

948 So.2d 705

Editor's Note: Additions are indicated by **Text** and deletions by **Text** .

Supreme Court of Florida.

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY  
COMPENSATION ASSOCIATION, Petitioner,  
v.  
FLORIDA DIVISION OF ADMINISTRATIVE  
HEARINGS, et al., Respondents.  
Florida Birth-Related Neurological Injury  
Compensation Association, Petitioner,  
v.  
Maria Ferguson, et al., Respondents.

Nos. SC04-227, SC04-666.

|  
Jan. 11, 2007.

### Synopsis

**Background:** In each of two cases, after parents filed medical malpractice action against health care provider who assisted in infant's delivery, the defending health care provider responded by raising the affirmative defense that the suit was brought in violation of the Birth-Related Neurological Injury Compensation Act (NICA), and the trial court abated the action and ordered the parents to file a NICA claim. Parents filed NICA claims and, in each case, the ALJ found that health care provider had not satisfied statutory notice requirement. In each case, health care provider and the Birth-Related Neurological Injury Compensation Association appealed. The District Court of Appeal, [863 So.2d 450](#), [Canady, J.](#), and, [869 So.2d 686](#), [Davis, J.](#), reversed on ground that ALJ did not have jurisdiction to make finding regarding notice, and certified conflict. Association petitioned for review.

**Holdings:** The Supreme Court, [Bell, J.](#), held that:

[\[1\]](#) one appeal was moot, and

[\[2\]](#) an ALJ has jurisdiction to determine whether a health care provider has complied with statutory requirement that notice of participation in the injury compensation

plan established by NICA be provided to obstetrical patients.

In one case, petition for review dismissed; in other case, decision of District Court of Appeal quashed.

[Lewis, C.J.](#), dissented and filed opinion in which [Anstead](#) and [Pariente, J.J.](#), concurred.

[Anstead, J.](#), dissented and filed opinion in which [Lewis, C.J.](#), concurred.

[Pariente, J.](#), dissented and filed opinion in which [Lewis C.J.](#), and [Anstead, J.](#), concurred.

West Headnotes (5)

### [\[1\]](#) [Health](#)

[🔑 Injury Compensation Funds](#)

Issue of whether an ALJ, when considering a Birth-Related Neurological Injury Compensation Act (NICA) claim, had jurisdiction to determine if a health care provider had complied with statutory notice requirement, required the interpretation of a statute, and thus Supreme Court's standard of review was de novo. [F.S.1999, § 766.316](#).

[8 Cases that cite this headnote](#)

### [\[2\]](#) [Health](#)

[🔑 Injury Compensation Funds](#)

Appeal by Birth-Related Neurological Injury Compensation Association and health care provider from appellate court's finding that ALJ, when considering a Birth-Related Neurological Injury Compensation Act (NICA) claim, did not have jurisdiction to determine whether health care provider complied with statutory notice requirement was moot, where claimants waived their challenge to the adequacy of the health care provider's notice and agreed to accept an award under NICA. [F.S.1999, § 766.316](#).

[4 Cases that cite this headnote](#)

[3] **Action**

🔑 [Moot, Hypothetical or Abstract Questions](#)

An issue is “moot” when the controversy has been so fully resolved that a judicial determination can have no actual effect.

[Cases that cite this headnote](#)

[4] **Health**

🔑 [Injury Compensation Funds](#)

As a condition precedent to invoking Birth-Related Neurological Injury Compensation Act (NICA) as obstetrical patient's exclusive remedy for birth-related neurological injuries, predelivery notice of the health care provider's participation in the injury compensation plan established by NICA must be given. [F.S.1999, § 766.316](#).

[3 Cases that cite this headnote](#)

[5] **Health**

🔑 [Injury Compensation Funds](#)

When notice is raised as part of a claim filed under the Birth-Related Neurological Injury Compensation Act (NICA), an ALJ has jurisdiction to determine whether a health care provider has complied with statutory requirement that notice of participation in the injury compensation plan established by NICA be provided to obstetrical patients. [F.S.1999, § 766.316](#).

[9 Cases that cite this headnote](#)

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**Opinion**

[BELL](#), J.

In this consolidated case, we review two decisions of the Second District Court of Appeal: [All Children's Hospital, Inc. v. Department of Administrative Hearings](#), 863 So.2d 450 (Fla. 2d DCA 2004), and [Florida Birth-Related Neurological Injury Compensation Ass'n v. Ferguson](#), 869 So.2d 686 (Fla. 2d DCA 2004). In each case, the Second District certified conflict with decisions from the Third, Fourth, and Fifth District Courts of Appeal on an issue regarding the subject matter jurisdiction of administrative law judges under the Florida Birth-Related [Neurological Injury Compensation Act](#) as found in [sections 766.301 through 766.316, Florida Statutes \(1997 & Supp.1998\)](#) (NICA). See [Univ. of Miami v. M.A.](#), 793 So.2d 999 (Fla. 3d DCA 2001); [Gugelmin v. Div. of Admin. Hearings](#), 815 So.2d 764 (Fla. 4th DCA 2002); [Behan v. Fla. Birth-Related Neurological Injury Comp. Ass'n](#), 664 So.2d 1173 (Fla. 4th DCA 1995); [O'Leary v. Fla. Birth-Related Neurological Injury Comp. Ass'n](#), 757 So.2d 624 (Fla. 5th DCA 2000).<sup>1</sup>

<sup>1</sup> We have jurisdiction. See [art. V, § 3\(b\)\(4\), Fla. Const.](#)

We frame the question in conflict as follows:

Does an administrative law judge (ALJ), when considering a NICA claim, have jurisdiction to determine whether or not a health care provider has complied with the “notice to obstetrical patients of participation in the plan” as required by [section 766.316](#)?

In the two cases before us, the Second District held that the NICA statute, as it existed prior to the 2003 amendment, did not give the ALJ any jurisdiction to determine this notice issue.<sup>2</sup> The Third, Fourth, and Fifth Districts had reached the opposite conclusion; and, subsequent to the Second District's certification of conflict, the First District issued an opinion aligning itself with the Third,

Fourth, and Fifth Districts. See [Tabb v. Fla. Birth-Related Neurological Injury Comp. Ass'n](#), 880 So.2d 1253 (Fla. 1st DCA 2004).

<sup>2</sup> However, in light of these statutory amendments, the Second District later reached the opposite conclusion. In [Weinstock v. Houvardas](#), 924 So.2d 982 (Fla. 2d DCA 2006), the Second District held that for claims made on or after September 15, 2003, an ALJ in a NICA proceeding has *exclusive* jurisdiction to determine whether the health care provider has given notice as required by [section 766.316](#). This decision rested upon the 2003 amendments made to section 766.309 by chapter 2003-416, section 77 at 89, Laws of Florida (2003), and the September 15, 2003, effective date expressly provided for therein. The pertinent language of these 2003 amendments, as well as an amendment in 2006, is provided in footnote 18.

