUTE SAID A

REBUTABLE PRESUMPTION SHALL

ARISE THAT THE INJURY ALLEGED

IS A BIRTH-RELATED INJURY AND

THEN IT GOES ON.

IN EITHER PARTY DISAGREES WITH

THE PRESUMPTION, THAT PARTY

SHALL HAVE THE BURDEN OF PROOF.

WHAT IS THAT, THAT IS NOT JUST

STAFF ANALYSIS.

THAT IS THE PRIOR STATUTE.

THEN IT WAS SUBSEQUENTLY

AMENDED.

WHAT IS YOUR INTERPRETATION

ABOUT WHAT CHANGED BETWEEN 1989

AND THE AMENDMENT?

>> IT IS HARD TO KNOW BECAUSE

THERE IS NO STAFF ANALYSIS THAT

TALKS ABOUT WHY THE CHANGE WAS

MADE.

>> BUT BEFORE, IT'S CLEAR IN

THE PRIOR STATUTE THAT EITHER

PARTY COULD CLAIM IT.

THEN IF THEY DIDN'T AGREE WITH

IT, THAT THEY WOULD BEAR THE BURDEN OF PROOF.

THAT'S NOT THERE IN THE SECOND STATUTE, WHICH TALKS ONLY ABOUT WHETHER THE CLAIMANT HAS SHOWN SOMETHING THAT THEY THEN GET THE BENEFIT OF THE PRESUMPTION. PRESUMPTIONS ARE USUALLY TO BENEFIT A PARTICULAR PARTY WHOSE TRYING TO DEMONSTRATE SOMETHING.

>> AND LET ME, I AGREE IN PRINCIPLE BUT YOU DON'T EVEN NEED TO GET THIS SORT OF STATUTORY CONSTRUCTION ANALYSIS BECAUSE THE LANGUAGE OF THE PRESUMPTION STATUTE IS PLAIN AND SIMPLE.

IT SAYS, IF THE CLAIMANT DEMONSTRATES.

THAT'S WHAT IT IS TODAY.

SO YOU DON'T NEED TO GO BACK AND FIND OUT WHAT IT USED TO SAY TO DETERMINE WHAT IT SAYS TODAY.

THAT'S THE FIRST POINT.

THE SECOND POINT IS, THAT AGAIN THERE WAS NO LEGISLATIVE HISTORY AS TO WHY THEY MADE THAT CHANGE.

WHAT I SUSPECT MAY BE THEY MAY HAVE BEEN THINKING WELL IN FLORIDA, WE'RE PRESUMING THAT CLAIMANTS WOULD BE MORE APT TO BE FILING FOR NICA BENEFITS THAN JUST ANYBODY AND THEREFORE

MAYBE THE PRESUMPTION MIGHT,  
SHOULD BE GEARED TOWARDS  
CLAIMANTS BY THE CLAIMANTS  
PRODUCING EVIDENCE.

I DON'T KNOW WHY AND THERE'S  
REALLY NO --

>> BUT ISN'T THERE AT LEAST A  
PLAUSIBLE ARGUMENT, WHETHER IT  
IS PERSUASIVE OR REASONABLE  
WE'LL PUT ASIDE, BUT AT LEAST A  
PLAUSIBLE ARGUMENT THAT VERY  
PHRASE INDICATES THAT THE  
PRESUMPTION IS SOMETHING THAT  
IS THERE FOR THE BENEFIT OF THE  
CLAIMANT, SOMETHING IN THE  
STRUCTURE OF THAT SENTENCE AS  
JUDGE KAHN SUGGESTED IN HIS  
DISSENT?

I THINK THAT IS WHAT HE WAS  
SAYING.

>> ABSOLUTELY IT IS PLAUSIBLE  
BUT AGAIN YOU DON'T HAVE TO  
RESORT SORT OF THAT STRAINED  
PLAUSIBILITY ANALYSIS  
BECAUSE THE STATUTE IS PLAIN  
AND SIMPLE ON ITS FACE.

IT SAYS WHAT IT SAYS.

IT SAYS, IF THE CLAIMANT  
DEMONSTRATES.

THE ALJ ACCEPTS I THINK IT IS  
THE PHRASE.

THE PLAUSIBILITY PART IS NOT  
SOMETHING WE NEED TO GET TO  
BECAUSE THE STATUTE IS PLAIN  
AND SIMPLE ON ITS FACE.

>> IF THAT'S THE CASE, EVEN IF

WE ACCEPT YOUR ARGUMENT THAT THE CLAIMANT BY THE PLEADING DEMONSTRATED THIS REBUTABLE PRESUMPTION, WAS THE FIRST DISTRICT, DID THE FIRST DISTRICT ERR IN THIS SAYING WE'LL SEND THIS BACK AND YOU HAVE TO FIND THIS IS COMPENSABLE? ISN'T THERE AN OPPORTUNITY TO REBUT THAT?

>> YES AND THEY HAD THEIR CHANCE AT THE HEARING.

THAT WAS THE PURPOSE OF THE ADMINISTRATIVE HEARING.

>> THE SECOND DISTRICT NEVER, THE FIRST DISTRICT, I'M SORRY, NEVER REALLY ADDRESSED WHETHER OR NOT THERE WAS SUBSTANTIAL COMPETENT EVIDENCE TO REBUT THAT PRESUMPTION, DID THEY?

