THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
2/24/11	SM	Fav/1 amendment
4/26/11	RC	**Favorable**

February 24, 2011

The Honorable Mike Haridopolos
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 322 (2011)** – Senator Anitere Flores
Relief of Aaron Edwards, and his parents, Mitzi Roden and Mark Edwards

SPECIAL MASTER'S FINAL REPORT

THIS IS AN EXCESS JUDGMENT CLAIM FOR $30,792,936.13 OF LOCAL MONEY BASED ON A JURY VERDICT FOR CLAIMANTS AND AGAINST LEE MEMORIAL HEALTH SYSTEM TO COMPENSATE CLAIMANTS FOR AARON EDWARD'S CEREBRAL PALSY, WHICH WAS CAUSED AT BIRTH BY THE NEGLIGENT ADMINISTRATION OF PITOCIN TO HIS MOTHER TO INDUCE LABOR.

FINDINGS OF FACT:

On the morning of September 5, 1997, Mitzi Roden was scheduled to deliver her first child at HealthPark Medical Center, a hospital owned and operated by Lee Memorial Health System ("Lee Memorial"). Mitzi was accompanied by her husband, Mark Edwards. Mitzi had enjoyed a healthy pregnancy, free of complications.

Mitzi's labor and delivery were to be managed by her nurse-midwife, Patricia Hunsucker, who would be assisted by the obstetric nurses whose work shifts covered the time that Mitzi was at the hospital. From 9:00 a.m. until 12:30 p.m., Mitzi made little progress in her labor. At 12:30 p.m., Ms. Hunsucker ordered that Pitocin be given to Mitzi, by IV drip, to stimulate Mitzi's labor.

The use of Pitocin to assist labor is a very common practice, but its effect on the mother and child must be closely monitored. In a normal childbirth, the mother's contractions cause some stress to the baby because the contractions compress the placenta, reducing blood flow to the baby. Because blood flow is the baby's source of oxygen, contractions require the baby to, in effect, hold his or her breath until the contraction stops. The contractions in a normal labor do not reduce oxygen to the baby to such a degree that the baby's life is endangered. However, the overuse of Pitocin can cause contractions that come too fast, too strong, and last too long, which can cause the baby to become severely stressed and even asphyxiated.

The initial amount of Pitocin given to Mitzi was 3 milliunits and was to be increased periodically until Mitzi's labor had progressed to the point that she was having good contractions every 2 or 3 minutes. Although Mitzi's contractions soon reached the point of being 2 or 3 minutes apart, the nurses evidently believed that her contractions were not strong enough.

For the next several hours, the dosage of Pitocin was increased by the obstetric nurses. At 6:00 p.m., Mitzi's contractions were closer than two minutes, but the Pitocin was increased again at 6:20 p.m. The dosage was up to 13 milliunits. Mitzi's obstetrician, who was never present during these events, testified later that the Pitocin should not have been further increased. Nevertheless, a new obstetric nurse, Elizabeth Kelly-Jencks, started her shift at 7:00 p.m. and increased the Pitocin to 14 milliunits at 7:15 p.m.

The more persuasive evidence shows that Ms. Hunsucker and Ms. Kelly-Jencks were not giving appropriate attention to the fetal monitoring machine and the frequency and duration of the contractions. The monitors indicated that Mitzi's contractions were becoming too frequent, too intense, and were lasting too long, and that they were causing the baby's heart rate to decelerate after the contractions. In the vast majority of cases when Pitocin is used, babies are delivered after less than 8 milliunits of Pitocin. Claimants' expert medical witnesses testified persuasively that there were multiple indications that increasing the Pitocin to 14 milliunits was neither sensible nor safe. Mitzi's uterus was being over-stimulated.

At 8:30 p.m., Mitzi experienced a contraction lasting longer than 90 seconds, showing clearly that the Pitocin level was too high. Even though reasonable obstetric practice and the standing policy of the hospital regarding the use of Pitocin required that the Pitocin drip be reduced or stopped at that point, the Pitocin dosage was increased again, to 15 milliunits. At 9:00 p.m., Ms. Hunsucker looked in on Mitzi, but was unaware of the Pitocin dosage she was receiving and failed to recognize that Mitzi was having excessive contractions.

Certainly, by this point, it should have been recognized that Mitzi's labor was not going well. There had been almost no progress toward a safe vaginal delivery. Ms. Hunsucker should have contacted Dr. Devall to consult about the situation, but she did not.

