

**RISSMAN, BARRETT, HURT,
DONAHUE & McLAIN, P. A.
ATTORNEYS AT LAW**

STEVEN A. RISSMAN
ROBERT C. BARRETT
JENNINGS L. HURT III
ROBERT A. DONAHUE
JOHN E. McLAIN III
RICHARD S. WOMBLE
JOHN P. DALY
STACIE B. GREENE
THEODORE N. GOLDSTEIN
RAYMOND A. LOPEZ
VANCE R. DAWSON
RICHARD B. MANGAN JR.
HENRY W. JEWETT II
DANIEL M. POLLACK
ART C. YOUNG
NICOLE D. RUOCCO
DANIEL T. JAFFE
BEATRIZ E. JUSTIN
J. GREGORY GIANNUZZI
DAVID K. BEACH
KAREN M. WALKER
ALFRED L. FRITH
F. DEAN HEWITT
EDWARD M. COPELAND IV
DAVID R. KUHN

201 EAST PINE STREET
15TH FLOOR
P.O. BOX 4940
ORLANDO, FLORIDA 32802-4940
TELEPHONE (407) 839-0120
TELECOPIER (407) 841-9726
ORLANDO@RISSMAN.COM

TAMPA COMMONS
ONE NORTH DALE MABRY HIGHWAY
11TH FLOOR
TAMPA, FLORIDA 33609
TELEPHONE (813) 221-3114
TELECOPIER (813) 221-3033
TAMPA@RISSMAN.COM

207 S. 2nd STREET
FT. PIERCE, FLORIDA 34950
TELEPHONE (772) 409-1480
TELECOPIER (772) 409-1481
FTPIERCE@RISSMAN.COM

R. CLIFTON ACORD II
ROBERT D. BARTELS
BRADLEY S. BELL
DOUGLAS J. COLLINS
CHRISTOPHER E. DENNIS
DAVID A. FIFNER
JOSHUA T. FRICK
PAUL B. FULMER
JANNINE C. GALVEZ
ELISE J. GEIBEL
DARA L. HAGGERTY
CHRISTOPHER A. HANSON
JEFFREY J. KERLEY
LAURA L. KLINGELHOEFER
G. WILLIAM LAZENBY IV
VICTORIA N. LUNA
LAURA F. LYTLE
JEDEDIAH A. MAIN
DARIEN M. MCMILLAN
DANIEL A. NICHOLAS
ERIC F. OCHOTORENA
KARISSA L. OWENS
JEREMY T. PALMA
WENDY L. PEPPER
JONATHAN K. POLK
AMANDA H. REHER
KELLEY A. RICHARDS
JUAN A. RUIZ
JILL M. SPEARS
MEREDITH M. STEPHENS
F. PAUL TIPTON
NICOLETTE E. TSAMBIS
JASON R. URBANOWICZ
ADAM J. WICK
CHRISTINE V. ZHAROVA

WWW.RISSMAN.COM

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FROM THE DESK OF
JENNINGS L. HURT III

MEDICAL MALPRACTICE CASE LAW

OCTOBER 1, 2008 THROUGH DECEMBER 31, 2008

SUPREME COURT OPINIONS

**NURSING HOMES - WRONGFUL DEATH - VIOLATION OF
NURSING HOME RESIDENT'S RIGHTS - DISCOVERY - ADVERSE
MEDICAL INCIDENTS - AMENDMENT 7 DISCOVERY - DISTINCTION BETWEEN
NURSING HOME "RESIDENTS" AND HEALTH CARE "PATIENTS" LEADS TO
CONCLUSION THAT NURSING HOMES NOT ENCOMPASSED BY AMENDMENT 7**

Benjamin v. Tandem Healthcare, Inc., 33 Fla. L. Weekly S1006 (Fla. Sup. Ct. December 23, 2008)

The Supreme Court considered the following certified question from the 4th DCA:

WHETHER "NURSING HOMES" OR "SKILLED NURSING FACILITIES" FALL WITHIN THE DEFINITION OF

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"HEALTH CARE FACILITY" OR "HEALTH CARE PROVIDER" AS CONTEMPLATED BY AMENDMENT 7 TO THE FLORIDA CONSTITUTION?

The Supreme Court answered the question in the negative.

Jodi Benjamin, as personal representative of the estate of Marlene Gagnon, sued Tandem Health Care, Inc., a nursing home, for negligence suffered in the death of Gagnon when he suffered cardiac failure and brain damage after food became lodged in her airway due to Tandem's alleged failure to serve her food in compliance with a treatment plan.

Benjamin requested that Tandem produce all reports of any adverse medical incidents involving Gagnon, as well as any peer review documents and quality assurance records. The trial court granted Benjamin's discovery request and Tandem Healthcare appealed to the 4th DCA.

The 4th DCA noted that the materials would normally be privileged as peer review and quality assurance records under Florida law. Benjamin argued those peer review and quality assurance privileges had been abrogated by Amendment 7.

Amendment 7 defined "health care facilities" and "health care providers" as having the meaning given in the general law related to a "patient's" rights and responsibilities. The 4th DCA concluded that Amendment 7 did not encompass nursing homes because section 25 (c)(1) of Amendment 7 defined the terms as having the meaning given in "general law" related to a "patient's rights and responsibilities." The 4th DCA agreed with and relied upon the 1st DCA's opinion in **Avante Villa at Jacksonville Beach, Inc. v. Breidert**, 958 So. 2d 1031 (Fla. 1st DCA 2007) in which it concluded that the specific language in Amendment 7 relating to a patient's rights and responsibilities did not include nurses homes.

The Supreme Court analyzed the language of Amendment 7 and compared it to that of the Florida Patient's Bill of Rights and Responsibilities, section 381.026. The fact that the Florida Patient's Bill of Rights and Responsibilities and section 381.026

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had been in existence since 1991, 10 years prior to the adoption of Amendment 7, was significant. The Supreme Court agreed with the 1st DCA's conclusion that Amendment 7's reference to "patient's rights and responsibilities" had to be deemed an intentional reference to the definition contained in section 381.026.

