



THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
2/24/11	SM	Fav/1 amendment

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. Mitzi 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 Pinocchio, 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

Attachment



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LEGISLATIVE ACTION

Senate

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House

The Special Master on Claim Bills recommended the following:

1 **Senate Amendment (with title amendment)**

2

3 Delete lines 176 - 185

4 and insert:

5 Section 2. Lee Memorial Health System, formerly known as
6 the Hospital Board of Directors of Lee County, is authorized and
7 directed to appropriate from funds of Lee Memorial Health System
8 not otherwise appropriated and to draw the following warrants as
9 compensation for the medical malpractice committed against Aaron
10 Edwards and Mitzi Roden:

11 (1) The sum of \$13,500,000, payable to the Guardianship of
12 Aaron Edwards;



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- 13 (2) The sum of \$1,000,000, payable to Mitzi Roden; and
- 14 (3) The sum of \$500,000, payable to Mark Edwards.

15
16 ===== T I T L E A M E N D M E N T =====

17 And the title is amended as follows:

18 Delete lines 12 - 120

19 and insert:

20 WHEREAS, Mitzi Roden and Mark Edward's only child, Aaron
21 Edwards, was born on September 5, 1997, at Lee Memorial
22 Hospital, and

23 WHEREAS, during Mitzi Roden's pregnancy, Mitzi Roden and
24 Mark Edwards attended childbirth classes through Lee Memorial
25 Health System and learned of the potentially devastating effect
26 that the administration of Pitocin to augment labor may have on
27 a mother and her unborn child when not carefully and competently
28 monitored, and

29 WHEREAS, Mitzi Roden and Mark Edwards communicated directly
30 to Nurse Midwife Patricia Hunsucker of Lee Memorial Health
31 System of their desire to have a natural childbirth, and

32 WHEREAS, Mitzi Roden enjoyed an uneventful full-term
33 pregnancy with Aaron Edwards, free from any complications, and

34 WHEREAS, on September 5, 1997, at 5:29 a.m., Mitzi Roden,
35 at 41 and 5/7 weeks' gestation awoke to find that her membranes
36 had ruptured, and

37 WHEREAS, when Mitzi Roden presented to the hospital on the
38 morning of September 5, she was placed on a fetal monitoring
39 machine that confirmed that Aaron Edwards was doing well and in
40 very good condition, and

41 WHEREAS, Mitzi Roden tolerated well a period of labor from



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42 9 a.m. until 12:30 p.m., but failed to progress in her labor to
43 the point of being in active labor. At that time, Nurse Midwife
44 Patricia Hunsucker informed Mitzi Roden and Mark Edwards that
45 she would administer Pitocin to Mitzi in an attempt to speed up
46 the labor, but both Mitzi Roden and Mark Edwards strenuously
47 objected to the administration of Pitocin because of their
48 knowledge about the potentially devastating effects it can have
49 on a mother and child, including fetal distress and even death.
50 Mitzi Roden and Mark Edwards informed Nurse Midwife Patricia
51 Hunsucker that they would rather undergo a cesarean section than
52 be administered Pitocin, but in spite of their objections, Nurse
53 Midwife Patricia Hunsucker ordered that a Pitocin drip be
54 administered to Mitzi Roden at an initial dose of 3 milliunits,
55 to be increased by 3 milliunits every 30 minutes, and

56 WHEREAS, there was universal agreement by the experts
57 called to testify at the trial in this matter that the
58 administration of Pitocin over the express objections of Mitzi
59 Roden and Mark Edwards was a violation of the standard of care,
60 and

61 WHEREAS, for several hours during the afternoon of
62 September 5, 1997, the dosage of Pitocin was consistently
63 increased and Mitzi Roden began to experience contractions
64 closer than every 2 minutes at 4:50 p.m., and began to
65 experience excessive uterine contractility shortly before 6
66 p.m., which should have been recognized by any reasonably
67 competent obstetric care provider, and

68 WHEREAS, in spite of Mitzi Roden's excessive uterine
69 contractility, the administration of Pitocin was inappropriately
70 increased to 13 milliunits at 6:20 p.m. by Labor and Delivery



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71 Nurse Beth Jencks, which was a deviation from the acceptable
72 standard of care for obstetric health care providers because, in
73 fact, it should have been discontinued, and

74 WHEREAS, reasonable obstetric care required that Dr.
75 Duvall, the obstetrician who was ultimately responsible for
76 Mitzi Roden's labor and delivery, be notified of Mitzi Roden's
77 excessive uterine contractility and that she was not adequately
78 progressing in her labor, but the health care providers
79 overseeing Mitzi Roden's labor unreasonably failed to do so, and

80 WHEREAS, in spite of Mitzi Roden's excessive uterine
81 contractility, the administration of Pitocin was increased to 14
82 milliunits at 7:15 p.m., when reasonable obstetric practices
83 required that it be discontinued, and a knowledgeable obstetric
84 care provider should have known that the continued use of
85 Pitocin in the face of excessive uterine contractility posed an
86 unreasonable risk to both Mitzi Roden and Aaron Edwards, and

87 WHEREAS, Lee Memorial's own obstetrical expert, Jeffrey
88 Phelan, M.D., testified that Mitzi Roden experienced a tetanic
89 contraction lasting longer than 90 seconds at 8:30 p.m., and Lee
90 Memorial's own nurse midwife expert, Lynne Dollar, testified
91 that she herself would have discontinued Pitocin at 8:30 p.m.,
92 and

93 WHEREAS, at 8:30 p.m., the administration of Pitocin was
94 unreasonably and inappropriately increased to 15 milliunits when
95 reasonable obstetric practices required that it be discontinued,
96 and

97 WHEREAS, at 9 p.m., Nurse Midwife Hunsucker visited Mitzi
98 Roden at bedside, but mistakenly believed that the level of
99 Pitocin remained at 9 milliunits, when, in fact, it had been



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100 increased to 15 milliunits, and further, she failed to
101 appreciate and correct Mitzi Roden's excessive uterine
102 contractility, and

103 WHEREAS, Lynne Dollar acknowledged that it is below the
104 standard of care for Nurse Midwife Patricia Hunsucker to not
105 know the correct level of Pitocin being administered to her
106 patient, Mitzi Roden, and

107 WHEREAS, at 9:30 p.m., the administration of Pitocin was
108 again unreasonably and inappropriately increased to 16
109 milliunits, when reasonable obstetric practice required that it
110 be discontinued in light of Mitzi Roden's excessive uterine
111 contractility and intrauterine pressure, and

112 WHEREAS, as 9:40 p.m., Aaron Edwards could no longer
113 compensate for the increasingly intense periods of
114 hypercontractility and excessive intrauterine pressure brought
115 on by the overuse and poor management of Pitocin administration,
116 and suffered a reasonably foreseeable and predictable severe
117 episode of bradycardia, where his heart rate plummeted to life-
118 endangering levels, which necessitated an emergency cesarean
119 section. Not until Aaron Edwards' heart rate crashed at 9:40
120 p.m. did Nurse Midwife Patricia Hunsucker consult with her
121 supervising obstetrician, Diana Devall, M.D., having not
122 discussed with Dr. Devall her care and treatment of Mitzi
123 Roden's labor since 12:30 p.m. Because Dr. Devall had not been
124 kept informed about the status of Mitzi Roden's labor, she was
125 not on the hospital grounds at the time Aaron Edwards' heart
126 rated crashed, and another obstetrician who was unfamiliar with
127 Mitzi Roden's labor performed the emergency cesarean section to
128 save Aaron Edwards' life, and



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129