>> JUSTICE QUINCE, YOU'RE ABSOLUTELY RIGHT, THEY DID NOT. AND CLEARLY, IF WE HAD THAT IN THE OPINION OF COURSE IT WOULD MAKE MY JOB A LOT EASIER BUT, BY VIRTUE OF THE FACT THAT WHEN THE PARTIES FILED A MOTION FOR CLARIFICATION WITH THE FIRST DCA'S OPINION, THEY CAME BACK AND SAID, WELL, NO, WE'RE NOT GOING TO CLARIFY BUT, WE'RE SENDING THIS CASE BACK TO, BACK TO DOAH FOR THE ALJ TO ENTER AND ORDER SAYING THAT THE INJURY WAS COMPENSABLE. BY VIRTUE OF THE FACT THEY MADE

THAT DETERMINATION, THE ONLY  
OPTION ONE, ONE IS LEFT WITH,  
IS THAT THEY REJECTED WHATEVER  
EVIDENCE WAS PRESENTED ON  
BEHALF OF THE PETITIONER'S THAT  
THEY FAILED TO REBUT THE  
PRESUMPTION AND THE PRESUMPTION  
OF COMPENSABILITY REMAINED IN  
PLACE.

>> CAN YOU SAY WHETHER OR NOT  
THE COURT CAN SAY THERE WAS  
EVIDENCE THAT REBUTTED THAT  
PRESUMPTION?

>> I THINK THE COURT CAN LOOK  
AT THAT AND MY BRIEF GOES  
THROUGH SOME OF THE EVIDENCE  
DESCRIBED BY THE ALJ AS BEING  
COMPETENT, I GUESS TO ANSWER OR  
REBUT THE PRESUMPTION.

WE DON'T THINK IT DOES.

>> BASICALLY YOU'RE SAYING  
THERE HAD TO BE EXPERT  
TESTIMONY --

>> YES.

>> -- TO ESTABLISH THAT.

>> I DON'T, AND THAT MAY BE THE  
BEST KIND OF EVIDENCE YOU COULD  
COME UP WITH BUT I DON'T  
UNDERSTAND WHY THOSE ENTRIES IN  
THE RECORDS THAT SEEM TO  
REFLECT THAT THE NEUROLOGICAL  
SYSTEM WAS OKAY, WOULD NOT BE  
COMPETENT EVIDENCE ON THAT.  
THAT WOULD BE SOMETHING THAT  
THE ADMINISTRATIVE LAW JUDGE  
COULD WEIGH?

THERE ARE A NUMBER OF ENTRIES THAT INDICATE THAT WOULD SUPPORT THE CONCLUSION THAT THE NEUROLOGICAL SYSTEM WAS ALL RIGHT.

AT LEAST AND CERTAINLY DID NOT RISE TO THE LEVEL THAT WOULD FALL WITHIN THE SCOPE OF THE NICA STATUTE?

>> AND THERE ARE A NUMBER OF ENTRIES THAT SAID SHE WAS NOT OKAY.

AND THE ALJ DIDN'T REALLY DISCUSS THOSE ENTRIES.

>> BUT NOT OKAY, THAT NOT OKAY, DID IT GO TO THE NEUROLOGICAL SYSTEM OR SOMETHING ELSE THAT WAS NOT OKAY?

I MEAN WASN'T THERE SOME OTHER KIND OF FAILURES ABOUT THE CHILD THAT WAS GOING ON THAT WAS NOT NEUROLOGICALLY-BASED?

>> CERTAINLY.

THERE WERE SOME THAT WERE. FOR EXAMPLE, SHE HAD AN INABILITY TO SUCK ON OCCASIONS, WHICH IS, USUALLY A BAD SIGN FROM A NEUROLOGICAL PERSPECTIVE.

SHE ALSO HAD FLAILING OF ARMS, WHICH ALSO ANOTHER SIGN THAT THERE MAY BE SOMETHING GOING ON FROM A NEUROLOGICAL BASIS.

>> LET ME ASK YOU THIS.

ON YOUR LEGAL POINT HERE, IS THERE ANYTHING IN THE STATUTE

THAT SUPPORTS YOUR ARGUMENT  
THAT EXPERT OPINION TESTIMONY  
WAS REQUIRED?

>> SO BASICALLY YOU'RE ASKING  
FOR US AS, KIND OF HAVE A  
JUDGE-MADE RULE THAT WOULD  
IMPOSE SUCH A REQUIREMENT IN  
THESE CIRCUMSTANCES?

>> WELL I THINK IT IS ALREADY  
IN PLACE.

IF YOU LOOK AT THE CASE LAW IN  
WORKERS' COMPENSATION CASE,  
WHICH THIS COURT HAS SAID MANY  
TIMES THAT THE NICA PLAN IS ONE  
THAT WE CAN USE WORKERS'  
COMPENSATION AS AN EXAMPLE OF  
HOW TO INTERPRET THE STATUTES.  
IN THOSE CASES, IN MEDICAL  
MALPRACTICE CASES THERE IS  
AMPLE CASE LAW THAT SAYS WHEN  
YOU HAVE A QUESTION THAT IS  
BEYOND THE EXPERTISE OF A LAY  
FACT-FINDER, YOU NEED EXPERT  
TESTIMONY.

>> AND I KNOW YOU'RE OUT OF  
YOUR TIME BUT I JUST HAVE TO  
ASK THIS QUESTION.

DID THE BENNETTS PRODUCE EXPERT  
TESTIMONY AS WELL AS MEDICAL  
RECORDS?

>> THEY DID.

>> ALL RIGHT. AND IS IT CORRECT  
WHEN THE ALJ REVIEWED ALL THE MEDICAL  
RECORDS AND THE EXPERT  
TESTIMONY, THE ALJ NOTED THAT  
NONE OF THE PARTIES OFFERED

TESTIMONY OF A NEUROLOGIST OR A  
NEONATE TOIST TO ADDRESS LIKELY  
TIMING OF THE BRAIN INJURY?

>> THAT IS CORRECT.

>> SO THE ISSUE, YOU BEAR THE  
BURDEN OF PROOF AS TO THE  
TIMING WAS OUTSIDE OF NICA AND  
WHETHER THE PRESUMPTION APPLIES  
BECOMES A CRITICAL FACTOR?