As explained below, we hold that when notice is raised as part of a claim filed under NICA, an ALJ has jurisdiction to make findings regarding whether a health care provider has satisfied the “notice to obstetrical patients” requirement of [section 766.316, Florida Statutes](#) (Supp.1998). In light of this holding, we quash the Second District's decision in [All Children's Hospital, Inc.](#) and remand that case for further proceedings consistent with this opinion. However, because the conflict question has become moot in [Ferguson](#), we dismiss that case.

## I. FACTUAL AND PROCEDURAL BACKGROUND

As stated, we have before us two decisions from the Second District. In [All Children's Hospital, Inc.](#), Christopher Glenn and Anna Glenn, now Anna Lentini, \*708 filed a civil suit in circuit court against All Children's Hospital, Inc. (All Children's) alleging that the medical malpractice of All Children's neonatal nurses caused injuries to their newborn infant. [863 So.2d at 452](#).<sup>3</sup> In [Ferguson](#), Maria and Garry Ferguson brought a similar suit in circuit court against Morton Plant Mease Health Care Hospital (Morton Plant) and nurse Lenore V. McCall, the certified nurse midwife, alleging medical malpractice in the delivery of their infant. [869 So.2d at 687](#).

<sup>3</sup> Courtney Ann Glenn was born on September 30, 1997, at Bayfront Medical Center. [All Children's Hosp., Inc.](#), 863 So.2d at 452. The neonatal nurses

who assisted in the delivery and postdelivery resuscitation of Baby Glenn were provided to Bayfront Medical Center by All Children's Hospital. [Id.](#)

The relevant facts of each case are essentially the same. In each case, the infant's parents filed a medical malpractice suit against the health care provider who assisted in the delivery of the infant.<sup>4</sup> The defending health care provider responded by raising the affirmative defense that the civil suit was brought in violation of NICA's exclusive remedy provision, [section 766.303\(2\), Florida Statutes \(1997\)](#). In each case, the respective circuit court abated the medical malpractice action and ordered the parents to file a claim for compensation under the injury compensation plan established by [section 766.303, Florida Statutes](#) (the NICA Plan). Claims under the NICA Plan are heard and determined administratively as set forth in sections 766.301-.316.

<sup>4</sup> Baby Glenn's family filed suit in circuit court on June 30, 1998, and their third amended complaint named only All Children's Hospital as a defendant. [863 So.2d at 452](#). The Fergusons filed suit on May 26, 1999.

In each case, the parents complied with the circuit court's order but did so under protest. They filed NICA claims but alleged that the health care providers had not provided them with the notice required by [section 766.316, Florida Statutes](#) (Supp.1998). This statutorily mandated notice informs obstetrical patients of “the limited no-fault alternative for birth-related injuries” under the NICA Plan. Specifically, [section 766.316](#), entitled “Notice to obstetrical patients of participation in the plan,” provides:

Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related [Neurological Injury Compensation Plan](#) shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related [neurological injuries](#). Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations

under the plan. The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(8)(b) or when notice is not practicable.

If a health care provider complies with this notice provision, according to [section 766.303](#), compensation under the plan is the exclusive remedy for the covered injuries. Therefore, in light of this allegation by the parents that the statutory notice was not provided, the health care providers \*709 were allowed to intervene in the administrative proceedings.

After an administrative hearing in each case, the ALJ found that the required notice was not provided. Given this finding, the ALJ then ordered the parents to elect their remedy—either waive the notice issue and pursue an award under NICA or pursue the medical malpractice action in circuit court. In both cases, the health care providers appealed the ALJ's order to the Second District Court of Appeal. The Second District reversed the ALJ's orders because it determined that NICA did not give the ALJ jurisdiction to make findings regarding notice.

The procedural history of the two cases varied on appeal. [All Children's Hospital, Inc.](#) was the first case decided by the Second District. [863 So.2d 450](#). All Children's sought to challenge the substance of the ALJ's findings regarding notice. The Second District never reached this substantive claim. Instead, as stated above, it held that NICA does not give an ALJ jurisdiction to make findings regarding notice. Specifically, the Second District wrote:

On appeal, All Children's contends the ALJ erred in determining that its immunity from suit under NICA was dependent on notice from both the mother's obstetrician and Bayfront. We decline to reach that issue, because we conclude

that, under the governing statutory language, the ALJ's jurisdiction was restricted to determining whether the claim was covered by NICA and did not extend to the issue of whether a provider is entitled to invoke the exclusive remedy provision of the statute.

[All Children's Hosp., Inc., 863 So.2d at 454.](#)

[Ferguson](#) was decided next by the Second District. [869 So.2d 686](#). In [Ferguson](#), the Florida Birth-Related Neurological Injury Compensation Association (the Association)<sup>5</sup> and Morton Plant appealed the ALJ's order. Before oral argument, the Fergusons and Morton Plant notified the Association and the Second District that they had entered into a settlement agreement. The case proceeded, however,<sup>6</sup> and in accord with [All Children's Hospital Inc.](#), the Second District again held that the ALJ did not have jurisdiction to make findings regarding notice. [Id. at 688-89.](#)

<sup>5</sup> As explained below, NICA claims are initially filed with the Association, the administrator of the NICA Plan. The Association makes an initial recommendation on whether the claim is compensable. [See § 766.302\(1\), Fla. Stat. \(1997\); §§ 766.305, .308, .315, Fla. Stat. \(Supp.1998\)](#). The Association's recommendation on Baby Ferguson's injuries was that they were compensable under the NICA Plan. The Association joined Morton Plant in its appeal when the ALJ failed to consider whether the claim was compensable. To the contrary, the Association's recommendation as to Baby Glenn's injuries was that they were not compensable, and, therefore, the Association did not join All Children's in its appeal of the ALJ's order to the Second District.

<sup>6</sup> The Fergusons unsuccessfully argued that the Association lacked standing to continue with its appeal. [See Ferguson, 869 So.2d at 689.](#)

The Association requested that this Court review the decisions of the Second District and resolve the certified conflict.

## II. ANALYSIS

[1] Again, the issue in conflict is whether an ALJ, when considering a NICA claim, has jurisdiction to determine if a health care provider has complied with the “notice to obstetrical patients” required by [section 766.316](#). Because resolving this conflict requires the interpretation of a statute, our standard of review is de *\*710* novo. *B.Y. v. Dep't of Children & Families*, 887 So.2d 1253, 1255 (Fla.2004). As previously stated, we conclude that when a health care provider's compliance with the notice requirement of [section 766.316](#) is raised as an issue in a NICA claim, an ALJ has jurisdiction to make this determination.