The Supreme Court also noted that the use of the term "patient" and not "resident" in Amendment 7 supported the conclusion of the 1st DCA and 4th DCA that in fact, Amendment 7 did not apply to nursing homes. Nursing home residents have their own separate enumeration of rights under F.S. § 400.022. Chapter 400, which regulates nursing homes, consistently uses the term "resident", and not "patient", to refer to nursing home occupants.

The Supreme Court concluded that the 4th DCA had correctly answered the certified question when it held that Amendment 7 did not apply to nursing homes.

APPELLATE COURT OPINIONS

MEDICAL MALPRACTICE – TRIAL COURT APPROPRIATELY ADOPTED MAGISTRATE'S RECOMMENDATION COMPELLING NON-RESIDENT PLAINTIFF TO TRAVEL TO FLORIDA FOR SECOND DEPOSITION AND COMPULSORY MEDICAL EXAMINATION WHERE PLAINTIFF NOT FORTHCOMING DURING INITIAL DEPOSITION AND FAILED TO ACCURATELY ANSWER INTERROGATORIES

Goeddel v. Davis, 33 Fla. L. Weekly D2431 (Fla. 5th DCA October 17, 2008)

Goeddel was a South Carolina resident who petitioned for a writ of certiorari from the trial court's order compelling him to appear in Florida for a second deposition and compulsory medical exam.

Goeddel filed a medical malpractice action in Orange County where he failed to answer numerous questions in his initial deposition and failed to disclose significant portions of his medical history in his answers to interrogatories. Once it became clear to defendants that plaintiff had failed to appropriately answer questions in his deposition and in his interrogatories,

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defendants moved to take a second deposition of plaintiff and require him to submit to a compulsory medical exam.

Initially, Goeddel did not oppose the request for a second deposition or the compulsory medical exam, but did demand that both be conducted in South Carolina. Because the trial court found that the need for the second deposition was necessitated by Goeddel's failure to be forthcoming in his initial deposition and his initial answers to interrogatories, the 5th DCA ruled that it was not an abuse of discretion to require the second deposition to be taken in the State of Florida.

With regard to the issue of the compulsory medical exam, Goeddel argued that a non-resident plaintiff could not be compelled to submit to a medical examination in Florida. The 5th DCA rejected this argument by stating that Fla. R. Civ. P. 1.360 requires only that the examination be set at a "**reasonable place.**" The 5th DCA went on to reason that it may be unreasonable for the trial court to require Goeddel to submit to a compulsory exam in the State of Florida at his own expense and absent any other circumstances.

However, Goeddel's own failure to be forthcoming in his initial deposition and discovery necessitated the second deposition, the order required the defendants to pay for half of his travel expenses, and the fact that he would already be in Florida for his deposition made the trial court's order to submit to a CMA in the State of Florida reasonable. Therefore, Goeddel's petition for writ of certiorari from the order compelling him to appear in Florida for deposition and compulsory medical exam was denied.

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**MEDICAL MALPRACTICE - UNNECESSARY SURGERY
RESULTING IN PHYSICAL INJURY - ERROR TO ENTER SUMMARY JUDGMENT
FOR DEFENDANTS ON GROUNDS THAT PLAINTIFF FAILED TO COMPLY
WITH PRESUIT REQUIREMENT WITHIN TWO-YEAR LIMITATIONS PERIOD AND
PLAINTIFF'S MEDICAL EXPERT AFFIDAVITS FAILED TO SATISFY PRESUIT
REQUIREMENTS - WHERE DEFENDANT ASSURED PLAINTIFF PAIN SUFFERED
AFTER SURGERY WOULD RESOLVE, AND NEUROLOGIST LATER INFORMED
PLAINTIFF PAIN DUE TO NERVE SEVERED DURING SURGERY, ISSUE
OF WHEN PLAINTIFF KNEW OR SHOULD HAVE KNOWN THAT MEDICAL
MALPRACTICE OCCURRED WAS ISSUE OF FACT - FOUR AFFIDAVITS,
WHICH WERE ACCOMPANIED BY MEDICAL EXPERT'S CURRICULUM
VITAE, SATISFIED MEDICAL MALPRACTICE PRESUIT REQUIREMENTS**

Gonzalez v. Tracy, 33 Fla. L. Weekly D2453 (Fla. 3d DCA October 22, 2008)

Gonzalez appealed the entry of final summary judgment in favor of the defendants based on the trial court's finding that Gonzalez failed to comply with medical malpractice presuit requirements of chapter 766, F.S. (2006) within the two-year limitations period. The 3d DCA reversed.

Dr. Tracy informed Gonzalez that she had four lipomas (benign fatty tumors) that needed to be surgically removed from her ankle. On November 22, 2004, Dr. Tracy surgically removed the lipomas. Throughout most of 2005, Dr. Tracy told Gonzalez that her pain was a result of plantar fasciitis, and that the pain would subside.

At the end of 2005, Dr. Tracy referred Gonzalez to a neurologist. In February 2006, the neurologist performed tests, and in March 2006, the neurologist informed Gonzalez that her pain was caused by a nerve that was severed during the surgery, not plantar fasciitis.

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On October 2, 2006, Gonzalez served Dr. Tracy and Westchester General with a notice of intent, accompanied by the corroborating medical expert opinion of Dr. Edward Lazzarin and his curriculum vitae. Dr. Lazzarin's affidavit, dated September 29, 2006, indicated that he was a licensed physician with a specialty in orthopedic surgery.

His affidavit further indicated that Dr. Tracy's treatment fell below the standard of care and the pre-operative tests did not indicate that Gonzalez had a tissue mass. As such, surgery was not warranted. During the ninety-day presuit period, Dr. Tracy advised Gonzalez that Dr. Lazzarin's affidavit failed to satisfy the requirements of F.S. §§ 766.102, 766.202, and 766.203 (2006).

On January 16, 2007, Gonzalez filed a medical malpractice complaint alleging that Dr. Tracy performed unnecessary surgery resulting in physical injury and damages, and that Westchester General was vicariously liable. Dr. Tracy moved to dismiss the complaint, asserting, in part, that Gonzalez failed to comply with the mandatory presuit requirements.

