



THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
3/7/07	SM	Fav/1 amendment
	HR	

March 7, 2007

The Honorable Ken Pruitt
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 504 (2007)** – Senator Ted Deutch
HB 753 (2007) – Representative Kelly Skidmore
Relief of Shakima Brown and Janaria Miller (daughter)

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNOPPOSED CLAIM FOR \$300,000 BASED ON A CONSENT FINAL JUDGMENT IN FAVOR OF CLAIMANTS SHAKIMA BROWN AND HER DAUGHTER JANARIA MILLER, FOR THE PERMANENT INJURIES SUFFERED BY JANARIA AT MEMORIAL REGIONAL HOSPITAL, A FACILITY OF THE SOUTH BROWARD HOSPITAL DISTRICT.

FINDINGS OF FACT:

On December 13, 2002, Shakima Brown went to Memorial Regional Hospital in Fort Lauderdale, complaining of abdominal pains. Ms. Brown was 8 months pregnant. She was kept overnight at the hospital because of concern that she might be in premature labor.

A fetal heart monitor was attached to Ms. Brown's abdomen. The monitor was designed to continuously record the fetus' heart rate and to give an audible alarm if the heart rate deviated above or below a safe range. Beginning at about 12:57 a.m. on December 14, 2002, the fetal monitor recording strips began to only intermittently record the fetus' heart rate. That caused the alarm to go off and the attending nurse with responsibility for checking the heart rate monitor, Ms. Nellie Miller, turned the alarm off. The monitor

continued to only intermittently record a heart rate for the next hour and a half. Although Ms. Miller made a written notation of "poor tracing" at 1:00 a.m., and again at 2:00 a.m., she took no action to make certain that the fetus was not in distress.

At 2:24 a.m., the monitor began to record a heart rate below safe levels or no heart rate. Despite the negative indications, Ms. Miller did nothing. There is no notation from her to show that she even checked the heart rate monitor during this critical period of time. Ms. Miller did not intervene to resuscitate the fetus nor did she contact the doctor. Finally, at about 3:15 a.m., she called the doctor. He immediately ordered a caesarian section and Janaria was delivered about an hour later.

A fetus obtains oxygen from the blood supplied through the umbilical cord. A low fetal heart rate threatens asphyxiation. A test of Janaria's blood following her birth showed metabolic acidosis, which is consistent with asphyxia. Janaria suffered irreversible brain damage as a result of lack of sufficient oxygen to her brain. She has cerebral palsy, partial paralysis, and cognitive impairment. Now 4 years old, Janaria has never spoken. She has weakness on her left side and 60 percent deafness in her left ear. She has had delayed cognitive development throughout her life. Although her life expectancy is normal, Janaria is unlikely to ever attend a regular school or hold a regular job.

The Medicaid lien that resulted from Janaria's medical costs has been satisfied.

Janaria receives Medicaid payments of \$626 per month, which will continue until she is 18 years old. She also receives Medicare payments of \$623 each month, which she should be eligible for the rest of her life.

The Claimants' attorney investigated and made tentative arrangements for using the proposed claim bill proceeds (after fees are deducted) to fund an annuity for the benefit of Janaria. Under one option, the annuity could pay Janaria \$1,981.18 each month for her entire life and terminate upon her death. Under a second option, the annuity would pay Janaria \$1,939.59 each month for her entire life and, if she died before the 40th year of the annuity, the monthly

payment would go to her estate until the end of the 40th year. Under either option, the payments would not begin until Janaria's 18th birthday.

LITIGATION HISTORY:

Ms. Brown sued the South Broward Hospital District in circuit court in Broward County, alleging negligence. The District agreed to a Consent Final Judgment in the amount of \$500,000. The District has already paid the Claimants \$200,000, exhausting the sovereign immunity cap. Of this amount, the Claimant netted \$80,000. This claim bill seeks the balance of \$300,000.

CLAIMANTS' POSITION:

Ms. Miller was negligent in failing to take appropriate action in response to Janaria's abnormally low heart rate as reported by the heart rate monitor.

Because Ms. Miller was acting within the course and scope of her employment by Memorial Regional Hospital, the Hospital is equally liable for the negligence and for the injuries that were proximately caused by the negligence.

The settlement agreement is fair and reasonable, but the amount of the settlement does not fully compensate the Claimants for their damages.

THE DISTRICT'S POSITION:

The District does not oppose the claim bill in the amount of \$300,000.

CONCLUSIONS OF LAW:

The attending nurse's actions and inactions fell below the standard of professional care applicable under the circumstances. The consequences of a below normal fetal heart rate are so critical that, even if the nurse was suspicious that the monitor was not working properly, her proper response should have been to take immediate steps to determine whether the fetus was in distress, to intervene with resuscitation measures if needed, and to alert a doctor. Her failure to take appropriate action was negligence and was the proximate cause of the injuries suffered by Janaria. South Broward Hospital District, doing business as Memorial Regional Hospital, is liable as the nurse's employer. Although the District did not admit liability at the claim bill hearing, the Consent Final Judgment is a judgment against the District on the claim of negligence.

There are many reasons for entering into a settlement agreement other than the perceived merits of the claim and, therefore, I am not precluded from reviewing the terms of the parties' settlement agreement in this matter and determining whether they are reasonable under the totality of the circumstances. In this case, the settlement amount is far less than the usual jury verdict for injuries of this nature. The District asserts that it was prepared to present expert testimony at trial to show that the nurse's actions were not negligent and that Janaria's brain defects could be unrelated to the events of December 14, 2002. However, based on the record presented to me, I believe the settlement amount of \$500,000 reflects the general disadvantage faced by plaintiffs in settlement negotiations in tort actions against government entities, caused by the indefinite prospects for recovering damages beyond the sovereign immunity cap through a legislative claim bill. I am confident that, had this case involved a private hospital, the settlement amount would have been much larger because the negligence is relatively clear. Therefore, I believe the settlement amount of \$500,000 should be increased 50 percent, to \$750,000. That would leave a balance of \$550,000 to be paid through this claim bill.

ATTORNEY'S FEES AND
LOBBYIST'S FEES:

In compliance with s. 768.28(8), F.S., the Claimants' attorneys will limit their fees to 25 percent of any amount awarded by the Legislature. The lobbyist's fee will be an additional 6 percent of any award. If the claim bill is passed in the amount recommended, the Claimants' attorneys will receive a fee of \$137,500 and the lobbyists will receive a fee of \$33,000.

OTHER ISSUES:

Senate Bill 504 should be amended to revise or eliminate some of the factual allegations which are inconsistent with or unsupported by the evidence presented at the claim bill hearing. The bill should also be amended to increase the amount of the claim to \$550,000 and to correct the name of the defendant to South Broward Hospital District. If the Senate accepts my recommendation to pay the Claimants an additional \$250,000, I recommend that the additional amount be paid to Ms. Brown and not into the annuity for Janaria. The amount used to fund the annuity should be \$207,000, the same amount as originally proposed by the parties. Of the two annuity options presented by the Claimants' attorney, I believe the option that guarantees

payment for 40 years is the better option.

The District stated that paying a claim in the amount of \$300,000 would not impair its ability to provide normal services.

RECOMMENDATIONS:

For the reasons set forth above, I recommend that Senate Bill 504 (2007) be reported FAVORABLY, as amended.

Respectfully submitted,

Bram D. E. Canter
Senate Special Master

cc: Senator Ted Deutch
Representative Kelly Skidmore
Faye Blanton, Secretary of the Senate
House Committee on Constitution and Civil Law
Counsel of Record