



THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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November 16, 2000

SPECIAL MASTER'S FINAL REPORT	DATE	COMM	ACTION
President of the Senate Suite 409, The Capitol Tallahassee, Florida 32399-1100	11/16/00	SM HC FR	Fav/1 amend.

Re: SB 74 – Senator Betty Holzendorf
Relief of James Torrence

THIS IS AN EQUITABLE CLAIM FOR \$500,000 BASED ON A SETTLEMENT AGREEMENT BETWEEN THE PALM BEACH COUNTY HEALTH CARE DISTRICT AND JAMES TORRENCE, A DEPUTY WITH THE PALM BEACH COUNTY SHERIFF'S OFFICE FOR INJURIES AND DAMAGES SUSTAINED BY DEPUTY JAMES TORRENCE AS A RESULT OF THE NEGLIGENT SURGERY AND POST-OPERATIVE CARE PROVIDED BY DR. JOSE THOMAS-RICHARDS, AN EMPLOYEE OF THE PALM BEACH COUNTY HEALTH CARE DISTRICT.

FINDINGS OF FACT:

Background

James Torrence is a 36-year-old deputy sheriff with the Palm Beach County Sheriff's Office. On May 27, 1998, Deputy Torrence, a physically fit 34-year-old, while checking an inmate's cell at the Palm Beach County Sheriff's Department in West Palm Beach, Florida, tripped and twisted his left knee. His injury required medical attention and he went to the emergency department of Palms West Hospital. Subsequent to treatment received at the emergency department the day he sustained his injury, the Sheriff's department workers' compensation carrier referred Deputy Torrence to Jose Thomas-Richards, D.O., an orthopedic surgeon employed by the Palm Beach County Health Care District who practiced at Glades General Hospital, an entity subject to Florida's sovereign immunity law, §768.28, F.S.

Initially, Dr. Thomas-Richards treated Deputy Torrence's injury conservatively requiring him to wear an elastic knee support and prescribing pain medication. Deputy Torrence, however, complained of continuing significant pain and an occasional "giving away and locking of his knee" [Claimant's Summary of Case] and Dr. Thomas-Richards responded by scheduling a magnetic resonance imaging scan (MRI) of Deputy Torrence's knee for June 11, 1998.

From the MRI report, Dr. Thomas-Richards determined that Deputy Torrence had a torn medial meniscus and a complete tear of the anterior cruciate ligament (ACL) in his left knee. Deputy Torrence consented to Dr. Thomas-Richards performing a "mini-arthrotomy with medial meniscectomy and exploration of anterior cruciate ligament with repair, left knee." [Glades General Hospital Informed Consent to Surgery/Treatment, dated June 17, 1998, and signed by James Torrence and Dr. Thomas-Richards] Dr. Thomas-Richards operated on Deputy Torrence's meniscus and ACL on June 23, 1998. A knee immobilizer brace was placed on the knee after completion of the surgical procedures. The brace remained on Deputy Torrence for 4 weeks post-operatively. [Dr. Thomas-Richards' Report of Operation, dated June 23, 1998; parties' Joint Stipulation Statement, Items 6 and 7]

Dr. Thomas-Richards described a mini-arthrotomy incision as between three and four centimeters or, alternatively, approximately one and one-half inches in length. [Transcript of Deposition of Jose Thomas-Richards, D.O., p. 50, lines 20-25] During the changing of surgical bandages, while he was still hospitalized, Deputy Torrence, discovered that instead of the small incision that Dr. Thomas-Richards had explained to him would result from the procedure, he was left with a scar on his leg that extended from approximately 6 inches above the knee to 6 inches below the knee, almost 14 inches long. The much longer incision and scar resulted from use of the unspecified instrumentation that Dr. Thomas-Richards used [p. 108, ll. 13-18] in performing the "modified Jones procedure" to repair Deputy Torrence's ACL. (The modified Jones procedure is a surgical technique in which the middle one-third of the patellar tendon of the quadriceps is substituted for the original ACL. The authoritative orthopedic literature recommends use of arthroscopic

instrumentation that requires only small incisions and, typically, results in minimal scarring.)

No evidence was presented that indicates that Dr. Thomas-Richards discussed the modified Jones procedure with the deputy. In fact, neither the written informed consent that Deputy Torrence signed nor Dr. Thomas-Richards' operation report make reference to the modified Jones procedure. Dr. Thomas-Richards stated in his Report of Operation [p. 1] that he performed the "Jones technique" and described making a long incision [p. 2], as he was trained to do in the 1970's [Dr. Thomas-Richards' deposition testimony, p. 55, l. 12-17]. Deputy Torrence did consent to a mini-arthrotomy, but Dr. Thomas-Richards' Report of Operation does not mention nor is there a description of him performing such a procedure.