To resolve the conflict question, we will (1) contextualize the certified conflict by briefly outlining the purpose, structure, and relevant provisions of NICA as they existed in 1998; (2) summarize the analytical basis for the conflict between the district courts of appeal; and (3) set forth the statutory analysis we find most appropriate. We do this in the context of *All Children's Hospital, Inc.* because *Ferguson* is moot.

#### A. *Ferguson*

[2] [3] The issue raised in *Ferguson* is now moot; therefore, we dismiss the Association's petition for review. “An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect.” *Godwin v. State*, 593 So.2d 211, 212 (Fla.1992). The Fergusons waived their challenge to the adequacy of the hospital's notice and agreed to accept an award under NICA.<sup>7</sup> Thus, our holding regarding the ALJ's jurisdiction under NICA will have no bearing on the Fergusons' case. Accordingly, the Association's petition for review as to the *Ferguson* case is hereby dismissed.<sup>8</sup>

<sup>7</sup> The Association has stipulated that the Fergusons' claim is compensable. Although both the Association and Morton Plant initially appealed, Morton Plant settled with the Fergusons prior to oral argument before the Second District. Morton Plant and the Fergusons voluntarily dismissed their appeal and cross-appeal, respectively, and the Fergusons notified the Second District and NICA of their intent to accept a NICA award. The record is not clear whether the other defendant, nurse McCall, has also settled with the Fergusons, but she did not join in the appeal below or in this proceeding.

<sup>8</sup> Although the Association has stipulated that the Fergusons' claim is compensable, the ALJ has not made any findings regarding the compensability of the claim.

#### B. *All Children's Hospital*

##### 1. The Purpose and Structure of NICA

NICA was enacted in 1988 to address the adverse impact that the high cost of medical malpractice insurance premiums was having on the delivery of obstetric services in Florida. See [§ 766.301, Fla. Stat.](#) (Supp.1998). In NICA, the Legislature established the NICA Plan, [§ 766.302\(8\), Fla. Stat.](#) (1997), “for the purpose of providing compensation, irrespective of fault, for birth-related [neurological injury](#) claims.” [§ 766.303\(1\), Fla. Stat.](#) (1997). The NICA Plan is administered by the Association.<sup>9</sup>

<sup>9</sup> See [§ 766.302\(1\), Fla. Stat.](#) (1997); see also [§§ 766.314-315, Fla. Stat.](#) (Supp.1998) (detailing Plan funding and Association Board of Directors).

When an infant suffers what may be a birth-related [neurological injury](#),<sup>10</sup> NICA provides that the claimant (usually the infant's parent)<sup>11</sup> must file a claim for compensation *\*711* under the NICA Plan with the Association. [§ 766.305, Fla. Stat.](#) (Supp.1998).<sup>12</sup> The claim is then reviewed by a medical advisory panel. The panel makes a written recommendation as to whether the claim is compensable under the NICA Plan. [§ 766.308, Fla. Stat.](#) (Supp.1998). After the panel makes its recommendation, the claim is then heard and determined in an administrative hearing before an ALJ. [§ 766.307, Fla. Stat.](#) (1997).<sup>13</sup> The ALJ must consider, but is not bound by, the recommendation of the medical advisory panel. [§ 766.308\(1\), Fla. Stat.](#) (Supp.1998).

<sup>10</sup> A “birth-related neurological injury” is defined as an injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. [§ 766.302\(2\), Fla. Stat.](#) (1997).

11 “Claimant” is defined in applicable part as “any person who files a claim pursuant to [s. 766.305](#) for compensation for a birth-related neurological injury to an infant. Such a claim may be filed by any legal representative on behalf of an injured infant.” [§ 766.302\(3\), Fla. Stat.](#) (1997).

12 The statute of limitations for any civil action that might otherwise be brought for the injury is tolled by the filing of a NICA claim. *See* [section 766.306, Fla. Stat.](#) (1997).

13 *See* [§ 766.301\(1\)\(d\), Fla. Stat.](#) (Supp.1998) (“The issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding.”); [§ 766.304, Fla. Stat.](#) (1997) (“The [ALJ] shall hear and determine all claims filed pursuant to [ss. 766.301-766.316](#).”).

Under the 1998 version of NICA, the ALJ is expressly required to make three independent findings “based upon all available evidence.” [§ 766.309\(1\), Fla. Stat.](#) (1997). First, the ALJ must determine whether the claim is a birth-related [neurological injury](#). [§ 766.309\(1\)\(a\), Fla. Stat.](#) (1997). Second, the ALJ must determine whether the injury was caused by a participating health care provider, as defined in [section 766.302\(7\), § 766.309\(1\)\(b\), Fla. Stat.](#) Finally, if the first and second requirements are met, the ALJ must determine the amount of the award without any regard for fault. [§§ 766.309\(1\)\(c\), 766.31\(1\), Fla. Stat.](#) (1997).

If the ALJ determines that a claim is compensable, compensation under the NICA Plan becomes the claimant's exclusive remedy. *See* [§ 766.303\(2\), Fla. Stat.](#) (1997) (“The rights and remedies granted by this plan ... shall exclude all other rights and remedies of such infant ... at common law or otherwise, against any person or entity directly involved with the labor, delivery, or immediate postdelivery resuscitation during which such injury occurs.”). A claimant may not bring or maintain a civil suit in violation of NICA's exclusive remedy provision. [§ 766.304, Fla. Stat.](#) (Supp.1998). (“[N]o civil action may be brought or continued in violation of the exclusiveness of remedy provisions of [s. 766.303](#).”). If the claim is ultimately determined to be compensable, NICA's exclusive remedy provision shields participating health care providers from a civil tort action based upon the same claim. *See* [§ 766.302\(6\)-\(7\), Fla. Stat.](#) (1997).

14 However, as previously determined by this Court, there is a condition precedent to NICA's exclusivity. Predelivery notice of the health care provider's participation in the NICA Plan must be given as required by [section 766.316](#). *See* [Galen of Fla., Inc. v. Braniff](#), [696 So.2d 308, 309-10 \(Fla.1997\)](#) (“[T]he only logical reading of the statute is that before an obstetrical patient's remedy is limited by the NICA plan, the patient must be given pre-delivery notice of the health care provider's participation in the plan.... [T]he purpose of the notice is to give an obstetrical patient an opportunity to make an informed choice between using a health care provider participating in the NICA plan or using a provider who is not a participant and thereby preserving her civil remedies.”). [Section 766.316](#) provides that, except in the case of emergency or impracticability, a participating health care provider is required to furnish each obstetrical patient with notice that the NICA Plan's “limited no-fault alternative for birth-related [neurological \\*712 injuries](#)” may be the patient's exclusive remedy or means of receiving compensation for those injuries. This notice must be made using a form provided by the Association.