Thereafter, on April 6, April 30, and on July 11, 2007, Gonzalez filed supplemental corroborating affidavits executed by Dr. Lazzarin. In the April 6, 2006 affidavit Dr. Lazzarin claimed that as an orthopedic surgeon, he was qualified to perform the surgery performed on Gonzalez and that the surgery can be performed by either an orthopedic surgeon or a podiatrist.

In the April 30, 2007 affidavit, Dr. Lazzarin stated that he had experience diagnosing and treating the medical condition which was the subject of the lawsuit, that he had experience treating patients similar to Gonzalez and had performed the same type of surgery that was performed on Gonzalez.

The July 11, 2007 affidavit provided that in the past 3 years, he had devoted professional time to an active clinical practice that included the evaluation, diagnosis and treatment of the same or similar medical condition that was the subject of Gonzalez's claim.

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The defendants moved for summary judgment, arguing that Gonzalez failed to fully comply with the presuit requirements prior to the expiration of the statute of limitations. The trial court entered final summary judgment in favor of the defendants, finding that Gonzalez failed to comply with the presuit requirements because Dr. Lazzarin's affidavits failed to satisfy the statutory requirements of a medical expert. Further, the trial court concluded that the statute of limitations began to run immediately following the surgery and expired no later than March 1, 2007.

On appeal, the 3d DCA ruled that the trial court erred in holding the statute of limitations began to run on the date of Gonzalez's surgery, November 22, 2004. Further, the 3d DCA held that the trial court likewise erred by finding that Dr. Lazzarin's affidavits, even when taken in total, failed to satisfy the statutory requirements of a medical expert.

Instead, the 3d DCA held that when the statute of limitation began to run is a question for the jury, and that the four affidavits in addition to Dr. Lazzarin's curriculum vitae, satisfied the medical malpractice presuit requirements.

Specifically, the 3d DCA noted that the jury could conclude that the statute of limitations began to run immediately or shortly after the surgery. However, because Gonzalez alleged that Dr. Tracy continually assured her for approximately one year that her pain would resolve by the end of 2005, the jury could conclude that the statute of limitations did not begin to run until the end of 2005.

By the end of 2005, Gonzalez could have reason to believe that medical malpractice may have possibly occurred. Alternatively, the jury could conclude that the statute of limitations did not begin to run until March 2006 when the neurologist informed Gonzalez that the pain was due to a nerve that was severed during surgery.

The defendants argued that Dr. Lazzarin's affidavits did not satisfy F.S. § 766.102(5)(a)(2) because his July 11, 2007 affidavit claimed that he had devoted professional time to an

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active clinical practice "in the last three years," rather than "during the 3 years preceding the date of the occurrence."

The 3d DCA found that this minor deficiency did not warrant a dismissal of this medical malpractice action. Moreover, Dr. Lazzarin's affidavit was accompanied by his curriculum vitae. When the curriculum vitae was considered along with his affidavits, there was no doubt that Dr. Lazzarin had the required professional experience "during the 3 years preceding the date of occurrence." Accordingly, the 3d DCA reversed and remanded for further proceedings.

**MEDICAL MALPRACTICE - WRONGFUL DEATH - DISCOVERY -
PHYSICIANS CREDENTIALING FILES - TRIAL COURT DEPARTED FROM
ESSENTIAL REQUIREMENTS BY ORDERING HOSPITAL TO DISCLOSE LIST
OF DOCUMENTS IN PHYSICIANS CREDENTIALING FILES AND BY ORDERING
PRODUCTION OF PRIVILEGE LOG DISCLOSING CONFIDENTIAL INFORMATION**

Baptist Hospital of Miami, Inc. v. Garcia, 33 Fla. L. Weekly
D2461 (Fla. 3d DCA October 22, 2008)

Baptist Hospital of Miami and their professional associations ("Baptist") petition for writ of certiorari to quash the trial court's order overruling objections to interrogatories. The 3d DCA granted the Petition for Writ of Certiorari on the grounds that the trial court's order which overruled the objections to interrogatories was a departure from the essential requirements of law.

Garcia brought suit for wrongful death arising out of medical malpractice. The complaint alleged vicarious liability on the part of the hospital and three staff-privileged doctors and their professional associations.

Garcia propounded a set of interrogatories to Baptist. She requested the production of a list of all documents in the doctors' credentialing files as well as a privilege log detailing the dates of the documents, the nature of the documents, the identity of the person who sent or received the documents and anyone copied with the documents.

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Baptist objected on the grounds that Ms. Garcia was seeking descriptions of the contents of the credentialing files which Baptist claims were not discoverable pursuant to F.S. §§ 395.0191(8) and 766.101(5) (2007).

The trial judge overruled Baptist's objections and ordered Baptist to produce the information requested as well as a privilege log for all documents contained within the credentialing files of all the doctors, the identity of the person who sent or received the documents and anyone who had copied with the documents. Baptist argued that the contents of the credentialing files were not discoverable and that Baptist was statutorily exempt from supplying the information required to produce a privilege log.

The 3d DCA noted that the statutory exemptions from discovery of the contents of a hospital's credentialing files have been upheld recently in *Morton Plant Hospital Ass'n v. Shahbas*, 960 So. 2d 820 (Fla. 2d DCA 2007). To permit blanket disclosure of a list of all documents contained in doctors' credentialing files and the production of a privilege log necessarily would require Baptist to provide confidential information, which were not only irrelevant to the adverse medical incidents discoverable under Amendment 7, but which remained exempt from discovery under F.S. §§ 395.0191(8) and 766.101(5).

The 3d DCA held that such a result would violate F.S. §§ 395.0191(8) and 766.101(5), the very purpose of the statutory exclusions from discovery enacted pursuant to the Florida Statutes (2007).

Therefore, the 3d DCA held that trial court departed from the essential requirements of law by ordering the overly broad disclosure of a list of all of the documents contained in the physicians' credentialing files and by ordering the production of a privilege log disclosing confidential information that is a part of those files.