Subsequent to the June 23, 1998, surgery performed by Dr. Thomas-Richards, Deputy Torrence developed a condition called chondromalacia (degeneration of cartilage at a joint that can result in pain, a grating sensation, and a feeling of instability on movement) and arthritis (inflammation of a joint characterized by swelling, warmth, pain, and restriction of motion) in his left knee. Dr. Thomas-Richards, in his deposition testimony of August 14, 2000, [p. 163, l. 13] stated that Deputy Torrence did not have either condition when he examined him and treated him in 1998.

In response to questioning by Deputy Torrence's attorney during his deposition, Dr. Thomas-Richards agreed (noting there are many causes) that one cause of chondromalacia is when the ligament attached to the quadriceps mechanism becomes permanently stretched. [p.162, l. 12-p. 163, l. 8] The Jones technique (at his deposition, Dr. Thomas-Richards testified that he performed a modified Jones procedure [p. 97, l. 12-14]) that Dr. Thomas-Richards noted in his Report of Operation as the procedure he performed on Deputy Torrence to repair his ACL tear involves harvesting the middle one-third of the patellar tendon of the quadriceps, one end left attached to bone [p. 108, l. 8-11], to utilize as a graft stretched into position as a replacement mechanism for the original, damaged ACL. The authoritative medical literature, notably *Campbell's Operative Orthopaedics*, Eighth Edition [Volume Three, p. 1628], states ". . . we no longer use the Jones procedure, believing it to be

biomechanically flawed . . . if the patellar tendon is to be used as a source for anterior cruciate ligament replacement, we prefer to use the central third of the patellar tendon as a free graft . . . ”

The “free graft” is a component of what *Campbell's* describes as the modified Jones procedure described in 1982 by a Dr. Clancy and his associates [*Campbell's*, Volume Three, p. 1628]. The modified Jones procedure involves complete cutting away of the tendon with a fragment of bone attached and then placed into position for ACL replacement. When arthroscopic incisions and instrumentation (compared to lengthy incisions that cut into muscle and other tissue) is used with the modified Jones technique, *Campbell's* suggests, much of the rehabilitative difficulties relating to ACL repair is lessened.

Additional Surgery and Care Required to Alleviate Symptoms Resulting from the Surgery by Dr. Thomas-Richards

Deputy Torrence continued to have problems with his knee after the surgery performed by Dr. Thomas-Richards and, subsequently, was treated or evaluated by three additional orthopedic physicians. Collectively, these physicians eventually determined that: (1) the torn portion of the meniscus, that was supposedly removed by Dr. Thomas-Richards, had been left in the knee; (2) the anterior cruciate ligament, that Deputy Torrence consented to have repaired, was missing; and (3) Deputy Torrence will need a total knee replacement in the future.

On October 22, 1998, G. Scott Drumheller, M.D., performed arthroscopic surgery on Deputy Torrence's left knee and a partial medial meniscectomy, chondroplasty, and synovectomy. On August 1, 2000, Chaim Arlosoroff, M.D., operated on Deputy Torrence's left knee to remove “painful retained hardware.” [Dr. Arlosoroff's Operative Report, dated August 1, 2000, p. 2-3] Dr. Arlosoroff removed “an Athrotek staple with four metal prongs and a metal screw. The screw was loose and was removed with a small fragment screwdriver. The staple was well adhered and had to be removed by working around it with a small curet and an osteotome. . . . and [removed it] with some bone which was adhered in between the four prongs.” [Dr. Arlosoroff's

Operative Report, dated August 1, 2000, p. 4] Dr. Thomas-Richards had placed this “hardware” in Deputy Torrence’s knee in 1998.

Deputy Torrence went to Richard Weiner, M.D., on September 5, 2000, for a follow-up to Dr. Weiner’s May 5, 2000, evaluation. Dr. Weiner diagnosed Deputy Torrence to have “left knee arthritis” related to “direct joint cartilage injury and ACL disruption further aggravated by fixation affecting the patellofemoral joint and ACL surgery post-op immobilization in flexion which resulted in a permanent flexion contracture of the knee.” [Dr. Weiner’s Narrative Report, dated September 5, 2000, p. 2] Dr. Weiner also stated: “He will need a total knee replacement in the future and the exact timing will depend on the patient’s desires based on his understanding of the risks vs. benefits as well as his tolerance of arthritic symptoms. . . . Considering the severity of disease, the patient may be a candidate for a total knee replacement in a very short period of time (less than one year). Total costs for total knee replacement would be about \$45,000-\$50,000. Revision surgery may be necessary and currently costs about the same. I would estimate the revision in about 15 to 20 years. He cannot do his job now or with a total knee replacement based on the job description from the Sheriff’s Office. He could only do light or restricted duty.” [Dr. Weiner’s Narrative Report, dated September 5, 2000, p. 2]

An orthopedic expert, Richard Laskin, M.D., hired by Deputy Torrence’s attorney, reviewed Deputy Torrence’s medical records and concluded that the surgery performed on Deputy Torrence has been considered below the standard of care in the United States for the past 20 years. Dr. Laskin stated that most orthopedic surgeons would have performed this surgery arthroscopically. He further concluded that the outdated surgery was improperly performed and that it was improper to immobilize the knee following the surgery.