BECAUSE YOU DIDN'T PRODUCE  
EVIDENCE EITHER?

>> RIGHT. AND WE DIDN'T  
PRODUCE EVIDENCE  
BECAUSE WE DIDN'T HAVE THE  
BURDEN TO REBUT THE  
PRESUMPTION, THE PETITIONER'S  
DID.

>> YOU WENT IN THINKING --

>> YES IN FACT WE CITED --

>> YOU WENT IN THINKING THAT  
YOU DIDN'T HAVE TO SHOW THE  
ALJ, EVEN THOUGH THERE WAS A  
PENDING CIRCUIT COURT ACTION,  
THAT YOU COULDN'T PRODUCE AN  
EXPERT WITNESS ON YOUR BEHALF  
TO SHOW THAT THE BRAIN  
DAMAGE OCCURRED AT THE TIME OF?

>> I'M NOT SURE, I, I DIDN'T  
HANDLE THE HEARING BELOW AND I  
CAN'T TELL YOU WHAT THE  
ATTORNEYS WERE THINKING BUT THE  
PETITIONERS --

>> YOU THOUGHT YOU WERE GOING  
INTO A HEARING AND THOUGHT THE  
PLAINTIFFS STIPULATED  
THEMSELVES OUT OF, YOU THOUGHT

YOU HAD GOTTEN THEM OR SOMEBODY  
DID?

THEY STIPULATED ENOUGH YOU  
DIDN'T HAVE TO SHOW ANYTHING?  
>> THEY HAD THE INITIAL BURDEN  
OF REBUTTING THE PRESUMPTION  
AND WE KNEW THAT,  
WE KNEW THEY HAD A  
PEDIATRIC NEUROLOGIST THEY SAID  
WOULD TESTIFY AT THE NIKE  
HEARING AND THEY WITHDREW HIM.  
SO, AT THAT POINT, MY  
UNDERSTANDING IS THAT THE  
RESPONDENT, THE INTERVENERS AT  
THAT POINT DIDN'T NEED TO HAVE  
AN EXPERT TO REABOUT THE--  
REBUT THE TESTIMONY THAT THEIR  
EXPERT, THE EXPERT TESTIMONY  
THEY WERE SUPPOSEDLY GOING TO  
BE GIVING.

>> YOU HAVE USED, YOU HAVE USED  
MORE TIME THAN YOU HAD.

>> THANK YOU FOR YOUR TIME.

>> I'LL STILL LET THE OTHER  
COUNSEL HAVE HIS 15 MINUTES.

>> THANK YOU, YOUR HONOR.

>> IF IT PLEASE THE COURT.

GOOD MORNING, I'M SCOTT TACTILL  
REPRESENTING ST. VINCENT'S  
MEDICAL CENTER.

AS MR. JACKSON SAID I HAVE THE  
PRIVILEGE ADDRESSING CONFLICT  
ARGUMENTS.

AS JUSTICE PARIENTE MENTIONED A  
LITTLE WHILE AGO THIS COURT  
WOULD NOT HAVE LIKELY TAKEN

JURISDICTION IF NOT FOR THE  
CONFLICT ALLEGED BETWEEN NAGY  
AND ORLANDO REGIONAL.

THEREFORE I'M GOING TO BE  
DIFFICULTY AND RESPECTFULLY  
SUBMIT IMPROVIDENTLY GRANTED  
JURISDICTION BECAUSE THERE IS  
NO CONFLICT BETWEEN THE  
OFFICERS DISTRICT'S OPINION,  
PARDON ME, THE OPINIONS OF  
EITHER NAGY AND ORLANDO  
REGIONAL.

LET ME FIRST ADDRESS THE NAGY  
OPINION.

IN THE NAGY OPINION THE NAGY  
COURT WAS DEALING WITH A  
QUESTION OF WHETHER AN INJURY  
THAT OCCURRED LATER THAN THE  
STATUTORY PERIOD TO THE BRAIN  
AND SPINAL CORD COULD BE  
BACKTRACKED AND BOOTSTRAPPED IN  
AN INJURY THAT WAS NOT A  
QUALIFYING INJURY.

THAT IS TO SAY A MECHANICAL  
INJURY NOT TO THE BRAIN OR THE  
SPINAL CORD AND THE NAGY COURT  
CORRECTLY DECIDED THAT WAS  
IMPROPER BECAUSE THE PLAIN  
LANGUAGE OF SECTION 766.302  
SAYS THAT THE OXYGEN  
DEPRIVATION OR MECHANICAL  
INJURY MUST OCCUR IN THE COURSE  
OF LABOR, DELIVERY OR THE  
IMMEDIATE PERIOD AS WE  
DISCUSSED.

THAT'S NOT WHAT HAPPENED HERE.

THE FIRST DISTRICT SIMPLY SAID  
THAT NOTHING IN THE PLAIN  
LANGUAGE OF THE STATUTE  
REQUIRES ANYTHING MORE THAN THE  
OXYGEN DEPRIVATION OR  
MECHANICAL INJURY OCCUR DURING  
THAT STATUTORY PERIOD.

AND IN THIS CASE IT DID.

THERE WAS A, THERE IS NO  
QUESTION THAT THE CHILD  
SUFFERED OXYGEN DEPRIVATION AT  
THE TIME OF DELIVERY.

THAT WAS STIPULATED AS WE  
DISCUSSED BEFORE.

THE ONLY QUESTION IS, WHETHER  
IT WAS NECESSARY IN THE STATUTE  
FOR THE INJURY TO MANIFEST  
DURING THAT SAME STATUTORY  
PERIOD.

>> WHERE DOES MANIFEST COME  
INTO THE PLAY?

I DON'T SEE THAT IN THE  
STATUTE?

>> THE WORD MANIFEST DOESN'T  
APPEAR, YOUR HONOR, BUT  
RENDERED DOES.