As such, the 3d DCA quashed the trial court's order, without prejudice for Ms. Garcia to file interrogatories which requests documents in compliance with Amendment 7.

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**TORTS - DISCOVERY -
HOSPITAL'S PRODUCTION OF PEER REVIEW MATERIAL
PURSUANT TO AMENDMENT 7 - PHYSICIAN SUED ANOTHER PHYSICIAN
FOR DEFAMATION AND INTERFERENCE WITH ADVANTAGEOUS BUSINESS
RELATIONSHIP ATTACHING PATIENT'S AFFIDAVIT WHO REQUESTED ADVERSE
MEDICAL INCIDENTS INVOLVING THAT PATIENT BE TURNED OVER TO
PATIENT AND HER ATTORNEY - COURT PROPERLY ORDERED PRODUCTION -
HOSPITAL HAS NO BASIS TO CONTEST PRODUCTION OF PEER REVIEW
MATERIALS RELATING TO AN ADVERSE MEDICAL INCIDENT - AMENDMENT
DOES NOT LIMIT DEFINITION OF "PATIENT" TO ONE SEEKING THE
INFORMATION FOR ANY TYPE OF "PROPER PURPOSE" - AMENDMENT DOES
NOT REQUIRE THE INFORMATION REQUESTED TO BE RELEVANT TO PENDING
MEDICAL MALPRACTICE ACTION - AMENDMENT DOES NOT LIMIT THE
PERSONS TO WHOM A PATIENT CAN REVEAL INFORMATION ONCE OBTAINED**

Amisub North Ridge Hospital, Inc. v. Sonaglia, 33 Fla. L. Weekly
D2477 (Fla. 4th DCA October 22, 2008)

Amisub initiated peer review proceedings regarding Dr. Catherine Sonaglia. Sonaglia filed suit against Dr. Stephen Silverstein alleging defamation and tortious interference with an advantageous business relationship.

In her lawsuit, Dr. Sonaglia tried to take discovery from physicians and others involved in the peer review process. Dr. Sonaglia sought to obtain hospital records relating to Stacey Daley, a non-party and a former patient of Dr. Sonaglia on the basis that "proceedings" against Dr. Sonaglia may have arisen out of her treatment of Daley.

The affidavit indicated that after a successful surgery by Dr. Sonaglia, Daley learned that Dr. Silverstein removed her as a patient of Dr. Sonaglia and listed her as one of his own patients. Although she had never met Dr. Silverstein, Daley claimed that Dr. Silverstein had fraudulently noted in her file that he had physically examined her.

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The hospital produced billing and medical records, but refused to produce peer review materials, contending that Article X, Section 25 of the Florida Constitution did not apply. The hospital challenged the court's order requiring production of peer review materials.

The hospital argued that Dr. Sonaglia's request did not serve a "proper purpose" under Amendment 7; that Dr. Sonaglia had no standing to enforce Daley's constitutional right and that she lacked standing herself, as she was not seeking to educate herself to make a health care decision and was not a patient who was suing her doctor for medical malpractice. Further, the hospital argued that the use of Amendment 7 was pretextual, because it was not a medical malpractice action where documents were relevant, but a case where Daley sought to further the interests of her former physician.

The 4th DCA held that after the Florida Supreme Court's decision in *Waterman*, the hospital had no basis to contest the production of peer review materials that related to an adverse medical incident. Daley was a patient under Article X, Section 25(c)(2). The amendment did not limit the definition of a "patient" to one seeking the information for any type of "proper purpose." Additionally, the amendment did not require the requested information to be relevant to a pending medical malpractice action or to a medical care decision.

Further, the 4th DCA held that Amendment 7 did not limit the persons to whom a patient could reveal information once obtained. Thus, Daley's request to furnish the materials to Sonaglia's lawyers was not improper.

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REPOSE WHERE CHILDREN (UNDER 8-YEARS OLD) ARE INVOLVED, SO LONG AS THE MALPRACTICE WAS NOT AND COULD NOT HAVE BEEN PREVIOUSLY DISCOVERED, OPERATED ONLY TO EXTEND STATUTE'S FOUR-YEAR PERIOD OF REPOSE AND DID NOT EXTEND STATUTE'S TWO-YEAR LIMITATION PERIOD

Germ v. St. Luke's Hospital Association, 33 Fla. L. Weekly D2510 (Fla. 1st DCA October 24, 2008)

Germ challenged the trial court's order granting summary judgment in favor of Drs. Macksey & McLanahan.

Germ argued that the 1996 Amendment to F.S. § 95.11(4)(b) (2006), applied to the statute's two-year period of limitations and to its four-year period of repose. Additionally, Germ argued that the trial court erred by ruling that appellants were aware of appellee's alleged malpractice more than two years before they initiated their malpractice action.

The 1st DCA disagreed, finding that the 1996 amendment operated during the statute's four-year period of repose; and (2) the trial court correctly held that since appellants were aware of the alleged malpractice more than two-years before they filed suit against Drs. Macksey and McLanahan, their action was barred by the statute's two-year period of limitations.

On August 14, 1999, Cheryl Germ gave birth to Noah Germ. Germ had knowledge that she had suffered a ruptured appendix and had undergone an emergency appendectomy during pregnancy. Additionally, Germ had knowledge that Drs. Macksey and McLanahan were involved in her care and treatment. Germ was aware that a premature delivery could result in injury to Noah Germ. Attempts to prevent a premature delivery were unsuccessful.

Germ retained counsel and on May 2, 2001, mailed correspondence to St. Luke's Hospital in Jacksonville, Florida, seeking medical records associated with the care and treatment of Germ. On October 29, 2001, Germ served notices of intent onto various defendants. Drs. Macksey and McLanahan were not served at this time.

More than two years later, Germ served Drs. Macksey and McLanahan with her notices of intent. Drs. Macksey and McLanahan

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subsequently filed motions for summary judgment, arguing the claims against them were filed outside the statute of limitations.