At 9:30 p.m., the Pitocin was increased to 16 milliunits. Ten minutes later, alone in the room, Mitzi and Mark noticed that the fetal heart monitor showed their baby's heart rate had dropped to 40 beats per minutes. The normal fetal heart rate is 120 to 160 beats per minute. A low fetal heart rate for over ten minutes is referred to as "bradycardia." When no one responded to the emergency call button, Mark ran out of the room to get help. The obstetric staff realized the gravity of the situation, but incredibly, the Pitocin drip was not turned off while the nurses spent about 10 minutes trying to resuscitate the baby by turning Mitzi in the bed and by other means. Finally the Pitocin was turned off and an immediate cesarean section was ordered.

Aaron was delivered by cesarean 25 minutes later, but oxygen starvation to his brain left him with permanent damage to the parts of the brain that control muscle movement. The result is that Aaron has cerebral palsy. Aaron exhibits primarily dystonia, a lack of control of the direction and force of muscle movement, and some spasticity, which is involuntary contractions of the muscles.

A major issue at trial was whether Mitzi objected to receiving Pitocin, but her wishes were ignored. The evidence on this point was ambiguous. Mitzi says that she told Ms. Hunsucker that she did not want Pitocin, but did not mention it to the other obstetric nurses who were periodically increasing the dosage. Mitizi says that Ms. Hunsucker

called Dr. DeVall and then told Mitzi that Dr. DeVall approved the use of Pitocin. Ms. Hunsucker testified at trial that she did not remember Mitzi objecting to the Pitocin and that she does not think she would have administered the Pitocin if Mitzi had objected to it. I am not persuaded that Mitzi clearly communicated a strong objection about the Pitocin. That claim cannot be reconciled with the evidence that the Pitocin drip was started and was then administered for hours, but Mitzi made no mention of her objection to the obstetric nurses, and her husband apparently took no steps on her behalf to have the Pitocin stopped.

Aaron's brain damage did not affect his higher cognitive functioning. He is now an extremely bright and creative 13-year old. Unfortunately, he is trapped inside a body that he can barely control. He cannot feed, bathe, or dress himself. He cannot walk and uses a wheelchair. He cannot speak so as to be understood by anyone other than his mother. He uses a computer touch screen device to communicate. Still, it takes him a long time to compose simple sentences.

Aaron's limbs, especially his legs, are becoming rigid. He said at the claim bill hearing that he felt like Pinochio, a wooden boy who wants to be a real boy. His mother uses various physical therapies and Aaron also takes medication to reduce the contraction of the muscles.

The principal needs that Aaron currently has are regular speech and physical therapies and a better wheelchair. The wheelchair he has now is uncomfortable and difficult to operate. There are also more advanced communication devices becoming available that could help Aaron to communicate more quickly.

Mitzi Roden and Mark Edwards are now divorced. Aaron lives with his mother in Canyon City, Colorado. Aaron is home-schooled by his mother and, because she cannot afford to hire someone to care for him during the day, she brings him to the dog grooming shop where she works. Mitzi earns $14,000 annually as a dog groomer. She receives monthly Social Security disability payments of $674.

Lee Memorial is a special district that operates four acute care hospitals, a rehabilitation hospital, and some other health care facilities in Lee County. It does not have taxing

authority. It is a not-for-profit entity.

Lee Memorial is a "Safety Net Provider," meaning that it is a member of a group of hospital operators in Florida that provide access to medical services by Medicaid-eligible, Medicare-eligible, and uninsured patients far beyond the average for other hospitals in Florida. In 2010, Lee Memorial had about $170 million of losses attributable to these patients. However, with income from commercially-insured patients and from its investments, Lee Memorial had about $65 million in overall net income.

LITIGATION HISTORY:

In 1999, a negligence lawsuit was filed in the circuit court for Lee County by Mitzi Roden and Mark Edwards, on behalf of themselves and as the guardians of Aaron Edwards, against Lee Memorial. Following a six-week trial in 2007, the jury found that Lee Memorial was negligent and that its negligence was the sole cause of Aaron's injuries. The jury awarded damages of $28,477,966.48 to the guardianship of Aaron. They also awarded $1.34 million to Mitzi Roden and $1 million to Mark Edwards, for their damages as parents. The court entered a cost judgment of $174,969.65. The sum of these figures is $30,992,936.13.

Lee Memorial paid the $200,000 sovereign immunity limit. All of this payment was applied to legal fees. Aaron and his parents received nothing.

CONCLUSIONS OF LAW:

The claim bill hearing was a *de novo* proceeding for the purpose of determining, based on the evidence presented to the Special Master, whether Lee Memorial is liable in negligence for the injuries suffered by Aaron Edwards and his parents, and, if so, whether the amount of the claim is reasonable.