THE STATUTE SAYS WHETHER THE  
INJURY OCCURRED DURING THE TIME  
FRAME ULTIMATELY RENDERED THE  
CHILD PERMANENTLY AND  
SUBSTANTIALLY MENTALLY  
PHYSICALLY IMPAIRED.

THE OXYGEN DEPRIVATION AND  
MECHANICAL INJURY THAT OCCURRED  
DURING THE TIME CAUSED BRAIN OR  
SPINAL CORD ININJURY AT SOME

UNSPECIFIED DATE.

PUT SIMPLY THE PLAIN LANGUAGE IS NOT IN CONFLICT WITH THE FIRST DISTRICT'S INTERPRETATION IN THIS CASE NOR DOES IT CONFLICT WITH NAGY WHERE NAGY DEALING WITH A CASE THERE WAS UNDISPUTABLY INJURY DURING THE QUALIFYING PERIOD.

NAGY COURT WAS BEING ASKED TO EXPAND THE DEFINITION BEYOND THE STATUTE.

>> NOW, WHAT THE FIRST DISTRICT DID HERE?

>> NO, YOUR HONOR.

I RESPECTFULLY SAY NO.

THE FIRST DISTRICT HERE SIMPLY ARTICULATED AS JUSTICE CANADY I BELIEVE POINTED OUT A LITTLE WHILE AGO THAT THE ONLY THING THE STATUTE SAYS THAT THE DEPRIVATION OR MECHANICAL INJURY MUST OCCUR IN THE COURSE OF LABOR, DELIVERY OR RESUSCITATION IN THE IMMEDIATE POST-DELIVERY PERIOD THAT IS ALL THE FIRST DISTRICT SAID ON THAT.

IT DOESN'T CITE TO NAGY AT ALL IN THAT CONTEXT AND --

>> THEY DON'T HAVE TO CITE TO THE CASE TO BE IN CONFLICT WITH IT. ONE CASE TALKS ABOUT THAT YOU'VE GOT TO HAVE THE INJURY, THE OXYGEN DEPRIVATION CAUSES THE INJURY OCCURRING IN STRICT

TIME FRAME OF EITHER LABOR,  
DELIVERY OR IN THE  
RESUSCITATION IN THE IMMEDIATE  
POST-DELIVERY TIME PERIOD.

>> YES, YOUR HONOR.

>> THIS CASE EXPANDS THE TIME  
PERIOD TO ANYTHING THAT OCCURS  
DURING LABOR AND DELIVERY AND  
THAT, I FORGET THE EXACT  
LANGUAGE THAT THEY USED BUT  
THEY TAKE IT TO BE AS LONG AS  
IT, THERE IS CONTINUOUS CARE,  
THAT THE OXYGEN DEPRIVATION AND  
THE INJURY CAN OCCUR LATER ON?

>> RESPECTFULLY I DON'T BELIEVE  
THAT'S WHAT IT SAYS, YOUR  
HONOR.

AS TO THE SECOND PART ABOUT THE  
EXTENDED PERIOD THAT TIES  
ALLEGED CONFLICT BETWEEN  
ORLANDO REGIONAL I CERTAINLY  
WILL ADDRESS BUT IF I MAY  
CONTINUE ON THE NAGY ASPECT THE  
FIRST DISTRICT HERE SIMPLY SAID  
THE MECHANICAL INJURY OR  
OXYGEN DEPRIVATION TO THE BRAIN  
AND THAT DEFINITELY DID OCCUR  
DURING THAT PERIOD, THERE IS  
STIPULATION SAID WE HAD OXYGEN  
DEPRIVATION IN THE BEGINNING.  
THERE S ORIGINAL MEANT FROM  
PETITIONERS WHETHER THAT IS THE  
SAME OXYGEN DEPRIVATION WHICH  
ULTIMATELY LED TO THE INJURY  
THE CHILD SUFFERED.

>> WAIT A MINUTE.

I DIDN'T THINK THAT WAS A  
DISPUTED ELEMENT?

I THOUGHT IT WAS DOCUMENTED  
THERE WAS A SEPARATE EVENT OF  
OXYGEN DEPRIVATION, FIVE, SIX,  
SEVEN DAYS LATER, CORRECT?

>> YES, YOUR HONOR THERE WAS.  
THERE WERE TWO DIFFERENT  
EVENTS.

>> SECOND EVENT.

>> TWO DIFFERENT EVENTS.

>> THERE WAS THE SECOND EVENT,  
AT LEAST ACCORDING TO SOME  
TESTIMONY THAT PRODUCED THE  
ULTIMATE PERMANENT, SIGNIFICANT  
BRAIN DAMAGE?

>> THAT IS THE PETITIONER'S  
POSITION.

THAT IS NOT THE RESPONDENT'S  
POSITION.

>> I UNDERSTAND.

ISN'T THAT WHAT, THERE WAS  
EVIDENCE THAT LED TO THAT?

>> FACTUALLY, THE EVIDENCE,  
THERE WAS EVIDENCE OFFERED ON  
BOTH SIDES, THAT IS TRUE.

I AM TALKING ON A PRELIMINARY  
STANDARD WHETHER THE ACTUAL  
STATEMENT HERE FROM A LEGAL  
ARGUMENT, NOT THE FACTUAL ISSUE  
BUT LEGAL --

>> BUT YOU'RE BLENDING OVER.  
IT HAS GOT A FACTUAL COMPONENT.  
THE QUESTION IS DOES IT HAVE TO  
OCCUR, THE DEPRIVATION, AND THE  
INJURY TO THE BRAIN WITHIN

THE CONFINES OF THAT STATUTE  
OR CAN IT BE AN EVENT DOWN THE ROAD?

>> IT CAN BE AN EVENT DOWN THE  
ROAD, YOUR HONOR.