In turn, Germ submitted excerpts of Dr. Van Scriver's August 13, 2003, deposition claiming that Dr. Scriver's testimony for the first time put her on notice of the doctors' alleged malpractice. The trial court found that at least by May 2, 2001, Germ had knowledge of injury and possibility that such injury was caused by medical negligence. Accordingly, the trial court granted summary judgment in favor of Drs. Macksey and McLanahan, holding the two-year period of limitations contained in F.S. § 95.11(4)(b) barred Germ's action.

Germ argued that the statute of limitations did not bar an action arising from an injury to a minor until the minor was at least eight years old. Specifically, Germ argued that the 1996 amendment to F.S. § 95.11 (4)(b) referred to both the statute's two-year period of limitations and the statute's four-year period of repose.

The 1st DCA ruled that F.S. § 95.11(4)(b) set up three time periods. The first was when the incident giving rise to a malpractice action was known or readily discoverable. It ran from the day the malpractice occurred and expired two years from the date.

The second was a period of repose. This period is applicable when the incident giving rise to the malpractice action was not, and reasonably could not have been discovered. The second period ran from the day malpractice occurred, and expired up to four years from the date of occurrence, depending on whether the malpractice could or should have been reasonably discovered.

The third period was created by the 1996 amendment. This period applied only to cases involving children under eight years of age and enjoined the statute of repose until at least the child's eighth birthday, so long as the malpractice was not and could not have been reasonably discovered previously. Accordingly, the 1st DCA held that the statute's plain language extended the four-year period of repose that commenced the day the malpractice occurred.

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Further, the 1st DCA held that Germ's proposed interpretation of the 1996 Amendment was inconsistent with the statute's plain language. The trial court correctly held that the 1996 Amendment referred only to the four-year period of repose enumerated in § 95.11(4)(b), not the statute's period of limitations.

The 1st DCA further disagreed with Germ's argument that the trial court erred in finding F.S. § 95.11(4)(b) barred their malpractice action. The two-year period of limitations for medical malpractice expired before appellants initiated their action against appellees.

The 1st DCA ruled that Germ failed to initiate litigation against Drs. Macksey and McLanahan prior to the expiration of the period of limitations set forth in F.S. § 95.11(4)(b).

Pursuant to F.S. § 766.203 (2006), Germ was required to investigate her claim and confirm that reasonable grounds existed to commence a medical malpractice action. She should have initiated discovery to ascertain any alleged negligence by Drs. Macksey and McLanahan. Therefore, the 1st DCA held that pursuant to F.S. § 95.11(4)(b), Germ was barred from bringing a claim against any new defendants at least two years from October 29, 2001, the date on which Germ served her notices of intent.

The 1st DCA held that the record indicated that Germ knew or should have known after her initial investigation that Drs. Macksey and McLanahan contributed to the alleged malpractice. Accordingly, she failed to establish a genuine issue of fact precluding summary judgment.

**MEDICAL MALPRACTICE - WRONGFUL DEATH - JURORS -
NONDISCLOSURE OF LITIGATION HISTORY DURING VOIR DIRE -
THREE-PART TEST: WHETHER INFORMATION RELEVANT AND MATERIAL
TO JURY SERVICE IN CASE; WHETHER JUROR CONCEALED INFORMATION**

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**DURING QUESTIONING; WHETHER FAILURE TO DISCLOSE INFORMATION
ATTRIBUTABLE TO COMPLAINING PARTY'S LACK OF DILIGENCE -
ERROR FOR TRIAL COURT TO FOCUS ON WHETHER OR NOT IT BELIEVED
JURORS WERE BIASED RATHER THEN WHAT PLAINTIFF'S COUNSEL WOULD
HAVE DONE DURING VOIR DIRE HAD LITIGATION HISTORY BEEN DISCLOSED**

Fine v. Shands Teaching Hospital and Clinics, Inc., 33 Fla. L. Weekly D2538 (Fla. 1st DCA, October 29, 2008)

The 1st DCA reversed the trial court's order denying plaintiff's motion for judgment notwithstanding the verdict in a wrongful death medical malpractice case against Shands Teaching Hospital and Clinics, Inc. The 1st DCA found that the trial court had failed to utilize the required three-part test to determine whether nondisclosure of information during voir dire warranted a new trial and incorrectly focused on whether or not it believed jurors were biased when deliberating rather than focusing on what the plaintiff's counsel would have done during voir dire had the litigation history been disclosed.

Lisa Fine, as personal representative of the Estate of Cory Fine, brought an action against Shands Teaching Hospital alleging medical malpractice. The jury found in favor of Shands Teaching Hospital and Clinics, Inc., at which time Fine moved to interview the jurors and for a judgment notwithstanding the verdict.

After the jurors' interviews, the trial court denied Fine's motion, stating that if the court was to grant plaintiff's motion because the plaintiff may have exercised a challenge, that would ignore the fact that the judge felt that these jurors were not affected by their past experiences in carrying out their responsibilities in this particular case.

On remand, the trial court was instructed to use the three-part test outlined by the Florida Supreme Court in *DeLaRosa v. Zequeira*, 659 So. 2d 239, 241 (Fla. 1995), (1) whether the information is relevant and material to jury service in the case; (2) whether the juror concealed the information during questioning; and (3) whether the failure to disclose the information was not attributable to the party's lack of diligence.

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The trial court was further instructed to use the test outlined by the Supreme Court in **Roberts ex rel. Estate of Roberts v. Tejada**, 814 So. 2d 334, 340 (Fla. 2002) and **State Farm Fire and Casualty Co. v. Levine**, 837 So. 2d 363,365 (Fla. 2002) for the proposition that materiality is shown only were the omission of the information prevented counsel from making an informed judgment which **would in all likelihood** have resulted in a peremptory challenge.

The 1st DCA then discussed the standard for materiality set forth in **Garnett v. McClellan**, 767 So. 2d 1229 (Fla. 5th DCA 2000), in which the 5th DCA noted that materiality is shown if the information was substantial and important so that the party may have been influenced to use a challenge had the juror provided the information.