Financial Losses—Employment Compensation

Bernard F. Pettingill, Jr., Ph.D., an economist hired by Deputy Torrence’s attorney, prepared a present value analysis of Deputy Torrence’s financial losses resulting from the actions of Dr. Thomas-Richards. Dr. Pettingill found that prior to the surgery performed by Dr. Thomas-Richards,

Deputy Torrence was employed as a deputy sheriff at Pay Grade 19, Step 7 earning a base salary of \$39,072 annually. Had he been able to continue in his career, Deputy Torrence potentially could have increased his base salary to \$44,592 annually. The highest pay grade for a career deputy sheriff in the Palm Beach County Sheriff's Office is Pay Grade 33, Step 10, paying a base salary of \$60,684 annually.

Due to his physical limitations, Deputy Torrence has been reassigned to the position of control room operator, Pay Grade 13 (a pay grade on Payscale #7 that is assigned to various records management personnel), at the Palm Beach County Sheriff's Office. He earns \$34,344 annually as a control room operator. No promotion is possible for the control room operator position. Deputy Torrence, as a control room operator, will be eligible only for cost of living adjustments, estimated at 2.4 percent annually, in the future and loses the ability to pursue other financial incentives that were available to him for career advancement as a deputy sheriff.

The lifetime loss of earnings that Dr. Pettingill calculated on Deputy Torrence's behalf is based on “. . . the differential between the grade and step increases which the deputy would have realized had the incident not occurred, versus his current position as a control room operator with 2.4 percent increases for cost of living adjustments only. A second element of damages includes the monthly career salary incentive pay of \$120 per month for courses he would normally complete. Therefore, the lifetime loss of earning capacity is based initially on the difference between \$39,072 and \$34,344 or a loss annually of \$4,728.” Dr. Pettingill concluded that \$858,720 is the present value of the funds needed, as of October 5, 2000, in order to compensate for the loss to Deputy Torrence.

Lawsuit

Attorneys for Deputy Torrence filed a lawsuit in February 2000, against the Palm Beach County Health Care District. It alleges that the surgery performed by Dr. Thomas-Richards was negligent and caused the injuries and damages suffered by Deputy Torrence. On October 27, 2000, Deputy Torrence and the Palm Beach County Health Care District agreed to settle all claims arising from the

surgery performed by Dr. Thomas-Richards. On October 31, 2000, an Order of Voluntary Dismissal with Prejudice was issued by a Palm Beach County circuit court judge.

Settlement Agreement

On November 3, 2000, Deputy Torrence and the Palm Beach County Health Care District signed a settlement agreement, memorialized in a document titled *General Release of All Claims*. The agreement states, in part: “. . . . this settlement is a compromise of a doubtful and disputed claim, and that the payment or other consideration referenced above are not to be construed as an admission of liability or obligation by the Palm Beach County Health Care District, by whom liability or obligation is expressly denied.” The Health Care District agreed to pay Deputy Torrence \$100,000 and not to oppose or contest a legislative claim bill seeking an additional \$400,000 in exchange for his release of the Health Care District from all future claims related to the allegations of negligence or medical malpractice or any incidents alleged in, or giving rise to the lawsuit he had filed and that was dismissed on October 31, 2000.

The agreement provides that the Health Care District will pay Deputy Torrence \$100,000 within 10 days of its execution (payment was made on November 3, 2000), which sum is the maximum the Health Care District may lawfully pay under the state’s sovereign immunity law without further action of the Legislature. The agreement further provides acknowledgement that Deputy Torrence will seek an additional \$400,000 from the Palm Beach County Health Care District through the legislative claim bill process. The agreement authorizes a representative of the Health Care District to stipulate that the Palm Beach County Health Care District does not contest, object to, or lobby against the passage of the claim bill and agrees to the settlement amount.

CONCLUSIONS OF LAW:

Each claim bill must be based on facts sufficient to establish liability and damages by a preponderance of the evidence. This is true even for a claim bill in which the parties have entered a settlement agreement.

