



THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
12/1/01	SM	Favorable
	FT	

December 1, 2001

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

Re: **SB 8 (2002)** – Senator Walter "Skip" Campbell
HB 187 – Representatives Attkisson and Meadows
Relief of Towanna Hopkins, by and through Willie Hopkins,
her father and legal guardian, and Robert Bowman, Jr.

SPECIAL MASTER'S FINAL REPORT

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.

FINDINGS 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 that night, 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, and as the chief resident, 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.

EXPERT TESTIMONY:

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.

CONCLUSIONS OF LAW:

The claimants have established to my satisfaction, 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.

THE SETTLEMENT:

Prior to trial, suit was filed in the Circuit Court of Hillsborough County against Humana Medical Plan, Inc., a/k/a Humana Health Plan of Florida, Inc.; Humana Inc.; State of Florida Board of Regents; Hillsborough County Hospital Authority d/b/a Tampa General Hospital; Donald F. Temple, M.D., and Donald F. Temple, M.D., P. A.

The Circuit Court in Hillsborough County granted the motion for final summary judgment for Hillsborough County Hospital Authority d/b/a Tampa General Hospital on May 1, 2000. The Circuit Court in Hillsborough County approved a joint stipulation between the parties and dismissed with prejudice the claim against Dr. Temple and his professional association, Donald F. Temple, M.D., P.A., on July 21, 2000. The Circuit Court in Hillsborough County approved a joint stipulation between the parties and dismissed with prejudice the claim against Humana Medical Plan, Inc., a/k/a Humana Health Plan of Florida, Inc., and Humana Inc., on August 1, 2000.

On July 18, 2000, the Circuit Court in Hillsborough County granted a supplemental order approving the settlement and sealing documents in approving the settlement that include the report of the Guardian Ad Litem and the settlement statements providing distribution of settlement proceeds. The court order states that the settlement agreement and such documents are confidential and shall be placed into a sealed envelope that may be opened only upon order of the Court. The defendants listed on the court's July 18, 2000 order include: Humana Medical Plan, Inc.; Humana, Inc.; State of Florida Board of Regents; and Donald F. Temple, M.D., and Donald F. Temple, M.D., P.A.¹

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,

¹ On November 14, 2000, the Circuit Court in Hillsborough County granted plaintiff's motion to authorize the disclosure of the terms and amounts of the settlement with the Defendants, State of Florida Board of Regents and Donald F. Temple, M.D., Donald F. Temple, M.D., P.A., for the purpose of a pending legislative claim bill.

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.

On July 18, 2000, the Circuit Court in Hillsborough County 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.²

ATTORNEYS FEES:

The attorneys for the claimant have provided the Senate with 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.

RESPONDENT'S POSITION:

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 Senate Bill 8 (2002).

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

² Senate Rule 4.81 (6) provides that the hearing and consideration of a claim bill shall be held in abeyance until all available administrative and judicial remedies have been exhausted; except that the hearing and consideration of a claim that is still within the judicial or administrative systems may proceed where the parties have executed a written settlement. On August 23, 2001, the Circuit Court in Hillsborough County entered an order that approved the stipulation 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, 2002, then either party may file a motion to lift the stay.

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 Lloyd's of London. The University of South Florida Health Sciences Center Insurance Company, Ltd., is entitled to indemnification for those amounts which 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.

GUARDIANSHIP:

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 in Hillsborough County, Florida has established a guardianship with Willie Hopkins, the natural father of Towanna D. Hopkins, acting as guardian. The Circuit Court in Hillsborough County, Florida has retained jurisdiction over the expenditures from the account.

SPECIAL NEEDS TRUST:

To preserve Ms. Hopkins' eligibility for public assistance benefits, including Medicaid, the Circuit Court in Hillsborough County has authorized the establishment of and funding of an irrevocable special needs trust. Willie L. Hopkins, Ms. Hopkins' father has been appointed trustee of a Special Needs 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 Circuit Court in Hillsborough County 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.

LEGISLATIVE HISTORY:

Senate Bill 78 (2001) was filed by Senator Campbell and was referred to the Senate Special Master on Claim Bills, the Senate Health, Aging and Long-Term Care Committee, and the Senate Finance and Taxation Committee. The Senate Special Master on Claim Bills recommended the bill favorably with one amendment to direct the Florida Board of Regents, the USF Health Sciences Center Insurance Company, and the University of South Florida, collectively, to compensate Towanna Denise Hopkins, incompetent, by and through Willie Lee Hopkins, her father and legally appointed guardian, the sum of \$3,260,563 for past and future damages arising out of the injuries; and the sum of \$333,333 for Robert Keith Bowman, Jr., son of Towanna Denise Hopkins, for past and future damages arising out of the injuries sustained by his mother; and the sum of \$100,000 to Willie Lee Hopkins for past and future expenses in taking care of Ms. Hopkins for a total of \$3,693,896.

The Senate Health, Aging and Long-Term Care Committee passed Senate Bill 78 (2001) favorably with one amendment consistent with the Special Master's recommendation and the bill passed the Senate Finance and Taxation Committee favorably. On May 4, 2001, the bill died on the Senate calendar. Its companion, House Bill 509 (2001), died on the House calendar.

No further Special Master's hearings have been held. Both parties have been given the opportunity to supplement the record for this claim. Updated reports on Ms. Hopkin's medical condition submitted to the Special Master show no significant change. The parties submitted a novation of their settlement agreement that extends the stay of any further proceedings pending the passage of the claim bill and payment of the settlement funds.

RECOMMENDATIONS:

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, or on the Special Master. 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.³ Thus, it is unknown whether the amount 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, we know the range of the settlement amount. 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.

For the foregoing reasons I again recommend that Senate Bill 8 be reported FAVORABLY.

Respectfully submitted,

Barry J. Munroe
Senate Special Master

cc: Senator Walter "Skip" Campbell
Representatives Attkisson and Meadows
Faye Blanton, Secretary of the Senate
Michael Billmeier, House Special Master

³ The claimants settled with Donald F. Temple for \$250,000. The closed claim filed with the Florida Department of Insurance for the February 27, 1996 incident by the Pronational Insurance Company for Donald F. Temple, M.D., the insured, notes that an indemnity in the amount of \$250,000 was paid by the insurer for Case No. 98-3625 filed in the Circuit Court in Hillsborough County. 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. To date, no closed claim has been filed by any insurer for Humana, Inc., with the Florida Department of Insurance for a settlement involving this case.