**ADMINISTRATIVE LAW – NICA
(FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION
PLAN) – "RESUSCITATION IN IMMEDIATE POSTDELIVERY PERIOD" –
WHERE INFANT EXPERIENCED BRAIN INJURY CAUSED BY OXYGEN
DEPRIVATION IN IMMEDIATE POSTDELIVERY PERIOD, ALJ ERRED IN
FAILING TO APPLY STATUTORY PRESUMPTION FAVORING OMPENSABILITY**

Orlando Regional Health Care System, Inc. v. Florida Birth-Related Neurological, 33 Fla. L. Weekly D2563 (Fla. 5th DCA October 31, 2008)

The 5th DCA reversed a final administrative order dismissing with prejudice a claim for compensation brought by the Estate of Harper Dean Stever under the Florida Birth-Related Neurological Injury Compensation Plan, F.S. § 766.301-316. Upon review, the appellate court concluded that the administrative law judge (ALJ) erred as a matter of law in interpreting the statutory language of the Plan and that certain findings were not supported by competent, substantial evidence.

The claim was filed by the personal representative of the estate for the survivors of Harper Dean Stever who died six days after birth. Mrs. Stever presented to Orlando Regional South

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Seminole Hospital with contractions and blood-tinged fluid discharge on October 16, 2004. The fetus was 40 6/7 weeks of gestation. Stever was given pain medication and monitoring. She subsequently developed a fever. The fetal heart rate had risen to more than 170 beats per minute. The fetal heart rate continued to rise to more than 180 beats per minute.

Dr. Christopher Quinsey, a "participating physician" under the Plan, decided to proceed with a cesarean section. At 12:48 p.m. the baby was delivered. At 12:50 p.m. the baby was noted as bluish and a neonatal code was called. The code concluded fifteen minutes later at 1:05 p.m. Manual ventilation continued because the baby was never able to breath on his own. At the time of delivery, there were copious amounts of meconium (fetal stool) exuding through the incision at the entry into the uterine cavity. The heart rate was less than 100 beats per minute and the baby was not breathing spontaneously.

At 1:05 p.m. the baby was transferred to the special care nursery. Resuscitation efforts continued and he was placed on a ventilator. A decision was made to transport the baby to the neonatal intensive care unit at Arnold Palmer Hospital for continued aggressive resuscitation.

The Arnold Palmer neonatal transport team took over care at 1:50 p.m. Oxygen saturation level was 92 percent. By 2:30 p.m. he was dusky and his oxygen saturation level was 85 percent. Chest x-ray revealed severe lung opacity. The transport team continued with resuscitative measures in attempts to stabilize the baby for transport. Despite aggressive resuscitation measures, Harper's status declined. By the time he arrived at Arnold Palmer Hospital at 5:30 p.m., his color was bluish, and his oxygen saturation levels were in the 50-60s (normal range is 95 or above).

Harper was placed on high frequency oscillatory ventilation and given medications. His status continued to decline and he was ultimately placed on extracorporeal membrane oxygenation, a heart/lung bypass machine. For the next six days, Harper remained on the ECMO bypass and received anti-seizure treatment due to his frequent seizure episodes. An Ultrasound Echoencephalogram ultimately confirmed Harper had experienced an intracranial

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hemorrhage, at which time he was taken off the bypass and died shortly thereafter.

The mother, as personal representative, filed a petition with the Division of Administrative Hearings to determine compensability under the Plan. As a party having a substantial interest in the outcome of the proceeding, ORHS was allowed to intervene in the action. Dr. Donald Willis, hired by NICA, opined that a fetal infection developed during labor and resulted in respiratory distress and that the intracranial hemorrhage and resulting death were not the result of the brain injury that occurred during labor and delivery. No opinion was offered by Dr. Willis as to whether a brain injury occurred during resuscitation in the immediate postdelivery period.

Based on Dr. Willis' opinion, the administrative law judge determined the claim was not compensable because it did not meet the definition of a "birth-related neurological injury" as defined in F.S. § 766.302(2).

F.S. § 766.301-.316 was established by the Legislature to provide no-fault compensation for birth-related neurological injuries to infants. Under the Plan, a "birth-related neurological injury" is an injury to the brain or spinal cord of a live infant caused by oxygen deprivation or mechanical injury in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant both permanently and substantially mentally and physically impaired.

An appellate court can review an ALJ final order under Florida Statute Chapter 120, the Administrative Procedure Act. The ALJ's determination with regard to the qualification of the claim for compensability purposes under the statute is conclusive and binding as to all questions of fact. However, the order is reversible on appeal where its interpretation of the law is clearly erroneous or its findings of facts are not supported by competent substantial evidence.

NICA argued that while Harper required continuous respiratory support since birth, his brain injury post-dated the "immediate postdelivery period" and therefore did not qualify for coverage.

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This case hinged on the statutory phrase "resuscitation in the immediate postdelivery period." Even more important, the definition of the term "immediate" was critical. The ALJ found that while Harper had continuous respiratory support, his injury did not occur during the "resuscitation and immediate postdelivery period." That finding was not supported by competent substantial evidence.

The application of the definition "immediate" in determining planned compensability must be applied on a case by case basis. The 5th DCA found that there was no reasonable interpretation for the phrase "resuscitation in the immediate postdelivery period" that would exclude the injury to Harper.

Under the Plan, the terms "resuscitation" and "immediate" are important qualifiers to determine the compensability of a claim. However, since those terms are not defined by the statute, those terms are required to be given their plain and ordinary meaning. Since the definition of "resuscitate" includes measures such as artificial respiration, and since Harper continued to suffer respiratory failure that required artificial respiration, it was not logical to find that "immediate" only meant through the first resuscitative attempt. Since Harper continued to need resuscitation, **without interruption**, that ongoing need created one time period - the "immediate postdelivery period." (Emphasis by court).

In addition, the 5th DCA found that the ALJ had failed to apply the statutory presumption favoring compensability for the claim, such that when a claimant establishes that the infant sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and the infant was permanently and substantially mentally and physically impaired, a rebuttable presumption arose that the injury is a birth-related neurological injury.

Since the doctor opined that Harper did suffer a brain injury in the period from the resuscitation effort initiated after his birth until he was placed on the ECMO bypass and that period was, by definition, within the "immediate postdelivery period," the claim was compensable under the Plan.