Deputy Torrence, an employee of the Palm Beach County Sheriff's Office, injured his left knee while performing work-related duties checking an inmate's cell. After obtaining emergency room treatment immediately following his accident, he later sought treatment from Dr. Jose Thomas-Richards pursuant to a referral from his employer's workers' compensation carrier.

Duty and Breach

Dr. Thomas-Richards had a duty to exercise reasonable care under all the surrounding circumstances in his care and treatment of Deputy Torrence's injuries. Dr. Thomas-Richard had a duty to provide care which was consistent with the prevailing professional standard of care, as was recognized as acceptable and appropriate by reasonably prudent similar health care providers. Dr. Thomas-Richards failed in complying with his duty of care by not performing the surgery to which Deputy Torrence had consented to have performed, and by using an outdated technique on Deputy Torrence that has been deemed to be substandard by the medical community for the past 20 years, since the early 1980's.

Causation

Deputy Torrence twisted his left knee at work in which he tore his medial meniscus and tore the anterior cruciate ligament in that knee. His employer's workers' compensation carrier referred him to Dr. Thomas-Richards. He authorized, through his written consent, Dr. Thomas-Richards to operate on his injured knee by performing a mini-arthrotomy. Dr. Thomas-Richards did not perform a mini-arthrotomy; instead, he performed either a Jones technique or a modified Jones technique that left a 14-inch scar and improperly immobilized Deputy Torrence's knee following surgery. Dr. Thomas-Richards is the proximate cause of additional physical injury to Deputy Torrence's left knee, compounding and aggravating the work-site injuries for which the deputy was being treated, as a consequence of the surgical procedures he performed on Deputy Torrence on June 23, 1998, at Glades General Hospital and the use of the knee immobilizing brace for 4 weeks post-operatively.

Liability

The Palm Beach County Health Care District is vicariously liable for the actions and inactions of Dr. Thomas-Richards with respect to the care and treatment he rendered to Deputy Torrence. As an employee of an entity that is shielded by sovereign immunity, Dr. Thomas-Richards may not be held to be individually liable for ordinary negligence.

Damages

Based on treatment and evaluation of Deputy Torrence by three physicians who have worked to repair the original injuries and the injuries caused by Dr. Thomas-Richards, Deputy Torrence has been declared incapable of performing the tasks and duties of a deputy sheriff. One doctor who evaluated Deputy Torrence has also stated that he will not be able to perform the tasks and duties of a deputy sheriff with a total knee replacement. This was not a foregone outcome of his original injury had it been properly addressed. He has been reassigned as a control room operator, a position that pays less, offers only cost of living adjustments for salary enhancement, and currently offers no avenues for career advancement.

Deputy Torrence has been injured in and about his body, suffered aggravation of pre-existing conditions, pain and suffering, disability, mental anguish, loss of enjoyment of life, disfigurement, loss of earnings and earning capacity, and medical expenses in the care and treatment of the injuries, caused by the actions of Dr. Thomas-Richard, an employee of the Palm Beach County Health Care District. All of these injuries are permanent.

ATTORNEYS FEES:

Section 768.28(8), F.S., provides a statutory limit on attorney's fees. Specifically, it states that when a case involves waiver of sovereign immunity and a claim bill for an equitable claim or an excess judgment is passed, no attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement.

Deputy Torrence's attorney submitted a copy of the signed agreement for payment of the standard contingency fee, based on a schedule of fees authorized and approved by the

Florida Supreme Court. The attorney, according to a statement submitted in response to the Special Master's inquiry about attorney's fees, is charging 25 percent of the settlement amount, as provided for in statute.

RECOMMENDATIONS:

I recommend that the Senate amend Senate Bill 74 to authorize the Palm Beach County Health Care District to pay the amount of \$400,000 to Deputy James Torrence, as provided for in the settlement agreement he entered into with the Health Care District on November 3, 2000. The monetary amount appears to be an adequate amount to ensure that Deputy Torrence will have the funds needed to pay for the future surgery that he will need and to provide a portion of lost compensation due to his job reassignment because of his permanent medical disability resulting from his care under Dr. Thomas-Richards. Neither the settlement agreement nor the economist's analysis of lifetime loss provide for non-economic damages such as mental pain and anguish, disfigurement, loss of enjoyment of life, or disability and inconvenience. On November 3, 2000, the Health Care District paid Deputy Torrence \$100,000. Therefore, the total amount of this claim would be \$500,000.

Accordingly, I recommend that Senate Bill 74 be reported FAVORABLY AS AMENDED.

Respectfully submitted,

Wanda E. Carter
Senate Special Master

cc: Senator Betty Holzendorf
Faye Blanton, Secretary of the Senate
House Claims Committee