## 2. The Analytical Basis of the Conflict Question

In both [All Children's Hospital, Inc.](#) and [Ferguson](#), the Second District certified conflict with [O'Leary, M.A.](#), and [Behan](#). The conflict is based on divergent views over the scope of the ALJ's duties in the NICA claims process.<sup>14</sup>

14 In addition in [Ferguson](#), the Second District certified conflict with the Fourth District's opinion in [Gugelmin](#) on the conflict question. [815 So.2d at 764](#). However, because [Ferguson](#) is moot and because the Second District did not certify conflict with [Gugelmin](#) in [All Children's Hospital, Inc.](#), we do not address [Gugelmin](#) in resolving this conflict. In [Gugelmin](#), the Fourth District held that an ALJ may make findings of fact regarding whether notice was provided as required by [section 766.316](#), but the ALJ cannot comment upon the legal effect of these findings on the claimant's common law remedies and, in turn, the health care provider's right to immunity from tort by requiring the claimant to make an election of remedies. [815 So.2d at 768](#). The Second District may not have certified conflict with [Gugelmin](#) in [All Children's Hospital, Inc.](#) because of its reliance on [Gugelmin](#). The Second District cites [Gugelmin](#) for the proposition that “this court is authorized to set

aside or modify a final administrative order, if there has been an erroneous interpretation of NICA or the ALJ has exceeded the scope of his authority.” [All Children's Hosp., Inc., 863 So.2d at 454](#) (citing [Gugelmin, 815 So.2d at 767](#)).

The Second District held that “[t]here is nothing in [section 766.309](#) or elsewhere in NICA that gives the ALJ any responsibility or authority to determine ... that notice under [section 766.316](#) was or was not properly given.” [All Children's Hosp., Inc., 863 So.2d at 456](#).<sup>15</sup> In essence, the Second District viewed the ALJ's subject matter jurisdiction as limited to making the three determinations mandated by [section 766.309\(1\)](#). Under the 1998 statute, the three determinations mandated by [section 766.309\(1\)](#) were (a) whether the injury claimed is a birth-related [neurological injury](#); (b) whether the obstetrical services were delivered by a health care provider that participates in the NICA Plan; and (c) the amount of any compensation. According to the Second District, since the ALJ's jurisdiction was limited to these three tasks (which it viewed as related solely to whether an injury is compensable under NICA and, if so, the amount of compensation), the ALJ had no authority to determine anything related to notice. In other words, the Second District reasoned that instead of being relevant to compensability, notice is relevant solely to whether the NICA Plan is the exclusive remedy for the covered injuries.

<sup>15</sup> The Second District reiterated this holding in [Florida Health Sciences Center, Inc., v. Division of Administrative Hearings, 871 So.2d 1062, 1065 \(Fla. 2d DCA 2004\)](#) (“No part of the NICA statute confers on the ALJ any authority to determine issues related to notice.”).

The other district courts of appeal took a broader view of the ALJ's subject matter jurisdiction. Each of these courts found jurisdiction in other provisions of the NICA statutory scheme, outside of [section 766.309\(1\)](#). The Fifth District was the first to do so in [O'Leary, 757 So.2d 624](#). That court held that the ALJ has *exclusive* jurisdiction to make findings regarding whether the notice provided for by [section 766.316](#) was either given or excused. *Id. at 627*. The Fifth District based its holding largely upon its analysis of three 1998 amendments to the NICA statute. *Id. at 626-27*. According to the Fifth District, these amendments were made in response to this Court's decisions in [Florida Birth-Related Neurological Injury Compensation Ass'n v. McKaughan, 668 So.2d 974](#)

([Fla.1996](#)), and [Galen of Florida, Inc. v. Braniff, 696 So.2d 308 \(Fla.1997\)](#). [O'Leary, 757 So.2d at 627](#). Specifically, the Fifth District viewed the 1998 amendments as indicating the Legislature's intent to authorize the ALJ to make all determinations regarding a claim under NICA. *Id. at 627-28*. In reaching this conclusion, the Fifth District first presented the language of the 1998 amendments as follows:

In 1998, after the [McKaughan](#) and [Braniff](#) decisions, the legislature, in chapter 98-113, amended [sections 766.301, 766.304, and 766.316](#), as follows:

....

*Be It Enacted by the Legislature of the State of Florida:*

Section 1. [Paragraph \(d\) of subsection \(1\) of Section 766.301, Florida Statutes](#), is amended to read:

**766.301 Legislative findings and intent.-**

(1) The Legislature makes the following findings:

(d) The costs of birth-related [neurological injury](#) claims are particularly high and warrant the establishment of a limited system of compensation irrespective of fault. *The issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding.*

Section 2. [Section 766.304, Florida Statutes](#), is amended to read:

**766.304 Administrative law judge to determine claims.-**

The administrative law judge shall hear and determine all claims filed pursuant to ss. 766.301-766.316 and shall exercise the full power and authority granted to her or him in chapter 120, as necessary, to carry out the purposes of such sections. *The administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable. No civil action may be brought until the determinations under s. 766.309 have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303. If it is determined that a claim filed under this act is*

*not compensable, the doctrine of neither collateral estoppel nor res judicata shall prohibit the claimant from pursuing any and all civil remedies available under common law and statutory law. The findings of fact and conclusions of law of the administrative law judge shall not be admissible in any subsequent proceeding; however, the sworn testimony of any person and the exhibits introduced into evidence in the administrative case are admissible as impeachment in any subsequent civil action only against a party to the administrative proceeding, subject to the Rules of Evidence. An action may not be brought under ss. 766.301-766.316 if the claimant recovers or final judgment is entered. The division may adopt rules to promote the efficient administration of, and to minimize the cost associated with, the prosecution of claims.*

Section 4. [Section 766.316, Florida Statutes](#), is amended to read:

**766.316 Notice to obstetrical patients of participation in the plan.-**

Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns \*714 deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related [Neurological Injury](#) Compensation Plan shall provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth-related [neurological injuries](#). Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. *The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(8)(b) or when notice is not practicable.*

Section 6. The amendments to [sections 766.301 and 766.304, Florida Statutes](#), shall take effect July 1, 1998, and shall apply only to claims filed on or after

that date and to that extent shall apply retroactively regardless of the date of birth.

Section 7. Amendments to [section 766.316, Florida Statutes](#), shall take effect July 1, 1998, and shall apply only to causes of action accruing on or after that date.