THE STATUTE --

>> THAT'S WHERE THE PROBLEM  
COMES IN.

I THINK WHERE THIS WHOLE  
DISCUSSION IS GOING THAT YOU'RE  
VIEWING IT AS THERE IS ONLY ONE  
INJURY AND THAT OCCURRED DURING  
THE DELIVERY PROCESS.

DEPRIVATION PERIOD, CORRECT?

>> YES.

>> AND THERE'S ANOTHER CLAIM,  
TWO SEPARATE CLAIMS?

>> THERE ARE TWO SEPARATE  
INCIDENTS OF OXYGEN  
DEPRIVATION.

>> HOW CAN YOU BRING THE SECOND  
INCIDENT WITHIN THE STATUTE?  
ISN'T THAT THE DISCUSSION WE'VE  
BEEN HAVING THIS MORNING?

>> THAT IS THE DISCUSSION AS TO  
THE ORLANDO REGIONAL.

>> I'M NOT WORRIED ABOUT  
ORLANDO REGIONAL.

I'M WORRIED ABOUT THIS STATUTE.

>> FIRST DISTRICT OFFERED TWO  
ALTERNATE BASIS TO FIND THIS IS  
COMPENSABLE INJURY.

THE FIRST ONE HAD TO DO WITH  
THE INITIAL OXYGEN DEPRIVATION  
AND IT SIMPLY SAID THAT TOOK  
PLACE WITHIN THE LABOR DELIVERY  
PERIOD AND THAT THE STATUTE

DIDN'T REQUIRE THAT THE  
ULTIMATE DAMAGE MANIFEST DURING  
THAT SAME PERIOD.

>> I MEAN ISN'T IT UNDERSTOOD  
IN THIS CASE THAT THE DAMAGE  
FROM THE SECOND DEPRIVATION IS  
THE HEART OF WHAT WE'RE TALKING  
ABOUT?

>> IT IS AN ALTERNATE THEORY OF  
DAMAGE THAT THE PETITIONER'S  
MOVE FORTH.

I MOVE FORWARD TO THAT BASIS,  
YOUR HONOR.

>> THE ALJ PUT THAT FORTH TOO.  
THE ALJ SPECIFICALLY FOUND IT  
WAS THAT SECOND INCIDENT OF  
OXYGEN DEPRIVATION THAT  
ACTUALLY CAUSED THE PERMANENT  
INJURY TO THE BRAIN HERE.

>> YES, YOUR HONOR, THAT IS  
TRUE.

I'M IN SOMEWHAT OF A DIFFICULT  
POSITION BECAUSE I'M TRYING TO  
ARGUE TO SOME EXTENT THERE IS  
NO CONFLICT WITH NAGY --

>> LET ME GO BACK TO NAGY AND  
YOUR ARGUMENT, IF I COULD, AND  
YOUR ARGUMENT ABOUT THE LACK OF  
CONFLICT WITH NAGY.

I READ WHAT YOU SAID IN YOUR  
BRIEF.

>> OKAY.

>> AND THEN I READ NAGY AND IT  
LOOKS LIKE TO ME, NAGY THE  
COURT IS SAYING THAT THE INJURY  
TO THE BRAIN MUST OCCUR WITHIN

THAT TIME PERIOD THAT SPECIFIED  
IN THE STATUTE, THAT IS, WITHIN  
THE LABOR, DELIVERY OR  
RESUSCITATION?

>> YES, YOUR HONOR.

BUT HERE IN OUR CASE THERE WAS  
INJURY TO THE BRAIN THAT  
OCCURRED DURING THAT TIME  
PERIOD.

INITIALLY THERE IS OXYGEN  
DEPRIVATION.

>> BUT IF IT DOESN'T RESULT,  
,NOT DURING THE TIME PERIOD.

IF IT DOESN'T RESULT IN THE  
SUBSTANTIAL AND PERMANENT  
INJURY THEN

IT IS A WRONG, WITHOUT  
ANYTHING OCCURRING.

SO THEY'RE BOTH SAYING THAT THE  
INJURY OF THE BRAIN MUST OCCUR.

THIS INJURY TO THE BRAIN DID  
NOT OCCUR BECAUSE THERE WERE  
TWO SEPARATE INCIDENTS AT THE  
TIME OF LABOR, DELIVERY OR THE  
IMMEDIATE POST-DELIVERY PERIOD.

>> CONCEDING FOR ARGUMENT SAKE  
THAT IS TRUE, THESE ARE  
CONSISTENT OPINIONS.

THEY BOTH HOLD THAT VIEW, THAT  
THE TIME MUST, THESE THINGS  
MUST OCCUR WITHIN THE  
PARTICULAR TIME, THE BRAIN  
INJURY.

NOT NECESSARILY ULTIMATE  
OUTCOME OF IT.

BUT TO ADDRESS THAT VERY

QUESTION --

>> BUT I THOUGHT, I'M SORRY,  
BEFORE YOU MOVE FROM THAT --

>> CERTAINLY.

>> I THOUGHT THAT THE FIRST  
DISTRICT OPINION DID NOT, HAVE  
AND THE INJURY TO THE BRAIN  
MUST OCCUR DURING THE  
NEUROLOGICAL, DURING THE  
OPERATIVE TIME PERIOD?

I THOUGHT THEY SAID SIMPLY THAT  
THE DEPRIVATION, EITHER THE  
MECHANICAL INJURY OR THE OXYGEN  
DEPRIVATION MUST OCCUR DURING  
THAT TIME PERIOD AND NOT  
NECESSARILY THE INJURY TO THE  
BRAIN?

>> RIGHT, YOUR HONOR.

I MAY HAVE MISSPOKE BECAUSE  
THEY'RE TALKING ABOUT  
MECHANICAL INJURY TO THE BRAIN  
VERSUS OXYGEN DEPRIVATION,  
WHICH IS OXYGEN DEPRIVATION TO  
THE BRAIN IMPLICITLY.

