THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
12/1/01	SM	Fav/1 amendment
	HC	
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December 1, 2001

The Honorable John M. McKay
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 10 (2002)** – Senator Alex Villalobos
HB 61 – Representative Jack Seiler
Relief of Mark Schwartz

SPECIAL MASTER'S FINAL REPORT

THIS IS AN EQUITABLE CLAIM FOR $400,000 BASED ON A CONSENT FINAL JUDGMENT SUPPORTED BY A SETTLEMENT AGREEMENT IN WHICH THE NORTH BROWARD HOSPITAL DISTRICT D/B/A THE CORAL SPRINGS MEDICAL CENTER AGREED TO COMPENSATE THE CLAIMANT FOR INJURIES SUFFERED DURING AN INCIDENT OF MEDICAL NEGLIGENCE.

FINDINGS OF FACT:

This case involves an incident of medical negligence occurring during the birth of Mark Schwartz, the second child born to parents Larry and Lori Schwartz. Mrs. Schwartz had previously undergone a cesarean section (c-section) during the birth of her first child, and, as a result, her care required greater monitoring. The medical standard of care in the United States for a patient who previously has had a c-section is to attempt a "trial of labor." If during the "trial of labor," the child fails to progress to delivery, the physician should perform a c-section. Mrs. Schwartz was classified a M.D.-only patient, and thus, only a doctor, not a certified nurse midwife (C.N.M.), was permitted to deliver her.

On April 29, 1997, 4 days before Mrs. Schwartz' May 3, 1997 due date, she and her husband went to the Coral Springs Medical Center emergency room, located in the North Broward Hospital District (NBHD), at approximately 4:46 a.m. Mrs. Schwartz was in labor and her condition was initially monitored by Julie Straight, C.N.M. Violet Farquharson, R.N., a labor and delivery nurse employed by the NBHD since 1989, took over the care of Mrs. Schwartz at approximately 7:00 a.m. Also monitoring Mrs. Schwartz was Kathy Fair, C.N.M. Nurse Farquharson was assigned exclusively to Mrs. Schwartz, while Nurse Fair was monitoring Mrs. Schwartz and another patient.

At 7:44 a.m., Mrs. Schwartz's membranes ruptured and clear fluid came out, which indicated that the child was not in fetal distress at that time. "Meconium-stained" amniotic fluid would have signaled fetal distress. At this time, Mrs. Schwartz was completely dilated and was having contractions every 2 to 3 minutes. Mark's head, however, was not progressing down the birth canal.

At 8:25 a.m., due to the baby's lack of progress, Nurse Fair ordered that Mrs. Schwartz be given Pitocin, a drug that is used to induce labor or increase the strength or duration of contractions. Pitocin requires close monitoring and can cause adverse effects, such as decreasing uterine blood flow, which in turn can reduce oxygen to the baby. Nurse Farquharson administered the Pitocin.

At 10:20 a.m., Dr. Kraemer, Mrs. Schwartz's obstetrician, called Nurse Farquharson, to check on Mrs. Schwartz. Nurse Farquharson advised the doctor that Mrs. Schwartz was okay and had begun pushing.

At 10:30 a.m., the baby began an approximately 8-minute period of mild to moderate bradycardia, and at 10:54 a.m., the baby began having variable decelerations in heart rate.[1] In response to the variable decelerations, Nurse Farquharson repositioned Mrs. Schwartz and gave her oxygen. From this time onward, the baby continued to have accelerations and variable decelerations.

[1] The baby's heart rate was monitored by a fetal monitor strip. This strip enables a labor and delivery nurse to determine if the fetal heart rate is reassuring or non-reassuring. A non-reassuring heart rate pattern is indicative of fetal distress that can result in brain injury or death, unless emergency measures, such as an immediate c-section, are performed.

At approximately 11:30 a.m., the fetal monitor showed repetitive variable decelerations, a pattern that is considered non-reassuring, and, thus, indicative of fetal distress. At approximately noon, the fetal monitor showed prolonged decelerations, a pattern that again is considered non-reassuring. At 12:10 p.m., the baby went into severe bradycardia, and Nurse Farquharson discontinued the Pitocin.

Dr. Kraemar was never advised of the non-reassuring fetal monitor strips until 12:20 p.m., when Nurse Fair called him. After receiving this information, Dr. Kraemar immediately went to the hospital, where he arrived at 12:31 p.m., Dr. Kraemar stated during his deposition that he told Nurse Fair during their telephone conversation that he would initially attempt to deliver the baby with forceps, and that if that procedure did not work, he would immediately perform a c-section.