[O'Leary, 757 So.2d at 626-27.](#)

The Fifth District then interpreted the applicability of these 1998 amendments to the conflict question by stating:

The language used by the legislature in its amendment to the Act indicates that the administrative judge is to determine all matters relative to a claim. Notably, the determination of the adequacy of notice is not excluded from the duties of the administrative law judge. [Section 766.304](#) states that the administrative law judge shall hear all claims and shall exercise the full power and authority granted that is necessary to carry out the purposes of the section. The section further grants exclusive jurisdiction to the administrative law judge to determine whether a claim is compensable and precludes any civil action until the issue of compensability is determined. We believe that under these amendments, any issue raising the immunity of a health provider, including the issue of whether the health provider satisfied the notice requirements of the Plan is an issue to be decided by the administrative law judge as one which relates to the question of whether the claim is compensable under the Plan. We recognize that lack of proper notice does not affect a claimant's ability to obtain compensation from the Plan. However, a health provider who disputes a plaintiff's assertion of inadequate notice is raising the issue of whether a claim can only be compensated under the plan. All questions of compensability, including those which arise regarding the adequacy of notice, are properly decided in the administrative forum.

Our conclusion that the administrative forum is the intended exclusive forum to determine the notice question eliminates the "ping-pong effect," that is, the trial court and the administrative law judge each throwing the case back to the other on this question. We also note that a [section 766.316](#) notice issue is peculiar to a NICA claim. The 766.316 notice is not applicable to a common law tort or contract action. We also believe that it is economical and practicable to both the

litigants and judicial system to have all \*715 NICA issues determined by one tribunal.

*Id.* at 627-28.

This interpretation by the Fifth District in *O'Leary* was substantially followed by the First and Third Districts.<sup>16</sup> However, the Second District expressly considered and rejected this analysis in *All Children's Hospital, Inc.* Though it agreed that “[s]ince the adoption of the 1998 amendments, NICA is very clear that the determination of whether an injury is compensable is exclusively within the province of the ALJ,” it found that “[n]othing in the 1998 amendments to NICA did anything to extend the jurisdiction of the ALJ to the issues of notice and immunity from tort liability.” *All Children's Hosp., Inc.*, 863 So.2d at 455-56. Instead, the Second District found that “[t]he issue of immunity from tort liability and the related issue of notice are an entirely different matter” from whether an injury is compensable under NICA. *Id.* at 456.

<sup>16</sup> The Fourth District's decisions in *Behan* and *Gugelmin* are also, in large part, aligned with the First, Third, and Fifth Districts' holdings that an ALJ has jurisdiction under NICA to determine whether notice was adequately provided. However, *Behan* rests upon a nuance that the First District takes into account but that is not considered by the other decisions. The Fourth District decided *Behan* in 1995, before this Court issued its decision in *McKaughan*, a decision later abrogated by the Legislature as noted by the Fifth District in *O'Leary*. In *Behan*, the Fourth District held that an ALJ must determine whether notice is adequate pursuant to section 766.316 before exercising jurisdiction to make any determination with regard to a claim under NICA. 664 So.2d at 1174. The First District in *Tabb* cites a similar rationale for finding that an ALJ has exclusive jurisdiction over notice issues. 880 So.2d at 1256-57 (“In order to ‘hear and determine’ a claim, an ALJ must, almost of necessity, decide whether notice was given, because if no notice was given, the exclusivity provision of the statute does not apply.... As established law provides, an ALJ must have jurisdiction to determine whether the ALJ has jurisdiction.”) (citations omitted); see discussion of Judge Kahn's analysis in part II.B.3, *infra*.

### 3. Resolving the Conflict Question

Again, the narrow question we must resolve is whether the 1998 version of NICA gives the ALJ jurisdiction to determine if the notice mandated by section 766.316 was provided. As previously stated, we disagree with the Second District's holding that “[t]here is nothing in section 766.309 or elsewhere in NICA that gives the ALJ any responsibility or authority to determine ... that notice under section 766.316 was or was not properly given.” *All Children's Hosp., Inc.*, 863 So.2d at 456. Instead, we agree with Judge Kahn's analysis of this question in *Tabb*, 880 So.2d 1253, where he wrote:

The ALJ's authority derives from section 766.304, Florida Statutes (2001):<sup>17</sup>

<sup>17</sup> The 1998 and 2001 versions of section 766.304 are identical.

*The administrative law judge shall hear and determine all claims filed pursuant to ss. 766.301-766.316 and shall exercise the full power and authority granted to her or him in chapter 120, as necessary to carry out the purposes of such sections. The administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable. No civil action may be brought until the determinations under s. 766.309 have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303. If it is determined that a claim filed under this act \*716 is not compensable, neither the doctrine of collateral estoppel nor res judicata shall prohibit the claimant from pursuing any and all civil remedies available under common law and statutory law....*

(emphasis added). In order to “hear and determine” a claim, an ALJ must, almost of necessity, decide whether notice was given, because if no notice was given, the exclusivity provision of the statute does not apply. See § 766.316, Fla. Stat. (2001); *Galen*, 696 So.2d at 310-11. Further, an ALJ has “exclusive jurisdiction” to determine whether a claim is compensable under

the NICA Plan. In the absence of notice, the Plan does not apply. Given these provisions, we are led to conclude that an ALJ has jurisdiction to determine whether notice was given. As established law provides, an ALJ must have jurisdiction to determine whether the ALJ has jurisdiction. *See, e.g., Sun Ins. Co. v. Boyd*, 105 So.2d 574, 575 (Fla.1958) (explaining that “a tribunal always has jurisdiction to determine its own jurisdiction”).

Notably, in 2003, the Legislature amended the NICA statute to add [section 766.309\(4\), Florida Statutes](#):

If it is in the interest of judicial economy or if requested to by the claimant, the administrative law judge may bifurcate the proceeding addressing compensability and notice pursuant to [s. 766.316](#) first, and addressing an award pursuant to [s. 766.31](#), if any, in a separate proceeding. The administrative law judge may issue a final order on compensability and notice which is subject to appeal under s. 766.311, prior to issuance of an award pursuant to [s. 766.31](#).

Ch. 03-416, § 77, at 4117, Laws of Fla. In passing the amendment, the Legislature implicitly acknowledged the existing case law indicating that an ALJ has jurisdiction to determine whether notice was provided pursuant to [section 766.316](#). *See generally, e.g., City of Hollywood v. Lombardi*, 770 So.2d 1196, 1202 (Fla.2000) (explaining that the Legislature is presumed to know the judicial construction of a law when passing a new version of the law and to have adopted the prior judicial construction unless a contrary intent is expressed).

Other district courts of appeal had, before 2003, indicated that an ALJ has jurisdiction to determine whether the notice requirement was satisfied in a particular case. *See O'Leary v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 757 So.2d 624, 627 (Fla. 5th DCA 2000) (“The language used by the legislature in its amendment to the Act indicates that the administrative judge is to determine all matters relative to a claim. Notably, the determination of the adequacy of notice is not excluded from the duties of the administrative law judge.... [A]ny issue raising the immunity of a health provider, including the issue of whether the

health provider satisfied the notice requirements of the Plan is an issue to be decided by the administrative law judge as one which relates to the question of whether the claim is compensable under the Plan.”); *Univ. of Miami v. M.A.*, 793 So.2d 999 (Fla. 3d DCA 2001) (adopting decision in *O'Leary* ). *See also Gugelmin v. Div. of Admin. Hearings*, 815 So.2d 764 (Fla. 4th DCA 2002); *Behan v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 664 So.2d 1173 (Fla. 4th DCA 1995).