IN THAT CASE THERE WAS, IN THIS  
CASE THERE WAS OXYGEN  
DEPRIVATION TO THE BRAIN.

>> WHY ISN'T THAT CLEAR  
CONFLICT THEN IF THE FIRST  
DISTRICT DOES NOT REQUIRE THE  
INJURY TO THE BRAIN TO HAVE  
OCCURRED DURING THE OPERATIVE  
PERIOD?

>> BECAUSE THE NAGY COURT WAS  
NOT ADDRESSING WHAT HAPPENS  
WHEN THERE'S AN INJURY IN THE

OPERATIVE PERIOD THAT THEN  
LATER MANIFESTS. IT JUST SIMPLY  
WASN'T REACHED.

>> THE PREMISE YOU HAVE HERE, IF  
I UNDERSTAND CORRECTLY IS THAT  
WHENEVER THERE IS OXYGEN  
DEPRIVATION, THAT NECESSARILY  
MEANS THERE IS INJURY TO THE  
BRAIN?

IS THAT THE PREMISE FOR YOUR  
ARGUMENT?

>> YES, YOUR HONOR.

YES, YOUR HONOR.

>> THAT PERIOD COULD EXTEND FOR  
A MATTER OF YEARS THEN?

>> THE PERIOD WHERE OXYGEN  
DEPRIVATION COULD OCCUR BUT  
THE STATUTE, OXYGEN DEPRIVATION  
HAS TO OCCUR DURING THE  
STATUTORY PERIOD.

>> IN YOUR THEORY THE ULTIMATE  
INJURY COULD OCCUR TWO OR THREE  
YEARS DOWN THE ROAD AND STILL  
BE COVERED.

>> YES, ABSOLUTELY, YOUR HONOR.

IT MAY BE YEARS BEFORE THE  
ACTUAL RESULTS OF THAT  
DEPRIVATION ARE NOTICED BY  
ANYONE.

JUST AS COUNSEL FOR NICA  
SAID IT MAY NOT BE SEEN UNTIL  
SOMETIMES AFTERWARDS.

>> I THINK YOU'RE MISSTATING  
WHAT NICA SAID.

WHETHER THE BRAIN INJURY CAUSES  
THE PERMANENT AND SUBSTANTIAL

IMPAIRMENT.

THE MANIFESTATION WHEN SOMEONE SEES PERMANENT IMPAIRMENT CAN OCCUR OUTSIDE THE LABOR AND DELIVERY PERIOD BUT THE INJURY THAT IS THE CAUSE OF IT, THE INJURY TO THE BRAIN THAT'S THE CAUSE OF THE IMPAIRMENT HAS TO OCCUR IN THAT RESTRICTED PERIOD OF TIME.

>> YES, YOUR HONOR.

DIDN'T MEAN TO IMPLY ANYTHING DIFFERENT ABOUT --

>> MANIFEST IS NOT EVEN WITHIN THE STATUTE.

YOU'VE GOT TO HAVE THREE THINGS THAT OCCUR DURING THE OPERATIVE TIME PERIOD.

THE THREE THINGS BEING OXYGEN DEPRIVATION, IN THE PERIOD OF TIME THAT CAUSES AN INJURY TO THE BRAIN BUT THAT INJURY TO THE BRAIN HAS TO BE THE ONE THAT CAUSES THE PERMANENT IMPAIRMENT.

>> THERE HAS TO BE CAUSAL LINK BUT THERE IS NOTHING IN THE STATUTE THAT SAYS THE OXYGEN, I'M SORRY THE INJURY TO THE BRAIN OR SPINAL CORD THAT RESULTS FROM THE OXYGEN DEPRIVATION OR MECHANICAL INJURY HAS TO --

>> LET'S TAKE HERE THERE WAS AN OXYGEN DEPRIVATION, ALL RIGHT AND THERE WAS INJURY,

THEORETICAL INJURY TO THE BRAIN  
BECAUSE EVERY TIME THERE IS OR  
AGAIN DEPRIVATION MAYBE THERE  
ARE A FUEL CELLS THAT ARE  
DAMAGED AND I THINK THAT IS  
SORT OF IN THE THEORETICAL  
SENSE, EVERY TIME WE'RE  
DEPRIVED OF OXYGEN MAYBE WE  
LOSE A COUPLE OF CELLS AND THAT  
IS INJURY TO THE BRAIN.

BUT THEN THE CHILD GOES FINE,  
PERFECTLY ALONG HIS OR HER WAY  
AND THEN THERE IS A, SHE  
SUFFERS A SEIZURE THREE WEEKS  
LATER.

AND THAT'S THE SEIZURE IS CAUSE  
OF THE PERMANENT IMPAIRMENT.  
ARE YOU SAYING BECAUSE THERE  
WAS THEORETICALLY A OXYGEN  
DEPRIVATION AT THE TIME OF  
BIRTH THAT THAT SEIZURE AND  
THEN THE DAMAGE RESULTING FROM  
IT WOULD BE WITHIN THE WITHIN  
THE NICA STATUTE?

>> IF THE SEIZURE COULD BE TIED  
AS CAUSAL BASIS TO THE INITIAL  
DEPRIVATION, YES, YOUR HONOR.  
IF, FOR EXAMPLE, THERE WAS A  
PHYSICIAN WHO TESTIFIED BELOW,  
DR. HANKINS, THE MENTIONED  
COURSE THE CHILD TOOK WAS  
CONSISTENT WITH OXYGEN  
DEPRIVATION EARLY ON THAT  
ULTIMATELY DEVELOPED INTO  
CEREBRAL PALSY YOU'RE REALLY  
EXPANDING, YOU'RE ACTUALLY

EQUATING THE NICA STATUTE WITH THE TORT STATUTE EVEN THOUGH THE LANGUAGE USED IS DIFFERENT? IN OTHER WORDS IF THERE IS ANY WAY THAT A PHYSICIAN IS BEING SUED BECAUSE THINGS THAT HAPPENED DURING THE LABOR AND DELIVERY PERIOD, I MEAN, NEGLIGENT ACT, IT DOESN'T REALLY MATTER WHETHER THE DAMAGE TO THE, WHETHER IT IS SETS IN MOTION A SERIES OF EVENTS THAT THEN CAUSED THE ULTIMATE DAMAGE?