At 12:31 p.m., Dr. Kraemar examined Mrs. Schwartz and unsuccessfully attempted to deliver the baby with forceps. At approximately 1:00 p.m., Mrs. Schwartz was taken to the operating room for a c-section. The c-section was not performed until 1:12 p.m., because the room was not ready. The baby was delivered at 1:20 p.m.

At the time of delivery, the baby was cyanotic, depressed, flaccid, and poorly responsive. He required resuscitation and ventilation, and was admitted to the neonatal intensive care unit for respiratory distress. He had seizures at the age of 18 hours. On days 2 and 3, he had severe metabolic acidosis, elevated enzymes, and renal failure.

Dr. Steven Clark, an expert in Maternal Fetal Medicine, stated during his deposition that the nursing care provided to Mrs. Schwartz violated numerous standards of care. First, the Pitocin should not have been continued after the time of 10:30 a.m., when the baby experienced a prolonged period of bradycardia. Second, Nurse Farquharson should have notified Dr. Kraemer at 11:30 a.m., that the baby was experiencing a non-reassuring pattern of variable decelerations in heart rate, and that the doctor needed to come evaluate Mrs. Schwartz immediately. Third, there should have been no delay in setting up the c-section room for Mrs. Schwartz.

Dr. Mark Epstein, an expert in Pediatric Neurology who first examined Mark when he was 1-day old and periodically thereafter, stated during his deposition that Mark's permanent neurological injuries were caused by hypoxic ischemic encephalopathy, which resulted from a decrease in blood and/or oxygen flow to the brain during delivery. Dr. Epstein further stated that Mark has poor head control, has spastic quadraperisis, has a depressed immune system, and cannot speak, walk or think. According to the doctor, Mark, at the age of 3 years old, approximately had the cognitive ability of a 6 month old. The doctor does not believe Mark's cognitive and motor skills will ever progress in any significant fashion. Mark's life expectancy is 20 to 30 years.

LEGAL PROCEEDINGS:

On March 3, 1999, Mr. and Mrs. Schwartz filed suit on behalf of themselves, individually, and as guardians of Mark in the circuit court for Broward County against the Humana Medical Plan; Elihu Kraemer, M.D., individually; Kraemer and Zafran, P.A.; Kathy Fair, C.N.M.; Julie Straight, C.N.M.; and the NBHD. Prior to trial, the suit against Nurse Straight was summarily dismissed. Mr. and Mrs. Schwartz entered into settlement agreements with the remaining parties, which provided for a total of $7.62 million in compensation. The settlement share of each party was: (a) $6.75 million from the Humana Medical Plan and Kraemer and Zafran, P.A.; (b) $20,000 from Elihu Kraemer, M.D.; (c) $250,000 from Kathy Fair, C.N.M.; and (d) $600,000 from the NBHD. After payment of medical liens and attorney fees and costs, Mark received $4,015,945, and Mr. and Mrs. Schwartz received $1,520,000 from the total $7.62 million settlement.[2] An annuity was purchased for Mark with $2.6 million of his proceeds.

The settlement agreement between the claimants and the NBHD provided that the NBHD would pay the claimants $200,000 at the time of approval of the settlement by the circuit court, and $400,000 at the time of approval of a claim bill by the Legislature. The $400,000 is to be paid by the NBHD's Self Insured Trust. The NBHD further agreed to pay six percent simple interest per annum from the date of court approval of the settlement until the passage of the

[2] These figures include the $600,000 settlement amount from the NBHD; however, to date, only $200,000 of this amount has been paid to the claimants. The remaining $400,000 is the subject of this claim bill.

claim bill or for 2 years, whichever is shorter. Finally, the settlement agreement provided that the NBHD would take a pro-active interest in passage of the claim bill, and would hire a lobbyist to facilitate its passage.

A Guardian Ad Litem (GAL) reviewed the settlement agreement between the claimants and the NBHD, and issued a report dated November 29, 2000. The GAL found that the settlement amount of $600,000 was fair and appropriate, and would provide some of the funding necessary to support and care for Mark throughout his lifetime. The GAL recommended that the net settlement proceeds, after payment of plaintiff's attorney fees and costs, be placed into a guardianship account for Mark.

