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SPECIAL MASTER'S FINAL REPORT

The Honorable Tom Feeney
Speaker, The Florida House of Representatives
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: HB 509 - Representative Attkisson
Relief of Towanna Denise Hopkins and Robert Bowman

THIS \$3,693,896 CLAIM IS AN EQUITABLE CLAIM, SUPPORTED BY A SETTLEMENT AGREEMENT IN WHICH THE BOARD OF REGENTS AGREED TO COMPENSATE THE CLAIMANT AND HER FAMILY FOR SEVERE AND PERMANENT INJURIES SUSTAINED IN AN INCIDENT OF MEDICAL MALPRACTICE.

FINDING OF FACT:

In January 1996, Towanna Hopkins had a computerized axial tomography (CT) scan which revealed a liver mass. Dr. Donald Temple, a surgeon for removal of a liver tumor, saw Ms. Hopkins. Dr. Temple performed surgery on February 27, 1996, and discovered that the mass was significantly larger than expected and Dr. Temple decided to refer Ms. Hopkins to a more experienced surgeon to remove the mass because of its size and vascularity. On April 1, 1996, Ms. Hopkins was referred to Dr. Michael Albrink who provided care at the University of South Florida Clinic and scheduled Ms. Hopkins for a left lobe liver resection at Tampa General Hospital. The procedure was highly specialized and had a potential complication of blood loss. Although malignancy could not be ruled out, Dr. Albrink testified that the tumor was removed because it gave Ms. Hopkins pain and she wanted it removed.

Dr. Albrink was on staff at the University of South Florida College of Medicine and Dr. Reinhard Rott, his chief resident, a fifth year resident who assisted with Ms. Hopkins surgery, was also associated with the University of South Florida. Dr Albrink and the University of South Florida medical school residents were agents of the State of Florida, Board of Regents by and through the University of South Florida College of Medicine.

On April 25, 1996, Dr. Albrink and Dr. Rott performed a left hepatic lobectomy in which Ms. Hopkins lost two and one half liters of blood, about half her blood volume before the surgeons actually divided her liver. The average adult has five liters of blood in his or her body and according to Dr. Albrink at this stage of surgery, the patient usually has lost less than a liter of blood. Ms. Hopkins lost a total of 21 liters of blood during the liver resection. At one point, Dr. Albrink tied off the main hepatic artery for about 20 minutes before he realized that he tied off the wrong vessel. A later biopsy showed that the liver mass was cirrhotic tissue but not cancerous or life threatening.

After her surgery, Ms. Hopkins was placed in the intensive care unit. Dr. Albrink left Ms. Hopkins' in the care of his chief resident, Dr. Rott, and a third-year resident, Dr. Blaine Nease. Dr. Nease, the junior resident, primarily provided Ms. Hopkins' post-surgical management. Drs. Nease and Rott treated Ms. Hopkins by giving her blood and blood products. Between late afternoon and about 11:30 p.m., Ms. Hopkins showed signs of post-operative bleeding in the intensive care unit. Lab studies taken at 11:30 p.m. and as late as 1:55 a.m. revealed that Ms. Hopkins was still bleeding, primarily due to surgical bleeding. Dr. Nease communicated his concern about Ms. Hopkins' condition to Dr. Rott. Dr. Rott indicated that he would decide what to tell Dr. Albrink, the attending physician. During the course of the night, clinical examinations and lab studies revealed that Ms. Hopkins was losing blood, even though Dr. Nease gave the patient blood and blood products. Dr. Albrink was never called during the evening or early morning hours to be apprised of his patient's condition. Despite continuing efforts, Ms. Hopkins' condition worsened and the resident staff was unable to keep up with the bleeding. In deposition testimony, Dr. Albrink notes that he should have been advised by the residents about Ms. Hopkins' condition and admits that he would have taken the patient back to surgery between midnight and 7 a.m., if he was aware of the deterioration of her condition.

Under accepted communication protocols, the residents should have advised Dr. Albrink, the attending physician about Ms. Hopkins' deteriorating condition during the evening and early morning hours of April 26. At about 7 a.m. on April 26, 1996, Dr. Albrink was notified by the residents that Ms. Hopkins had been unstable over the night and that her ability to clot blood was impaired but advised that she had become stable again. By 9 a.m. on April 26, 1996, Dr. Albrink reviewed Ms. Hopkins' records, and recognized signs of the patient's ongoing bleeding. The patient's hemoglobin and hematocrit had dropped in spite of blood volume transfusions, her abdomen was distended, and her urine output was very low. At this point, Dr. Albrink realized that Ms. Hopkins was in critical condition and needed surgery to alleviate her bleeding. Dr. Albrink planned to perform an emergent exploration to resolve her bleeding but Ms. Hopkins was placed on the surgery

schedule at the end of his elective cases. "Emergent" is a recognized protocol of medical personnel to connote an immediate and threatening condition. Dr. Albrink did not operate on Ms. Hopkins until 1:30 p.m. on April 26, 2000 after he finished an elective surgery on another patient.