Ms. Hunsucker and Ms. Kelly-Jencks failed to recognize and respond appropriately to the risks to the baby that were indicated by the monitoring devices. Their actions failed to meet the standard of care applicable to the administration of Pitocin and the management of Mitzi's labor. Their negligence was the proximate cause of the injuries suffered by Aaron, and the related damages suffered by his parents. Because these individuals were acting within the course and scope of their employment when their negligent acts occurred, Lee Memorial is liable for their negligence.

I agree with Lee Memorial that the manner in which the "lack of consent" issue was raised for the first time at trial was wrong and the trial judge would have been justified in not allowing the issue to be presented to the jury. Nevertheless, I do not believe that the jury's verdict of liability was based solely on lack of consent. The preponderance of the evidence presented at trial and at the claim bill hearing establishes that Ms. Hunsucker and Ms. Kelly-Jencks were negligent in their management of the Pitocin and their care for Mitzi during her labor.

Aaron and his parents deserve to be compensated for his injuries, but the unusual size of this claim bill must be addressed. This claim bill for almost $31 million is the largest ever presented to the Legislature. In the past ten sessions, there have only been two claim bills passed by the Legislature that exceeded $5 million, one was for $7.6 million and the other was for $8.5 million.

In my report for the Brody claim bill, SB 68 (2010), which was a claim for nearly the same amount, I stated that the fiscal impact to Broward County would be substantial and would impair the County's ability to provide important public services. This claim would not have as substantial an adverse effect on Lee Memorial as the Brody claim would have on Broward County. Lee Memorial does not carry medical malpractice liability insurance, but it budgeted $15 million for potential liability claims. If Lee Memorial were allowed to pay this claim in several installments, the fiscal impact could be absorbed without preventing it from maintaining current levels of medical services to the public.

However, in addition to the issue of whether a local government can pay a large claim without unreasonable disruption of public services, is the issue of whether the Legislature should approve the payment of multi-million dollar claims, especially those that would be paid by local governments, when the claim exceeds the amount that is usually awarded by juries for similar injuries.

A trial court cannot set aside a jury verdict unless "it is so inordinately large as obviously to exceed the maximum reasonable range within which the jury may reasonably operate." See Kaine v. Government Employees Insurance Company, 735 So. 2d 599 (Fla. 3d DCA 1999). However,

that legal principle is not applicable to the Legislature's consideration of a claim bill because the payment of a claim bill is a matter of legislative grace. For very large claim bills, it is reasonable for the Senate to consider whether the amount of a claim deviates substantially above the median jury verdict for similar injuries. That was my reasoning when I recommended that the Senate pay a smaller amount to the claimant in SB 30 (2008), because the $5.5 million jury award was at the extreme high end of awards for similar injuries (severe fracture to one leg without paralysis). The Senate passed the claim bill after reducing the award to $4 million.

Jury verdict data for cases involving permanent brain injuries like the one suffered by Aaron do not allow a median award to be stated with precision, but it appears to be well under $20 million. The present value of the Life Care Plan for Aaron is $13.1 million and, if services available through Medicaid were subtracted, might be closer to $12.7 million.

I believe the Senate would be striking a reasonable balance between the purposes served by the doctrine of sovereign immunity and the goal to provide reasonable compensation to claimants in deserving circumstances if the claim was reduced to $15 million. If the Senate adopts this recommendation, then I would further recommend that the $15 million be divided as follows: $13,500,000 for the care of Aaron Edwards; $1 million for Mitzi Roden; and $500,000 for Mark Edwards.

ATTORNEY'S FEES:

Claimants' attorneys have agreed to limit attorney's fees and lobbyist's fees to 25 percent of the claim paid. However, they request that the fee for the attorneys who handled the appeal of the trial court judgment (5 percent of the claim bill award) not be included in the 25 percent. In other words, they request that 30 percent of the claim bill award go to attorneys fees and costs. I believe paying a separate and additional fee in this manner would create a precedent for many similar requests. Therefore, I recommend that all attorneys fees be limited to 25 percent of the award.

SPECIAL ISSUES:

The trial court ordered that the damage award and cost judgment would accrue interest at the rate of 11 percent per year. I do not believe that interest on an excess judgment can be required because the only amount owed and due is

the sovereign immunity limit. Any amount paid by the Legislature on claim bills is a matter of legislative grace. It is not "owed" to the claimants.

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 322 (2011) be reported FAVORABLY, as amended.

Respectfully submitted,

Bram D. E. Canter
Senate Special Master

cc: Senator Anitere Flores
R. Philip Twogood, Secretary of the Senate
Counsel of Record