On November 30, 2000, the circuit court in Broward County entered a consent judgment approving the settlement agreement. The court records also reflect the establishment of a guardianship account for Mark. Mark's settlement proceeds that remained after the purchase of the annuity were placed in to his guardianship account. The monthly annuity payments are also paid to his guardianship account.

The named guardians for the account are Mark's parents, Lori and Larry Schwartz. Under court direction, funds are periodically placed into a guardianship checking account, which provides Mark's parents with funding for Mark's daily expenses. An accounting for the checking account must be completed at the end of each year.

Because settlements 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, stipulations or settlement agreements between the parties to a claim bill are not necessarily binding on the Legislature or its committees, or on the Special Master assigned to the case by the Senate President. 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.

CONCLUSIONS OF LAW:

Liability: Notwithstanding whether there is a settlement agreement, as there is here, every claim bill must be based upon facts sufficient to meet the preponderance of the evidence standard. In order for the claimants to prevail in

their case against the NBHD, it was necessary for them to show that Mark's injuries were proximately caused by negligent care received from employees or agents of the district acting within the course and scope of their employment.

In this case, it is clear that the nursing care provided by employees of the NBHD was within the course and scope of their employment and was negligent based on the numerous violations of standards of care. First, the Pitocin was not timely discontinued. Second, Dr. Kraemer was not timely notified that non-reassuring heart rate patterns were occurring. Third, the c-section room was not timely prepared. Further, it is clear from the evidence that Mark's physical injuries were proximately caused by the negligence. Due to the delays, Mark suffered decreased blood and/or oxygen flow to his brain, which resulted in his permanent neurological injuries. Accordingly, each element of liability has been proven to the Special Master's satisfaction.

Damages: The evidence demonstrated that Mark now suffers from permanent neurological damage that causes him to have poor head control, spastic quadraperisis, a depressed immune system, and an inability to speak, walk or think. Mark's life expectancy is 20 to 30 years.

A rehabilitation expert retained by the claimants completed a life care plan for Mark. The plan indicates that Mark throughout his lifetime will require: general medical, gastroenterological, ophthalmological, dental, audiology, orthopedic and neurological care; medical x-rays and tests; medications; occupational and physical therapy; psychosocial therapy; registered dietician evaluation; special education; and 24-hour general care. Additionally, Mark may need surgery. Mark's family will require education and counseling in providing Mark's care, and Mark's home will require modifications, such as a roll-in shower, wider doorways and hallways, and ramps. For transportation purposes, Mark's family will also need a specially equipped van.

The estimated costs for Mark's care were based on two models. The first model provided for Mark's lifetime care in his family's home with a Licensed Practical Nurse's assistance. The second model provided for Mark's care in a

family home until age 21, and in a group home for the remainder of his life. Using these models, the estimated present value of Mark's future medical care ranged from $5.3 million should he live to 20 to $8.6 million should he live to age 30.

Currently, some of Mark's medical expenses are covered by his family's health insurance, which is provided by the Well Care Health Maintenance Organization (HMO). Expenses not covered by the HMO are paid with Mark's guardianship funds.

I find that the settlement amount of $400,000 from the NBHD, which is now the subject of this claim bill, is reasonable and supported by a preponderance of the evidence. This amount combined with the settlement amounts received from the collateral parties and with the HMO coverage should provide adequate funding to care for Mark's needs during his lifetime. Further, the use of a guardianship account will protect the funds from inappropriate use. Finally, the $400,000 will be paid by the NBHD's Self Insured Trust, and will not jeopardize any county programs or require a tax increase.

Post-Judgment Interest: In the settlement agreement, the NBHD agreed to pay six percent post-judgment interest until passage of the claim bill. However, since the award could not be paid without further act of the Legislature, as required by s. 768.28, F.S., the respondent should not have to pay interest on a judgment that they could not satisfy but for the passage of a claim bill.

ATTORNEYS FEES: The claimant's attorney has provided documentation indicating that attorney fees are capped at 25 percent in accordance with s. 768.28, F.S.

RECOMMENDATIONS: I recommend that Senate Bill 10 be amended to specify that the $400,000 payment be made out of the NBHD's Self Insured Trust.

Accordingly, I recommend that Senate Bill 10 be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

Tina White
Senate Special Master

cc: Senator Alex Villalobos
Representative Jack Seiler
Faye Blanton, Secretary of the Senate
Tonya Chavis, House Special Master