After induction of anesthesia, Ms. Hopkins suffered a cardiac and respiratory arrest during the surgery. Ms. Hopkins suffered profound and severe brain damage. Dr. Albrink discovered the site of the surgical bleeding which was a relatively simple repair. At age 31, Ms. Hopkins sustained injuries that have left her permanently and totally disabled. She cannot communicate and care for herself. She remained at Tampa General Hospital until she was moved to University Village Nursing Home on July 5, 1996 where she requires continuous nursing care. Ms. Hopkins is in a semi-comatose and minimally conscious state and is totally dependent for care. She is incontinent and receives feeding through a stomach tube. Ms. Hopkins has also received therapy in an effort to prevent contractures (involuntary tightening and shortening of muscles). The claimants presented evidence of the total economic loss of the claimant by an economist retained by the claimants. The past economic damages are estimated at \$210,153 (does not include past medical expenses). Future lost income is estimated at a minimum of \$1,050,454. Loss of support and services to Robert Bowman, Jr., Ms. Hopkins' son, is valued at \$50,799. The present value of future medical costs for 25 years is at a minimum estimated to be \$6,638,463 if Ms. Hopkins is cared for at home and \$5,484,720, if Ms. Hopkins is cared for in a facility. Total economic damages are at \$7,958,869 and do not include noneconomic damages.

The claimants presented two models showing the total economic loss of the claimants, in a life care plan structured by experts retained by the claimants. Ms. Hopkins has a 25-year life expectancy. Life expectancy for persons in a persistent vegetative state is markedly diminished due to problems such as contractures, infections, non-ambulatory status, tube feeding and the lack of the ability to communicate. According to Brenda Mulder, an economist retained by the claimants, Ms. Hopkins' present value of future economic damages is estimated to be between \$8.5 million and \$9 million if she were to be cared for at home, and between \$4.6 million and \$5 million if she were to remain in a residential setting. There is a lack of consensus on whether Ms. Hopkins should be cared for at home by her family. Ms. Hopkins currently receives care in a nursing home. In deposition testimony, a rehabilitation expert retained by claimants, Rodolfo Eichberg, M.D., testified that it is the family's decision as to whether or not they want to take her home. The report of Jane Mattson, Ph.D., another rehabilitation expert retained by the claimants, believes it would be inappropriate to consider bringing Ms. Hopkins to her father's home because her parents are aging and her son is about to be on his own; in her opinion a home program does not meet Ms. Hopkins' needs. Additionally, Ms. Hopkins may

lose Medicaid eligibility for certain services that are only reimbursed in an institutional setting. Despite these financial constraints and the experts' recommendations, her family strongly wishes to bring her home either on a full-time or part-time basis.

The claimants presented deposition testimony regarding the causation of Ms. Hopkins' injuries. Dr. Albrink, the attending physician, who was responsible for her post-surgical management, testified that the residents involved should have advised him of the deterioration of Ms. Hopkins' condition. Although it was unclear whether the patient's bleeding was due to her failure to clot, surgical bleeding, or both, Dr. Albrink testified that if he had been aware of her condition that he would have taken measures to counteract her bleeding so that, within reasonable probability, she would not have suffered a cardiac arrest and resulting brain damage. The claimants also presented expert testimony by liver surgeons that the physicians who treated Ms. Hopkins failed to get her back into surgery earlier and to take measures to counteract her bleeding and that their failure to do so resulted in care which fell below the applicable standard of care for these physicians. One surgical expert opined that if she had been taken back to surgery during the early morning of April 26th that more likely than not she would have recovered without the brain damage and other complications.

The respondent presented testimony of an expert who is a liver surgeon that Ms. Hopkins would have had a similar clinical outcome regardless of when she was taken back to surgery to correct the bleeding.

Suit was filed in the circuit court of Hillsborough County against Humana Medical Plan, Humana Inc., State of Florida Board of Regents, Tampa General Hospital, and Dr. Donald F. Temple, M.D. The court granted the motion for final summary judgment for Tampa General Hospital and the claimant reached settlement agreements with Dr. Temple and Humana, Inc. and Humana Medical Plan.

On July 19, 2000 the claimants entered into a settlement agreement with the Florida Board of Regents, the University of South Florida Health Sciences Center Insurance Company and the University of South Florida for a total sum \$3,693,896, with \$333,333 for the claimant, Robert Bowman, Jr., and his attorney, for past and future damages arising out of the injuries sustained by his mother; \$3,260,563 for the claimant, Willie Lee Hopkins, father and guardian of Towanna D. Hopkins; and \$100,000 for the claimant Willie Lee Hopkins, for purposes of compensating him for past and future expenses in taking care of Ms. Hopkins, within 10 days after the effective date of the claim bill. The settlement agreement is contingent on the passage of a claim bill authorizing payment. The settlement agreement provides that if a claim bill is not passed to become effective as of July 1, 2001, the agreement can be rendered

null and void and any party to the agreement may petition the court to reinstate the lawsuit. The court entered an order that approved the settlement between the claimants and the Board of Regents and stayed any further proceedings pending the passage of the claim bill and payment of the settlement funds. The court order also provided that if a claim bill is not passed and the settlement funded by July 15, 2001, then either party may file a motion to lift the stay.