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**CONTRACTS - HOSPITAL MEDICAL STAFF BYLAWS - HOSPITAL
WITHIN ITS RIGHTS TO TERMINATE EXCLUSIVE CONTRACT WITH GROUP OF
RADIOLOGISTS BUT HOSPITAL BREACHED ITS MEDICAL STAFF BYLAWS BY
TERMINATING STAFF PRIVILEGES OF INDIVIDUAL RADIOLOGISTS - PROPER
MEASURE OF DAMAGES IS REMAINING TERM OF CONTRACT FOR PRIVILEGES**

University Community Hospital, Inc. v. Wilson, 33 Fla. L. Weekly
D2753 (Fla. 2d DCA December 3, 2008)

Appellees, physicians who were radiologists who until November 11, 2001, had privileges granted by UCH to practice their medical specialty at UCH's two hospitals. The physicians were members of Shea Ahearn. Shea Ahearn had an exclusive contract to provide radiology services to UCH dating back to December 1986.

In May 2001, UCH gave timely notice to Shea Ahearn that it was terminating its exclusive contract for radiology services effective November 10, 2001. There was no dispute that under the exclusive contract, UCH was entirely within its rights to take this course of action as a business decision.

However, UCH, through its credentialing committee, had previously granted individual clinical privileges to each physician to practice radiology at UCH, and thus had formed separate contracts with each physician according to its own medical staff bylaws. Nonetheless, each radiologist received a letter informing them that effective November 10, 2001, they would not be permitted to exercise privileges at UCH Hospitals.

The physicians instituted a breach of contract action against UCH, claiming that UCH had violated its own medical staff bylaws by terminating or restricting the physicians' clinical privileges, despite the fact that none of the physicians had triggered one of the three possible situations that would cause loss of privileges without a hearing.

In June 2005, the trial court granted the physicians' motion for summary judgment on liability. Thereafter, the parties agreed to hold a trial on damages only before a retired judge. During this proceeding, Judge Ficarrota relied on the physicians' expert witness, Kevin Kwan, CPA, whose methodology suggested an assumption that it would take five years for each physician to reach a level of compensation to mitigate the damages that were

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incurred as a result of being denied the ability to practice radiology at UCH.

On appeal, the 2d DCA held that the trial court properly entered a summary judgment against UCH, finding it liable for breach of contract by violating its own medical staff bylaws and refusing the physician's right to exercise their clinical privileges. On the other hand, the 2d DCA reversed Judge Ficarotta's damages finding, holding that he abused his discretion in relying on the physicians' expert on damages.

The 2d DCA concluded that the damages period began when UCH breached each physicians' contract on November 11, 2001, and instead of running for the five years suggested by expert Kwan, the correct period of measurement would be the remaining term of the contract or clinical privileges.

**MEDICAL MALPRACTICE -
WRONGFUL DEATH - DISCOVERY - DISINTERMENT OF BODY IMPROPER**

Gottlieb v. Samiian, 33 Fla. L. Weekly D2790 (Fla. 1st DCA December 5, 2008)

This matter arose from a binding arbitration proceeding. In the arbitration proceeding, only damages, not liability, were at issue before the administrative law judge.

Dr. Samiian performed liposuction on decedent, Martin Gottlieb, who was 32 years old. Several hours after the procedure, Mr. Gottlieb suffered a heart attack and died. An autopsy performed the following day identified the cause of death as respiratory insufficiency due to complications of the liposuction. No drug testing was performed.

During the course of discovery, defendants filed a motion to disinter seeking an order requiring the exhumation of Mr. Gottlieb's remains for the purposes of drug testing on Mr. Gottlieb which would have shown drugs allegedly taken during the year before his death that could have affected his life expectancy.

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The administrative law judge determined that because Mr. Gottlieb's life expectancy was at issue, the discovery sought was reasonably calculated to lead to the discovery of admissible evidence. In support of its motion, defendants filed an affidavit of a forensic pathologist, Steven Karch, who concluded that hair samples may show the presence of drugs.

The 1st DCA quashed the order, holding that the case fell short of requiring disinterment. The cause of death was not at issue. Additionally, the appellate court determined that the affidavit of Dr. Samiian offered to justify the disinterment was based upon anonymous sources and added nothing to the threshold requirements of reliance and good cause.

CIRCUIT COURT OPINONS

**MEDICAL MALPRACTICE - NICA (FLORIDA
BIRTH-RELATED NEUROLOGICAL INJURY ASSOCIATION) - VENUE -
NICA HAS NO HOME VENUE PRIVILEGE - CLASS ACTION - PARENTS
OF NICA QUALIFIED CHILDREN ENTITLED TO CLASS CERTIFICATION**

Basey v. Florida Birth-Related Neurological Injury Compensation Association, 15 Fla. L. Weekly Supp. 1081 (Fla. 13th Cir. Ct. August 28, 2008)

In this class action lawsuit plaintiffs were families with children who had been born with catastrophic injuries. Plaintiffs sought damages and declaratory and injunctive relief against Florida Birth-Related Neurological Injury Compensation Association NICA.

Hillsborough County Circuit Court Judge Sam D. Pendino denied defendant's motion to transfer venue and found that Hillsborough County was a proper venue for one or more of the plaintiffs' causes of action. The trial court expressly stated that NICA had no "home venue privilege" pursuant to F.S. § 766.315(1), and therefore, Hillsborough County was the proper venue.

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The more complex motion addressed by the Circuit Court was whether plaintiffs should be permitted to amend for class certification pursuant to Fla. R. Civ. P. 1.220(b)(2). The trial court was asked to determine whether the plaintiffs had satisfied the classification requirements of this rule for their injunctive and declaratory relief claims.

The central issue was whether the parents of children born from January 1, 1989 through June 6, 2002 were legally entitled to seek benefits for "residential and custodial care and services" under F.S. § 766.31(1)(a) (1988-2001). There was also an issue as to whether NICA had refused to pay and/or had underpaid benefits to parents and guardians who provided "residential and custodial care and services" to their NICA qualified children.