UNDER THAT SCENARIO YOU'RE DIRECTLY IN CONFLICT WITH NAGY BECAUSE IN NAGY, IF IT HADN'T BEEN FOR WHAT HAPPENED DURING BIRTH THE, THAT WAS ONLY WHAT 12 HOURS LATER, MOST LIKELY THAT LATER EVENT WOULD NOT HAVE OCCURRED.

>> YOUR HONOR I'M NOT SUGGESTING A SIMPLE BUT FOR ANALYSIS. IN NAGY THERE WAS NO, NO INITIAL QUALIFYING EVENT. THERE WAS NO BRAIN INJURY WHATSOEVER WITHIN THE QUALIFYING PERIOD.

THAT WAS UNDISPUTED IN THE CASE.

THAT IS NOT ADDRESSING THE SAME THING.

THE NAGY COURT WAS ADDRESSING COULD IT TAKE A LATER INJURY CAUSED BY NONQUALIFYING

INJURIES EARLY ON AND COUNT THAT AS PART OF NICA BECAUSE ULTIMATELY THERE WAS A BRAIN INJURY BUT THERE WAS NO MECHANICAL INJURY TO THE BRAIN DURING THAT PARTICULAR CASE. OR AGAIN DEPRIVATION WAS NOT AN ISSUE IN NAGY, ONLY INITIALLY BUT LATER ON. CAUSED BY VACUUM EXTRACT TORE BUT DID NOT CAUSE DIRECT INJURY TO THE BRAIN. THERE WAS NOTHING IN THE QUALIFYING PERIOD TO CATEGORIZE AS BIRTH RELATED NEUROLOGICAL INJURY UNDER 766.302. ALTERNATELY THE FIRST DCA OFFERED THE OPTION LOOKING AT THE LATER PERIOD. I WANT TO CLARIFY, THERE IS DISCUSSION OF RESUSCITATION IN THE IMMEDIATE POST-DELIVERY PERIOD. THE FIRST DISTRICT WAS COMPLETELY CONSISTENT WITH ORLANDO REGIONAL ON THIS POINT THERE IS TENDENCY AND ALJ INDULGES IN IT AT ONE TIME AND COUNSEL AT ONE POINT IN TIME SUGGESTING WE'RE TALKING ABOUT THE IMMEDIATE POST-DELIVERY RESCUSITATIVE PERIOD. WE'RE ACTUALLY NOT. WE'RE TALKING ABOUT THE RESUSCITATION IN THE IMMEDIATE POST. AND ORLANDO COURT

ANALYZED THOSE TWO THINGS  
SEPARATELY.  
IT LOOKED TO SEE WHAT IMMEDIATE  
POST-DELIVERY PERIOD IN THE  
HOSPITAL MEANT AND LOOKED AT  
THE WORD IMMEDIATE.  
WHICH MEANT THERE WAS NO  
INTERVENING TIME FROM DELIVERY.  
SO THE TIME BEGAN THERE.  
THE NEXT QUESTION WAS WHERE THE  
TIME ENDED FOR THE  
POST-DELIVERY PERIOD.  
THAT HAD NOTHING DIRECTLY TO DO  
WITH RESUSCITATION.  
WHAT THE FIRST, PARDON ME, WHAT  
THE FIFTH DCA LOOKED AT IN  
ORLANDO REGIONAL WAS WHETHER  
THE CHILD WAS STABLE AND FOR AS  
LONG AS THE CHILD WAS NOT  
STABLE, THE IMMEDIATE  
POST-DELIVERY PERIOD CONTINUED.  
NOW SOME OF THE CONFUSION  
NATURALLY ARISES BECAUSE THE  
NEXT THING THE ORLANDO REGIONAL  
COURT LOOKED AT WAS THE  
DEFINITION OF RESUSCITATION.  
IT WAS TRYING TO DETERMINE  
WHETHER THE CHILD'S PLACEMENT  
ON A VENTILATOR OR THE ENTIRE  
TIME QUALIFIED AS  
RESUSCITATION.  
ULTIMATELY IT DECIDED IT DID  
QUALIFY AS RESUSCITATION.  
THEN IT WENT TO LOOK AT WHETHER  
THE THIS CHILD WAS STABLE  
DURING PERIOD IT WAS ON -- YES?

>> LET ME JUST STOP YOU HERE.  
ARE YOU SAYING THERE ARE TWO  
SEPARATE THINGS HERE?  
>> ABSOLUTELY, YOUR HONOR.  
>> RESUSCITATION AND IMMEDIATE  
POST-DELIVERY?  
>> ABSOLUTELY.  
>> AND THAT THE IMMEDIATE  
POST-DELIVERY DOES NOT MODIFY  
RESUSCITATION?  
>> THE PHRASE, IMMEDIATE POST,  
THE QUALIFYING PERIOD IN  
766.302 ONLY ALLOWS FOR THE  
RESUSCITATION TO BE A THING  
TAKING PLACE WITHIN THE  
INDEPENDENT IMMEDIATE  
POST-DELIVERY PERIOD.  
I'M NOT ARGUING ANYTHING  
DIFFERENT THAN THAT BUT THEY'RE  
NOT SYNONYMOUS.  
IMMEDIATE POST-DELIVERY PERIOD  
DOES NOT MEAN THE CHILD WAS  
BEING RESUSCITATED FOR THAT  
ENTIRE TIME.  
IN ORLANDO REGIONAL ON A  
FACTUAL BASIS THAT WAS  
HAPPENING.  
>> BUT IT DOES MEAN THAT IF YOU  
STABILIZE THE CHILD AND THEN  
THERE'S A PERIOD WHERE THERE IS  
RESUSCITATION, THAT IS NOT  
APPLICABLE?  
>> YES, YOUR HONOR, IT DOES  
MEAN THAT.  
BUT IN OUR CASE HERE WE HAVE  
STIPULATION THE CHILD WAS

UNDERGOING MULTIORIGINAL BEGAN  
SYSTEM FAILURE UP TO OCTOBER  
3rd.