*Tabb*, 880 So.2d at 1256-57.

[5] Given our agreement with this analysis of NICA in *Tabb*, we hold that when notice is raised as part of a claim filed under NICA, an ALJ has jurisdiction \*717 to make findings regarding whether a health care provider has satisfied the notice requirements of [section 766.316, Florida Statutes](#).<sup>18</sup>

<sup>18</sup> Our resolution of the conflict question is based upon the language of the NICA statute as it existed in 1998. However, for the sake of completeness, we note that our resolution is supported by the 2003 and 2006 amendments to [section 766.309](#).

In 2003, [section 766.309](#) was amended to add subsection (4) which states, in applicable part, that “[t]he administrative law judge may issue a final order on compensability and notice which is subject to appeal under s. 766.311, prior to issuance of an award pursuant to [s. 766.31](#).” When the Second District decided *Ferguson*, it stated that it had no opinion as to whether the 2003 amendment addressed the issue of whether an ALJ has jurisdiction over notice issues under NICA. [869 So.2d at 690 n. 2](#). However, as we noted earlier in footnote 2, the Second District subsequently held that an ALJ has exclusive jurisdiction over notice issues involving NICA claims made on or after September 15, 2003, the effective date of the 2003 amendments. *See Weinstock*, 924 So.2d at 984.

Most recently, on May 2, 2006, chapter 2006-8, Laws of Florida, became law. Chapter 2006-8 added subsection (d) to [section 766.309\(1\)](#) as follows:

(1) The administrative law judge shall make the following determinations based upon all available evidence:

(d) Whether, if raised by the claimant or other party, the factual determinations regarding the notice requirements in [s. 766.316](#) are satisfied.

*The administrative law judge has the exclusive jurisdiction to make these factual determinations.* Ch.2006-8, § 1, at 194, Laws of Fla. Section 2 states that this amendment “clarifies that since July 1, 1998, the administrative law judge has had the exclusive jurisdiction to make factual determinations as to whether the notice requirements in [s. 766.316, Florida Statutes](#), are satisfied.” Ch.2006-8, § 2, at 194, Laws of Fla.

### III. CONCLUSION

In conclusion, when the issue of whether notice was adequately provided pursuant to [section 766.316](#) is raised in a NICA claim, we conclude that the ALJ has jurisdiction to determine whether the health care provider complied with the requirements of [section 766.316](#). Therefore, we quash the Second District's decision in [All Children's Hospital](#), and remand for further findings consistent with this opinion. We dismiss the petition to review [Ferguson](#) as moot.

It is so ordered.

[WELLS, QUINCE](#), and [CANTERO, JJ.](#), concur.

[LEWIS](#), C.J., dissents with an opinion, in which [ANSTEAD](#) and [PARIENTE, JJ.](#), concur.

[ANSTEAD](#), J., dissents with an opinion, in which [LEWIS](#), C.J., concurs.

[PARIENTE](#), J., dissents with an opinion, in which [LEWIS](#), C.J., and [ANSTEAD](#), J., concurs.

[LEWIS](#), C.J., dissenting.

I dissent from the majority's conclusion that the ALJ possessed jurisdiction to determine whether the notice mandated by [section 766.316 of the Florida Statutes](#) was provided in this case. Rather, I would conclude that the Second District's decision in [All Children's Hospital, Inc. v. Department of Administrative Hearings](#), 863 So.2d 450 (Fla. 2d DCA 2004), holding that “[i]t is the circuit court which *must* address th[is] issue[ ] in deciding whether a civil action will be allowed to proceed in the circuit court,” should be approved. *Id.* at 457 (emphasis supplied).

In interpreting the jurisdiction of the circuit court to determine notice under NICA, this Court should look to the workers' compensation system for guidance, as \*718 it has so often in the past. *See, e.g., Fla. Birth-Related Neurological Injury Compensation Ass'n v. McKaughan*, 668 So.2d 974, 979 (Fla.1996) (“[B]ecause both the [NICA] Plan and the workers' compensation system possess common purposes and characteristics and are aimed at accomplishing similar results, albeit in different contexts, we may regard and construe them in *pari materia*.”). This Court has previously determined that “because the [NICA] Plan, like the Workers' Compensation Act, is a statutory substitute for common law rights and liabilities, *it should be strictly construed to include only those subjects clearly embraced within its terms.*” [Fla. Birth-Related Neurological Injury Compensation Ass'n v. Fla. Div. of Admin. Hearings](#), 686 So.2d 1349, 1354 (Fla.1997) [hereinafter [DOAH](#) ] (emphasis supplied) (quoting [Humana of Fla., Inc. v. McKaughan](#), 652 So.2d 852, 859 (Fla. 2d DCA 1995), *approved sub nom. Fla. Birth-Related Neuro. Injury Comp. Ass'n v. McKaughan*, 668 So.2d 974 (Fla.1996)). Under the version of NICA that is applicable in the instant case, the ALJ possesses exclusive jurisdiction solely to determine whether a claim is compensable under NICA. *See* [§ 766.301, Fla. Stat.](#) (Supp.1998) (“The issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding.”). Under the specific language of NICA, a determination of compensability entails assessing: (1) whether the injury claimed is a birth-related [neurological injury](#); (2) whether obstetrical services were delivered by a NICA participating physician; and (3) how much compensation should be awarded. *See* [§ 766.309, Fla. Stat.](#) (1997). There is no mention whatsoever of notice in the version of [section 766.309](#) that is applicable to the instant case. Since notice is not expressly listed as one of the issues that the ALJ must determine pursuant to [section 766.309](#), we should not interpret NICA to remove the right of individuals to have this issue heard and decided by a circuit court. Rather, NICA should be strictly construed to limit the jurisdiction of the ALJ to those items expressly relegated under [section 766.309](#). *See* [DOAH](#), 686 So.2d at 1354.

