

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, FLORIDA

CASE NO. _____

Plaintiff(s),

vs.

Defendant(s)

_____/

MOTION TO ABATE

COME(S) NOW, Defendant(s), _____, by and through (its/their) undersigned counsel, and file(s) this (its/their) Motion to Abate pursuant to Sections 766.301, 766.303, 766.304, and 766.309, Florida Statutes, and in support thereof would state the following:

1. The Plaintiff filed a _____ suit on _____
alleging _____.

2. Based on the allegations of the suit, it is appropriate for this Court to abate the suit in order for a Petition for Benefits pursuant to Section 766.301, *et seq*, Florida Statutes, to be filed with the Division of Administrative Hearings (DOAH) for a determination of whether the injury asserted here falls within the exclusive purview

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of the Florida Birth-Related Neurological Injury Compensation Plan (the “Plan”).

3. The Plan was created in 1988 by the Florida Legislature to “provide compensation, on a no-fault basis, for a limited class of catastrophic injuries” in an effort to stabilize and reduce the malpractice insurance premiums for obstetricians in Florida to ensure such services will be available in the future. §766.301, Fla. Stat.; Fluet v. Fla. Birth-Related Neurological Injury Comp. Ass’n, 788 So. 2d 1010, 1011 (Fla. 2d DCA 2001).

4. Section 766.304, Florida Statutes, provides, in pertinent part:

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, or if the claimant accepts an award issued under s. 766.31, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303. . . . An award may not be made or paid under ss. 766.301 – 766.316 if the claimant recovers under a settlement or a final judgment is entered in a civil action. . . .

5. Section 766.309, Florida Statutes, outlines the requirements for a finding of compensability under the Plan. In order for an injury to be compensable:

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1) the physician must have been a “participating physician” in the Plan as that term is defined in Section 766.302(7), Florida Statutes, at the time the injury occurred, and 2) the injury must meet the definition of a “birth-related neurological injury” which is defined as:

. . . injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 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. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

§766.302(2), Fla. Stat.

6. Pursuant to Sections 766.301, 766.304, and 766.309(1)(d)¹, Florida Statutes, the Administrative Law Judge has exclusive jurisdiction to determine whether a claim is compensable under the Plan and whether the notice requirement in Section 766.316, Florida Statutes, was satisfied. See also, University of Miami v. M.A., 793 So. 2d 999, 1000 (Fla. 3d DCA 2001); O’Leary v. Florida Birth-Related Neurological Injury

¹ This subsection was added by Ch. 2006-8, Laws of Florida, in 2006. In adding such subsection, the Legislature provided that the legislative intent is that the amendment “clarifies that since July 1, 1998, the administrative law judge has had the exclusive jurisdiction to make factual determinations as to where the notice requirements in s. 766.316, Florida Statutes, are satisfied.” §2, Ch. 2006-8, L.O.F. (2006).

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Compensation Ass'n, 757 So. 2d 624, 627 (Fla. 5th DCA 2000); Weinstock, M.D. v. Houvardas, 924 So. 2d 982 (Fla. 2d DCA 2006)².

7. If the claim is found to be compensable under the Plan, then pursuant to Section 766.303, Florida Statutes, the instant proceeding may be rendered unnecessary or moot. Section 766.303(2), Florida Statutes, provides:

The rights and remedies granted by this plan on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, her or his personal representative, parents, dependants, and next of kin, at common law or otherwise, against any person or entity directly involved with the labor, delivery, or immediate post delivery resuscitation during which such injury occurs, arising out of or related to a medical malpractice claim with respect to such injury; except that a civil action shall not be foreclosed where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property, provided that such suit is filed prior to and in lieu of payment of an award under ss. 766.301- 766.316. Such suit shall be filed before the award of the division becomes conclusive and binding as provided for in s. 766.311.

8. Failure of a circuit court to abate an action for determination before DOAH as to the compensability of the injury under the Plan is considered a “depart[ure] from the essential requirements of law.” University of Miami v. M.A. at 1000. In University of Miami v. M.A., the Plaintiffs filed a Petition for Writ of Certiorari seeking

² This case was decided prior to the enactment of Ch. 2006-8, Laws of Florida, which clarifies that the ALJ has had the exclusive jurisdiction to determine notice since 1998.

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to quash the order of the circuit court which denied the Plaintiffs' motion to abate the circuit court action pending determination by an administrative law judge whether the claim was compensable under NICA. The Court held that "the denial of the motion to abate the action in circuit court departed from the essential requirements of law." Id.; See also, O'Leary, supra; Weinstock, M.D., at 985 ("Accordingly, because the circuit court does not have jurisdiction to determine issues of notice, we grant the petition and quash the order denying the motion to abate.").

WHEREFORE, Defendant(s) respectfully request this Court to enter an Order abating the instant proceeding until such time as the Plaintiff(s) (has/have) complied with Sections 766.301 - 766.316, Florida Statutes, and specifically require the Plaintiff(s) to file a Petition for Benefits under the Plan.

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