



**STORAGE NAME:** h0179.CVJS

**DATE:** 4/11/2011

April 11, 2011

SPECIAL MASTER'S FINAL REPORT

The Honorable Dean Cannon  
Speaker, The Florida House of Representatives  
Suite 420, The Capitol  
Tallahassee, Florida 32399-1300

Re: HB 179 - Representative Passidomo  
Relief/Kirby/University of South Florida

**THIS IS AN UNCONTESTED CLAIM FOR \$1,800,000 PREDICATED ON THE SETTLEMENT AGREEMENT ENTERED BETWEEN STEPHEN AND MEREDITH KIRBY, PARENTS AND NATURAL GUARDIANS OF THEIR DAUGHTER, HARPER KIRBY, AND THE UNIVERSITY OF SOUTH FLORIDA, BASED ON DAMAGES SUSTAINED DUE TO THE NEGLIGENCE OF AN EMPLOYEE OF THE UNIVERSITY WHO FAILED TO PROPERLY ASSESS THE KIRBYS' RISK OF HAVING A CHILD WITH CYSTIC FIBROSIS. THE UNIVERSITY HAS ALREADY PAID \$200,000 PURSUANT TO SECTION 768.28, F.S.**

FINDING OF FACT:

**Procedural History:** Mr. and Mrs. Kirby filed a medical negligence lawsuit for wrongful birth on December 5, 2008, in the Circuit Court of the Thirteenth Judicial District, against the Board of Trustees of the University of South Florida for damages related to the extraordinary expenses of raising a child who has cystic fibrosis. On July 20, 2010, the parties mediated the case and reached a settlement of all claims prior to trial. The University of South Florida has paid Stephen and Meredith Kirby \$200,000 pursuant to the statutory limits of liability set forth in s. 768.28, F.S.

The University has admitted liability and fully supports passage of this claim bill.

**Findings:** In 2004, Meredith and Stephen Kirby had their first child. The pregnancy was normal, but during routine screening, the Kirbys learned they were both carriers for cystic fibrosis, but with different mutations of the gene. Their child, Raley, tested negative for cystic fibrosis but is a carrier, as well.

In 2006, the Kirbys desired to have a second child. Before conceiving a second child, the Kirbys sought genetics counseling on October 18, 2006, from a physician at the University of South Florida to assess their risks of having a child with cystic fibrosis. The physician incorrectly and in violation of the standard of care informed Mr. and Mrs. Kirby that since they had different mutations of the gene, they were not at risk and that their second child would not be born with cystic fibrosis. Based on the physician's assertion that the Kirbys were not at risk for conceiving a child with cystic fibrosis, Mr. and Mrs. Kirby chose to conceive a second child, who was born on August 22, 2007.

Newborn screening tests revealed that the Kirbys' new baby, Harper Kirby, had cystic fibrosis. Harper currently requires medical care and treatment for cystic fibrosis and will require such care and treatment for the rest of her life. Past medical bills are in excess of \$17,000 and future medicals bills are expected to exceed \$1,800,000.

CONCLUSION OF LAW:

**DUTY:** Whether or not there is a jury verdict or a settlement agreement, as there is here, every claim bill must be based on facts sufficient to meet the preponderance of evidence standard. From my review of the evidence, I find that the University of South Florida had a duty to provide adequate medical advice to the Kirbys. Specifically, the University's physician had the duty to provide medical advice based on the prevailing standard of care.

**BREACH:** A preponderance of the evidence establishes that the University's physician breached his duty to properly provide medical advice. In his deposition, the physician admitted "he made a mistake" but could not explain why.

**PROXIMATE CAUSE:** The negligence of the physician was the legal proximate cause of the damages suffered by the Kirbys. While the Kirbys obviously love Harper, the evidence in the record demonstrates that had the Kirbys been given the proper medical advice, they would not have taken the chance of having a child with cystic fibrosis as they already had one healthy child.

**DAMAGES:** Damages in the amount of \$2,000,000 are

reasonable under these circumstances, and fully supported by the weight of the evidence. As noted above, this amount will only cover the actual economic damages and will not provide any noneconomic damages for the stress and anguish caused by this debilitating condition and Harper's shortened life expectancy. \$200,000 of this amount has already been paid by the University.

ATTORNEY'S/  
LOBBYING FEES:

The Claimants' attorneys have acknowledged in writing that nothing in excess of 25 percent of the gross recovery will be withheld or paid as attorneys' fees, lobbyist fees, or costs.

PRIOR LEGISLATIVE  
HISTORY:

This is the first year a claim bill has been filed in this matter.

RECOMMENDATION:

Accordingly, I recommend that House Bill 179 be reported FAVORABLY.

Respectfully submitted,

**TOM THOMAS**  
Special Master, House of Representatives

cc: Representative Passidomo, House Sponsor  
Senator Norman, Senate Sponsor  
Judge Bram D. E. Canter, Senate Special Master