My conclusion is further bolstered by the fact that we have stated “[b]ecause the assertion of NICA exclusivity is an affirmative defense, factual disputes concerning notice should be submitted to the jury where a jury trial is requested on all questions of fact.” [Galen of](#)

*Florida, Inc. v. Braniff*, 696 So.2d 308, 311 (Fla.1997). This Court has previously determined that “allowing a circuit court to determine the exclusivity of [NICA] as an affirmative defense will not result in a frustration of the legislature's purpose in enacting the Plan.” *McKaughan*, 668 So.2d at 979 (quoting lower court's opinion). In reaching this determination, we compared NICA to the workers' compensation system and concluded that “we are not aware of any documented evidence indicating that the legislative goal of this system has been frustrated by the long established law that workers' compensation immunity is an affirmative defense to a traditional tort action.” *Id.* (quoting lower court's opinion); see also *Mandico v. Taos Constr., Inc.*, 605 So.2d 850, 854 (Fla.1992) (“The assertion that the plaintiff's exclusive remedy is under the workers' compensation law is an affirmative defense, and its validity can only be determined in the course of litigation. The court has jurisdiction to decide the question....”). The 1998 amendments to NICA in no way altered this Court's holding in *Braniff* because those amendments did not expressly delegate to the ALJ the authority to determine this issue of whether the notice mandated by [section 766.316](#) was provided. Rather, the 1998 amendments granted an \*719 ALJ the exclusive jurisdiction solely to determine whether a birth-related injury is compensable under NICA. See [§ 766.301, Fla. Stat.](#) (Supp.1998).

Further, as noted in *All Children's Hospital*, whether an entity is precluded from raising NICA as an affirmative defense for failure to give notice is a completely distinct issue from whether an injury is compensable under NICA. See [863 So.2d at 455](#).<sup>19</sup> This is evidenced by the fact that an individual who was not provided notice is not excluded from receiving compensation under NICA. See *Braniff v. Galen of Florida, Inc.*, 669 So.2d 1051, 1053 n. 2 (Fla. 1st DCA 1995) (“The presence or absence of notice will neither advance nor defeat the claim of an eligible NICA claimant who has decided to invoke the NICA remedy by making this filing ....”), approved, [696 So.2d 308 \(Fla.1997\)](#). Additionally, it is not necessary under NICA for an ALJ to determine whether a party received notice pursuant to [section 766.316](#) in order to decide whether a birth-related injury is compensable under NICA. See *id.* To decide the latter issue, the ALJ is only required to analyze the three elements listed in [section 766.309](#). Hence, absent specific language, we should not assign duties to the ALJ that have traditionally been delegated to the exclusive

province of the circuit courts. See *Braniff*, [696 So.2d at 311](#).

<sup>19</sup> Judge Canady's well-written analysis is quoted at length in Justice Anstead's dissenting opinion.

Like workers' compensation, NICA “is a statutory substitute for common law rights and liabilities,” and, therefore, “it should be strictly construed to include only those subjects clearly embraced within its terms.” *DOAH*, [686 So.2d at 1354](#) (quoting *McKaughan*, [652 So.2d at 859](#)). Therefore, the NICA plan must be interpreted narrowly so as not to sacrifice the common law rights of patients to a statutory substitute. I believe that the majority has erred in concluding that the ALJ possesses jurisdiction to determine whether the notice mandated by [section 766.316](#) was provided because there is no express language in [section 766.309](#) dictating such. Rather, I would conclude that the Second District in *All Children's Hospital* properly determined that the issue of notice under the version of NICA applicable to the instant case can only be resolved by the circuit court.

Therefore, I dissent.

[ANSTEAD](#) and [PARIENTE, JJ.](#), concur.

[ANSTEAD, J.](#), dissenting.

I would approve the thorough and well-reasoned opinion of Judge Canady for the unanimous panel of Second District Court of Appeal judges in the decision below. In my view, the majority has ignored the conceptual differences between administrative proceedings structured to determine NICA claims versus the entirely distinct judicial proceedings for malpractice claims in which the exclusivity provisions of NICA may be invoked as an affirmative defense. In doing so, the majority has failed to adhere to this Court's prior controlling decision in *Galen of Florida, Inc. v. Braniff*, [696 So.2d 308 \(Fla.1997\)](#).

Because I find Judge Canady's opinion compelling, I adopt it as my own. Further, I set out here that portion of the opinion that I believe so clearly distinguishes the function of administrative proceedings under NICA (as those functions existed under the controlling law to be applied at the time of the underlying events involved in the Second District's \*720 ruling) from the function of judicial proceedings. Judge Canady explains:

### C. The Limits of ALJ Jurisdiction Under NICA

In the instant case, the ALJ did something NICA gave him no authority to do and failed to do what the statute required him to do. There is no basis in NICA for the ALJ's foray into the issue of immunity from tort liability under [section 766.303\(2\)](#) and the related issue of notice under [section 766.316](#). And there is no justification under NICA for the ALJ's failure to make a determination concerning the compensability of the injury which is the subject of the underlying claim.

The responsibilities of the ALJ are succinctly set forth in [section 766.309](#). The ALJ must address the two basic questions which determine if a claim is compensable under the plan: (1) “[w]hether the injury claimed is a birth-related [neurological injury](#),” [§ 766.309\(1\)\(a\)](#); and (2) “[w]hether obstetrical services were delivered by a [covered person] in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital,” [§ 766.309\(1\)\(b\)](#). If both of these questions are answered in the affirmative, the injury is compensable under the plan. If either question is answered in the negative, the injury is not compensable. Since the adoption of the 1998 amendments, NICA is very clear that the determination of whether an injury is compensable is exclusively within the province of the ALJ, *see* [§ 766.304, Fla. Stat.](#) (Supp.1998)-subject, of course, to the right to pursue an appeal of the ALJ's determination, *see* [§ 766.311, Fla. Stat.](#) (1997).

The issue of immunity from tort liability and the related issue of notice are an entirely different matter. There is nothing in [section 766.309](#) or elsewhere in NICA that gives the ALJ any responsibility or authority to determine either (a) that notice under [section 766.316](#) was or was not properly given, or (b) that a provider is or is not entitled to invoke the immunity from tort liability provided for in [section 766.303\(2\)](#). These issues are entirely distinct and separate from the issue of compensability under the plan.

The issue of notice is only relevant to the issue of whether a provider is eligible under [section 766.303\(2\)](#) for immunity from tort liability. *See Galen*, [696 So.2d at 309-11](#). Thus, the provision of notice has no bearing whatsoever on whether a claim is compensable. The availability of compensation under the plan is alike available to claimants who received proper notice under [section 766.316](#) and to claimants who did not receive

such notice. *See, e.g., O'Leary v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, [757 So.2d 624, 627 \(Fla. 5th DCA 2000\)](#) (“recogniz[ing] that lack of proper notice does not affect a claimant's ability to obtain compensation from the [p]lan”). A claimant cannot be deprived of compensation under the plan due to the failure of a provider to give the required notice. *See id.*

Nothing in the 1998 amendments to NICA did anything to extend the jurisdiction of the ALJ to the issues of notice and immunity from tort liability. Insofar as those amendments addressed the issue of the jurisdiction of the ALJ, they simply made clear that—contrary to the holding in *McKaughan*—the ALJ “has exclusive jurisdiction to determine whether a claim filed under [NICA] is compensable.” [§ 766.304](#). The 1998 amendments also established that “[n]o civil action may be brought until the determinations [regarding compensability] under [s. 766.309](#) have been made by \*721 the [ALJ].” *Id.* No change was made in the determinations the ALJ is required to make under [section 766.309](#).