Fla. R. Civ. P. 1.220 establishes a two-step process for class certification. First, pursuant to Fla. R. Civ. P. 1.220(a) the court must find that there is numerosity, commonality, typicality, and adequacy. Second, if the requirements of 1.220(a) are met then at least one of the three requirements of Rule 1.220(b) must be met.

I. Fla. R. Civ. P. 1.220(a) factors

A. Numerosity

The "numerosity" element of Rule 1.220(a) requires that the class members be "so numerous that separate joinder of each member is impracticable." The trial court pointed out if they had broad discretion to make assumptions when determining the numerosity of the class. **See Fuller v. Becker & Poliakoff, P.A.**, 197 F.R.D. 697, 699 (M.D. Fla. 2000), **citing Evans v. U.S. Pipe & Foundry**, 696 F. 2d 925, 930 (11th Cir. 1983).

The trial court concluded that the exact number of class members was information that was exclusively within NICA's knowledge. However, based various information obtained on-line, it appeared that the plaintiffs were representing the interests of approximately 258 similarly situated people. Thus, the trial court found that the numerosity element of rule 1.220(a)(1) had been satisfied.

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B. Commonality

The commonality element of Rule 1.220(a) considers whether there is a common question of law or fact among the members of the class. The trial court pointed out that the commonality factor required only that the resolution of common issues affect a substantial number of class members. **See *Paladino v. American Dental Plan, Inc.***, 697 So. 2d 897, 898 (Fla. 1st DCA 1997).

A sufficient nexus would be established if the claims or defenses of the class and the class representative arose from the same event or pattern or practice and were based on the same legal theory. **See *Kornberg v. Carnival Cruise Lines, Inc.***, 741 F. 2d 1332, 1337 (11th Cir. 1984), **cert. den.**, 470 U.S. 1004 (1985). The trial court pointed out that although it was not required, the plaintiffs' claims for declaratory and injunctive relief appeared to be practically identical, and therefore, the trial court held that the commonality requirement of rule 1.220(a) had been satisfied.

C. Typicality

The typicality element of Rule 1.220(a) considers whether the claim or defense of the representative party is typical of the claim or defense of each member of the class. The trial court explained that a class representative's claim was typical if his claims and those of the class arise from the same event, pattern, or practice, and were based on the same legal theory. **See, e.g., *Singer v. AT&T Corp.***, 185 F.R.D. 681, 689 (S.D. Fla. 1998); ***Walco Investments, Inc. v. Thenen***, 168 F.R.D. 315, 326-327 (S.D. Fla. 1996).

The trial court found that the named plaintiffs were members of the class and that their claims for declaratory and injunctive relief appeared to be practically identical to the claims of the other members of the class. Thus, plaintiffs satisfied the typicality requirement of Rule 1.220(a).

D. Adequacy of Representation

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The Adequacy of Representation element of Rule 1.220(a) required that a) plaintiffs and class members have common interests; and (b) the class representatives will properly prosecute the class action. The trial court pointed out that a trial court has broad discretion to determine whether a class representative is fit to serve, and the court's decision will not be disturbed absent showing of an abuse of discretion. **See Tampa Service Co., Inc. v Hartigan**, 966 So. 2d 465, 468 (Fla. 4th DCA 2007). The trial court also stated that the threshold for satisfying the "adequacy" of the class representative was relatively low. **See, e.g., Lerner v. Haimsohn**, 126 F.R.D. 64, 47 (D. Colo. 1989).

As to the first step the trial court found that the named plaintiffs were familiar with the complaint and the claims in the case; they regularly conferred with counsel; were committed to and able to represent the interests of the class; and were willing to participate as necessary in the future. Accordingly, the first prong was satisfied.

The second step involved questions of whether the representatives' counsel were qualified, experienced, and generally able to conduct the proposed litigation. The trial court found that the plaintiffs' counsel were very knowledgeable and possessed extensive experience in complex multi-party and class action litigation. Based on the foregoing, the trial court held that the adequacy of representation requirement of Rule 1.220(a).

II. Fla. R. Civ. P. 1.220 (b) Factors

Once the trial court found that plaintiffs had satisfied the four requirements of Rule 1.220(a), the next step was to determine whether the plaintiffs also satisfied one of the three Fla. R. Civ. P. 1.220(b) requirements.

The trial court found that plaintiffs were only seeking class certification under Rule 1.220(b)(2). In order to comply with Rule 1.220(b)(2), the plaintiffs had to demonstrate that NICA had actively refused to act on grounds generally applicable to all members of the class, thereby making final injunctive relief

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appropriate. The trial court held that the evidence provided was sufficient to demonstrate for purposes of class certification that NICA had refused to apply the 2002 version of F.S. § 766.31(1)(a) to all class members.

The trial court also found that NICA had applied the reduced payment provisions of the 2002 amendments to all class members in a retroactive manner, regardless of the fact that all class members had children born before the June 7, 2002 effective date of the amendment. The trial court found for purposes of class certification that it appeared NICA had concealed information from the class members and given them misinformation concerning their right to recover full payment for residential and custodial care and services provided to their NICA children.

The trial court explained that recent case law construing Rule 1.220(b)(2) required that class claims be "cohesive." **See *Wyeth, Inc. v. Gottlieb***, 930 So. 2d 635, 639 (Fla. 3d DCA 2006). Cohesiveness contemplated that members of a Rule 1.220(b)(2) class are generally bound together through pre-existing or continuing legal relationships or by some significant common trait such as race or gender that transcends a specific set of facts giving rise to the litigation. **See *Chase Manhattan Mortg. Corp. v. Porcher***, 898 So. 2d 153, 158-159 (Fla. 4th DCA 2005).

The trial court held that plaintiffs and the class members clearly satisfied the cohesiveness test. For example, the class members all shared the significant common trait of being parents and guardians of catastrophically injured and handicapped children. In addition, the class members were bound together by chapter 766 as beneficiaries of the Florida Birth-Related Neurological Injury Compensation Plan.

III. Conclusion

Based on the elements set forth above, plaintiffs' amended motion for class certification was granted. By virtue of granting the motion, the court certified the class as defined by plaintiffs.

JLH/tsr