The respondents did not admit liability. As part of the settlement, the Florida Board of Regents, the University of South Florida Health Sciences Center Insurance Company and the University of South Florida has agreed to support the passage of the claim bill. The initial \$200,000 of the claim is to be paid by a trust fund established by the University of South Florida Health Sciences Center specifically for the purpose of resolving malpractice claims of this nature. The University of South Florida Health Sciences Center Insurance Company, Ltd. shall pay the remaining amounts of the settlement and will be reimbursed for any amount in excess of \$1,000,000 by reinsurance companies and by Underwriters at Lloyds of London. The University of South Florida Health Sciences Center Insurance Company, Ltd. is entitled to indemnification for those amounts that it pays for a claim bill against the Board of Regents for the State of Florida.

The Board of Regents established the University of South Florida Health Sciences Center Insurance Company, a self insurance program in 1995. The current asset balance of the self-insurance program is \$14,987,251.33. The University of South Florida has the assets in accounts to make payment of this claim up to \$1 million.

To protect the funds to be paid by the respondent, the Florida Board of Regents, the University of South Florida Health Sciences Center Insurance Company and the University of South Florida, and to insure their proper expenditure, the circuit court has established a guardianship with Willie Hopkins, the natural father of Towanna D. Hopkins, acting as guardian. The court has retained jurisdiction over the expenditures from the account.

To preserve Ms. Hopkins' eligibility for public assistance benefits, including Medicaid, the court has authorized the establishment of and funding of an irrevocable special needs trust. Willie L. Hopkins, Ms. Hopkins' father has been appointed trustee of the trust. The trust is irrevocable during Ms. Hopkins' lifetime, and at her death will reimburse the Florida Agency for Health Care Administration for all funds expended by or through that agency for her lifetime care. The net balance will be distributed to Ms. Hopkins' estate. The court has retained jurisdiction to oversee expenditures from the trust fund. On August 18, 2000, the claimants paid \$96,774.88 to the Florida Agency for Health Care Administration to discharge a Medicaid lien for care and treatment rendered to

Ms. Hopkins up through February 25, 2000.

CONCLUSION OF LAW:

The claimants have established by a preponderance of evidence that the respondent's agents, the resident and attending physicians, owed Ms. Hopkins a duty of care, that their applicable duty to Ms. Hopkins was breached, and that claimant's injuries and damages were a proximate and foreseeable result of that breach. As in many cases of this nature, the various named defendants shared responsibility for the result, and although reasonable people might disagree with the allocation of the responsibility among the defendants, I find that the sum to be paid by the respondent, the Florida Board of Regents, the University of South Florida Health Sciences Center Insurance Company and the University of South Florida, is supported by the evidence against it, in light of all circumstances.

ATTORNEYS FEES:

The attorneys for the claimant have provided an affidavit to the effect that the fees will be limited to 25 percent of all gross amounts paid or to be paid by the respondent, either before or after the claim bill is enacted into law.

RECOMMENDATIONS:

House Rule 5.7(c) provides:

The hearing and consideration of a claim, any element of which is pending in litigation, shall be held in abeyance until all judicial activity thereon, including any appellate proceedings, shall have come to rest.

The litigation underlying this bill is currently stayed pending the outcome of this claim bill process. If the claim bill does not become law, either party can file a motion to lift the stay. The House should consider whether it believes litigation that is stayed pending the outcome of a claim bill has "come to rest." The special master proceedings in this case occurred before the enactment of this Rule.

If the House finds that the claims bill can go forward, I recommend the bill be reported favorably. Because settlement agreements are sometimes entered into for reasons that may have very little to do with the merits of a claim or the validity of a defense, settlement agreements between the parties to a claim bill are not necessarily binding on the Legislature or its committees. However, all such agreements must be evaluated. If found to be reasonable and based on equity, then they can be given effect, at least at the Special Master's level of consideration. Because there is a confidential settlement agreement with at least two other defendants in this case, the net amount to actually be received by the claimant cannot be determined.¹ Thus, it is unknown whether the amount

¹ The claimants settled with Donald L. Temple for \$250,000. At hearing, the claimant's attorneys voluntarily disclosed that during mediation the range of the settlement negotiated with Humana, Inc., the other defendant in the case, was between \$500,000 and \$4 million.

contemplated in the bill will, in fact, adequately and appropriately compensate the claimant. Nevertheless, it seems inequitable to penalize any claimant with an unfavorable recommendation based on the receipt of other funds pursuant to a confidential agreement, where as in this case, the range of the settlement amount is known. I find that any amount within the stated range of the confidential agreements, even when added to the claim bill amount is reasonable and just compensation for the injuries suffered by this claimant and her family. Accordingly, I recommend that HB 509 be reported favorably.

Respectfully submitted,

L. Michael Billmeier
House Special Master

Stephanie Birtman
Staff Director

cc: Representatives Attkisson and Murman
Senator Campbell, Senate Sponsor
Barry Munroe, Senate Special Master
House Claims Committee