In cases such as the instant one, where the potential claimant wishes to pursue tort remedies and to forgo any compensation from the plan, the task of the ALJ is limited to determining whether the injuries were compensable under [section 766.309\(1\)](#), and thus “covered by [NICA],” in accord with [section 766.301\(1\)\(d\)](#) (Supp.1998). In cases where the claimant seeks compensation from the plan, once an injury is determined to be compensable, the ALJ must go on to determine the amount of compensation that is awardable. *See* [§§ 766.309\(1\)\(c\), .31](#).

If the ALJ determines that a claim is not compensable under NICA, there can, of course, be no immunity from liability under [section 766.303\(2\)](#). If the ALJ determines that a claim is compensable but the potential claimant desires to forgo compensation under NICA and to pursue a civil action for tort remedies, a determination must then be made concerning whether that civil action is “in violation of the exclusiveness of remedy provisions of [s. 766.303](#).” [§ 766.304](#). That determination concerning tort immunity will turn on whether proper notice was given as required by [section 766.316](#). *Galen*, [696 So.2d at 311](#) (stating that propriety of provider's NICA notice must be determined on a “case-by-case basis[.] [b]ecause the assertion of NICA exclusivity is an affirmative defense [in a civil suit and] factual disputes

concerning notice should be submitted to the [trier of fact]).

The factual and legal issues related to notice and tort immunity are within the jurisdiction of the circuit court in which a tort claim is brought. They are not within the jurisdiction of the ALJ. Those issues are entirely irrelevant to the determination the ALJ must make concerning whether compensation is available from the association for a particular claim. It is the circuit court which must address those issues in deciding whether a civil action will be allowed to proceed in the circuit court. It, therefore, was error for the ALJ in the instant case to determine that the notice given was insufficient and that All Children's was not entitled to immunity from tort liability.

The ALJ further erred in requiring the claimants to make an "election of remedies." See *Bayfront Med. Ctr., Inc. v. Div. of Admin. Hearings*, 841 So.2d 626, 628 (Fla. 2d DCA 2003) (reversing ALJ's "rulings regarding the election of remedies and the finding regarding [NICA's] exclusivity of remedy provisions"); cf. *Gugelmin*, 815 So.2d at 768 (reversing administrative order of ALJ "requiring [claimants] to elect between remedies and denying the hospital statutory immunity despite its timely notice under the [p]lan"). Finally, the ALJ's errors of addressing the issues of notice, immunity, and election of remedies led him into the error of failing to carry out his responsibility to determine whether the injury was compensable under NICA.

We realize that in *O'Leary* the Fifth District held that the adequacy of a provider's notice is part of a compensability determination and that notice is thus a matter within the exclusive province of the ALJ. 757 So.2d at 626-28. The *O'Leary* court observed that its "conclusion that the administrative forum is the intended exclusive forum to determine the notice question eliminates the 'ping-pong effect,' that is, the trial court and the [ALJ] each throwing the case back to the other on this question." *Id.* at 627. For the reasons already stated, \*722 however, we conclude that the text of NICA does not support the conclusion reached by the Fifth District in *O'Leary* that the question of proper notice is part of the compensability determination the ALJ is required to make. Insofar as the supposed " 'ping-pong effect' " is concerned, we simply note that we are constrained to follow the ball wherever the legislature chooses to send it.

*All Children's Hospital, Inc. v. Dept. of Admin. Hearings*, 863 So.2d 450, 455-57 (Fla. 2d DCA 2004).

LEWIS, C.J., concurs.

PARIENTE, J., dissenting.

The issue in this case is a *very* narrow one: whether the Administrative Law Judge (ALJ) has jurisdiction to determine whether obstetrical patients were given the required notice under [section 766.316, Florida Statutes](#) (Supp.1998). The answer is based on principles of statutory interpretation. And the answer affects only a small number of cases because the language of the statute was amended in 2003. There is no question that as of 2006, the Legislature has unambiguously vested exclusive jurisdiction in the ALJ to make all factual determinations as to whether the notice requirements of section 761.316 were satisfied. See majority opinion at 717 n. 18.

Both the majority and the dissents base their conclusions as to whether the circuit court or the ALJ has jurisdiction to determine notice on the language of the statute. I conclude that the reasoning of Chief Justice Lewis's dissent and Justice Anstead's dissent, which incorporates Judge Canady's opinion, is more persuasive than the majority's reasoning. First, the actual language vesting jurisdiction in the ALJ to make determinations on the compensability of a claim lists only three specific findings that the ALJ must make, none of which include the issue of notice. See [§ 766.309, Fla. Stat.](#) (Supp.1998). Second, whether an obstetrical patient received the required notice is completely distinct from the compensability of a claim.

Third, as Chief Justice Lewis points out, this Court has previously determined that because the NICA statute limits common law rights, it must be strictly construed. See *Florida Birth-Related Neurological Injury Compensation Ass'n v. McKaughan*, 668 So.2d 974, 979 (Fla.1996). Further, as we explained in *McKaughan*, we take into consideration that this statute abridges Florida's constitutional guarantee of access to the courts. See *id.* at 979 n. 3; see also [§ 766.303, Fla. Stat.](#) (Supp.1998) (providing that "[t]he rights and remedies granted by this plan on account of a birth-related [neurological injury](#) shall exclude all other rights and remedies ... at common law or otherwise, ... except ... where there is clear and convincing evidence of bad faith or malicious purpose

or willful and wanton disregard of human rights, safety, or property”).<sup>20</sup> Statutes that limit access to the courts “must be narrowly construed in a manner that favors access.” *Woodham v. Blue Cross & Blue Shield of Fla., Inc.*, 829 So.2d 891, 897 (Fla.2002). These dual canons require the Legislature to clearly articulate its intent to limit access to the courts or abrogate common law \*723 rights. The Legislature did not do so in the version of the statute we are construing in this case. Although the issue is a narrow one affecting a small number of cases, the principles of strictly construing statutes that are in derogation of the common law or that limit access to the courts are ones to which we should faithfully adhere. For these reasons, I concur with the dissents.

<sup>20</sup> For this reason, NICA is not a remedial statute that should be liberally construed. Unlike legislation

such as the Wrongful Death Statute and the Whistle-Blower's Act, which created remedies unknown at common law and which we have stated should be liberally construed, see *BellSouth Telecomm. v. Meeks*, 863 So.2d 287, 290 (Fla.2003); *Irven v. Dep't of Health & Rehabilitative Servs.*, 790 So.2d 403, 406 (Fla.2001), NICA mandates an administrative remedy in lieu of a common law remedy for most claims arising from birth-related neurological injuries.

[LEWIS](#), C.J., and [ANSTEAD](#), J., concur.

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