ORGAN SYSTEM FAILURE.

WE HAVE STIPULATION FROM THE  
PETITIONERS THAT THE CHILD  
SUFFERED NEUROLOGICAL INJURY ON  
PERMANENT, SUBSTANTIAL MENTAL  
AND PHYSICAL BASIS FROM OXYGEN  
DEPRIVATION ON OCTOBER 3rd.

SO THE ONLY -- WE ALSO KNOW  
PARDON ME, FROM THE STIPULATION  
THAT THE CHILD UNDERWENT HOURS  
OF RESUSCITATION ON OCTOBER  
3rd.

SO THE ONLY QUESTION HERE FOR  
THE ALTERNATE BASIS OFFERED BY  
THE FIRST DISTRICT IS WHETHER  
THE CHILD WAS STILL IN THE  
IMMEDIATE POST-DELIVERY PERIOD  
IN THE HOSPITAL ON OCTOBER 3rd.  
THAT IS THE ONLY THING.

BECAUSE WE KNOW RESUSCITATION  
WAS TAKING PLACE AND WE KNOW  
OXYGEN DEPRIVATION WAS TAKING  
PLACE ON OCTOBER 3rd.

>> WHAT ABOUT IMMEDIATE?

>> IMMEDIATE DOESN'T MEAN IT  
HAS TO TAKE PLACE WITHIN FIVE  
MINUTES OF DELIVERY.

MEANS THERE IS NO INTERVENING  
TIME.

IN THE ORLANDO REGIONAL CASE --

>> NO INTERVENING TIME?

>> NO INTERVENING TIME FROM  
DELIVERY.

MEANING YOU DON'T SEND THE  
CHILD HOME AND COME BACK AGAIN.  
IT IS IMMEDIATE POST-DELIVERY  
PERIOD IN THE HOSPITAL.  
IN THE ORLANDO REGIONAL CASE IT  
WAS A SICK-DAY PERIOD.  
>> YOUR TIME HAS EXPIRED.  
>> THANK YOU, YOUR HONOR.  
>> MR. ^BREWTON.  
>> I WAIVE THE REST OF MY TIME.  
>> I'LL GIVE YOU A COUPLE  
MINUTES IF YOU WANT IT BUT  
ENTIRELY UP TO YOU.  
I LET THE OTHER COUNSEL GO ON A  
LITTLE LONG HERE.  
>> YOUR HONOR, VERY QUICKLY, WE  
BELIEVE THAT THERE IS CONFLICT.  
OUR JURISDICTIONAL BRIEFS MAKE  
IT CLEAR THAT THERE IS.  
WE BELIEVE THAT THE ALJ IS THE  
TOTAL FINDER OF FACT.  
THE ALJ FOUND THE FACTS HERE.  
WAS VERY, VERY SPECIFIC.  
WHEN APPLE EAST RAISED ISSUE OF  
THE PRESUMPTION, HE SAID NOPE,  
DOESN'T APPLY UNLESS THE  
CLAIMANT CLAIMS IT BUT EVEN IF  
IT DID, I FIND THAT THERE'S  
ENOUGH EVIDENCE IN THE RECORD  
TO REBUT THE PRESUMPTION.  
>> WHO HAS, IN THIS CASE, WHO  
HAD THE BURDEN OF PROOFING  
EITHER THAT THE INJURY, THE  
DAMAGE WAS COVERED OR NOT  
COVERED?  
>> INTERVENORS, OR NICA.

>> AND THEY PUT FORTH NO EXPERT TESTIMONY ON THEIR POSITION? THEY HAVE TO RELY SOLELY ON THE PRESUMPTION IN ORDER TO GET THEM --

>> BUT CAN'T RELY ON THE PRESUMPTION BECAUSE THE CLAIMANT DIDN'T --

>> THAT'S WHAT I'M SAYING.

>> RIGHT.

>> I DIDN'T REALIZE WHY UNTIL NOW WHY IT WAS SO CRITICAL TO HAVE THAT.

>> ABSOLUTELY.

AND NICA DIDN'T NOT BELIEVE IT WAS COMPENSABLE BELOW.

>> THEY THOUGHT REALLY THE CLAIMANT STIPULATED THEMSELVES OUT OF THE TORT CASE?

>> I'M ASSUMING.

BUT WE BELIEVE THAT, WE BELIEVE THAT THE ALJ SHOULD BE AFFIRMED ON THIS PARTICULAR CASE AND I DON'T KNOW HOW YOU GET THERE FROM HERE EXCEPT WE DO BELIEVE THAT THERE IS CONFLICT.

WE DO BELIEVE THAT THE FIRST DISTRICT MISSED IT AND WE BELIEVE THAT THE DISSENT IN THE FIRST DISTRICT NAILED IT.

THANK YOU.

>> THANK YOU.

>> THANK YOU FOR THE EXTRA TIME.

>> WE THANK BOTH SIDES FOR YOUR ARGUMENT.

AND COURT IS NOW ADJOURNED.

>> PLEASE RISE.