



STORAGE NAME: h0545.CVJS

DATE: 4/27/2011

April 27, 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 545 - Representative Abruzzo
Relief/Estrada/USF Board of Trustees

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM FOR \$24,823,212.92, BASED ON A JURY VERDICT THAT AWARDED THE PARENTS OF CALEB ESTRADA DAMAGES FOR INJURIES THEY SUFFERED DUE TO THE NEGLIGENCE OF AN EMPLOYEE OF THE UNIVERISTY OF SOUTH FLORIDA. THE UNIVERSITY HAS ALREADY PAID THE \$200,000 CAP AS PROVIDED IN SECTION 768.28, F.S.

FINDING OF FACT:

Amara and Daniel Estrada's first child, Aiden Estrada, was born on June 28, 2002, at Tampa General Hospital with numerous birth defects. His condition was later determined to be Smith-Lemli-Opitz syndrome. Smith-Lemli-Opitz is a recessive gene and does not cause birth defects unless both parents carry the gene. The Estradas had no reason to believe they both might be carriers of the gene. Because the syndrome results in the lack of cholesterol in the body, it can be detected with a simple test.

On the date of his birth, a genetic consultation by Boris Kousseff, M.D., Director of Medical Genetics of the University of South Florida College of Medicine, was ordered for Aiden. Dr. Kousseff examined Aiden on July 1, 2002, but was unable

to diagnosis any particular syndrome. At all times relevant to this matter, Dr. Kousseff was an employee of the University of South Florida and all medical services he provided were at facilities owned by the University.

Dr. Kousseff followed the condition of Aiden as his treating geneticist and made an appointment for Aiden for him to be brought to his office at the University of South Florida Genetics Clinic on August 29, 2002. At the appointment, Dr. Kousseff again was unable to diagnosis any particular syndrome.

Dr. Kousseff next saw Aiden a year later at the University of South Florida Genetics Clinic on September 15, 2003, at which time it was apparent that Aiden was severely developmentally delayed, had severe psychomotor retardation, and was unable to take nutrition or hydration by mouth, requiring Aiden to depend on a gastrostomy tube in order to deliver nutrition and hydration to him. Dr. Kousseff again failed to make a diagnosis and did not suspect or diagnose Smith-Lemli-Opitz syndrome.

Dr. Kousseff told Daniel and Amara Estrada that he believed Aiden's problems did not indicate any genetic disorder and they could expect pregnancies with "normal" children and had no greater risk than any other parent for birth defects. The parents relied on Dr. Kousseff's advice and, after following all of the recommendations of Dr. Kousseff, conceived a second child.

Amara Estrada gave birth to Caleb Estrada on November 18, 2004, at Shands Teaching Hospital of the University of Florida. Caleb had similar symptoms as his brother, Aiden. Within two hours after Caleb's birth, the geneticist at the University of Florida diagnosed him as having Smith-Lemli-Opitz syndrome. The next day, the Estradas brought Aiden to Shands Hospital to meet with the geneticist who diagnosed Aiden as having Smith-Lemli-Opitz syndrome.

Caleb is severely impaired and is also reliant on a gastrostomy tube for nutrition and hydration. He requires 24-hour care and supervision. The anguish and demands on the Estradas, physically, emotionally, and financially, are enormous.

The Estradas gave sworn testimony that had they been told the actual risks facing them if they conceived a subsequent child, they would have chosen not to conceive again but to adopt. The experts at the trial below were in agreement that the care provided by Dr. Kousseff, was below the acceptable standard of care in his failure to recognize and diagnose Smith-Lemli-Opitz syndrome from Aiden Estrada's many symptoms. The record further establishes that Dr. Kousseff should not have told the Estradas that their chances of having a normal child were the same as anybody else's.

Prior to the Estrada's conceiving Caleb, they took Aiden to a

pediatrician in Orlando, Dr. Lynda Pollack. Dr. Pollack was also a geneticist, but was seeing Aiden as a pediatrician as part of the enrollment process for a health plan. Dr. Pollack suggested some tests, but she did not follow up to see if those tests were run. The Estradas told Dr. Pollack they had a geneticist, Dr. Kouseff. Dr. Pollack knew of Dr. Kouseff, that he had a great reputation, and had no reason to follow up on any genetic tests.

PROCEDURAL HISTORY: The Estradas filed a lawsuit for medical malpractice in February, 2006, in the Circuit Court for the 13th Judicial Circuit, in and for Hillsborough County, Florida. After the trial, the jury returned a verdict in favor of the Estradas, as parents and guardians of Caleb Estrada, in the amount of \$23,553,000, for the cost of care for Caleb Estrada. The jury assigned the University of South Florida 90 percent liability for the wrongful birth of Caleb Estrada, and 10 percent liability against Dr. Lynda Pollack.

The judge found the evidence of malpractice so clear that he ordered a Directed Verdict on the issue at the close of trial. The University appealed and the verdict was upheld by the Second District Court of Appeal.

SOURCE OF FUNDS: The University of South Florida has a self-insurance fund to cover all claims each year for up to a total of \$3 million through the Health Science Insurance Company. The University also has reinsurance for this fund through Lloyds of London in the amount of \$15 million. The Health Science Insurance Plan provides that it will pay all costs taxed against the University.

CONCLUSION OF LAW:

The University and Dr. Kousseff owed a duty to the Estradas to perform medical care in conformity with the prevailing professional standard of care for similar health care providers in light of all the relevant surrounding circumstances. I find they breached this duty. Further, I disagree with the jury in finding the University and Dr. Kouseff only 90 percent liable. I don't see any duty on Dr. Pollack to have pursued genetic testing for Aiden – that she was not seeing him in that capacity and knew Aiden was seeing an expert geneticist.

Aiden's defects and conditions should have caused a geneticist to suspect and then confirm the diagnosis of Smith-Lemli-Opitz syndrome. Even if Dr. Kouseff could not identify the syndrome, the standard of care calls for a geneticist under this situation, when he or she does not know the diagnosis, to advise parents that there is at least a 25 percent chance of recurrence of the defects in the next child.

The breach of duty caused injury and serious damages to the Estradas. I find no reason to depart from the damages awarded by the jury that considered this matter at trial.

SPECIAL MASTER'S FINAL REPORT--

Page 4

Economic experts justified the economic damages and, while a price cannot be placed on the pain and suffering the Estradas experience on a daily basis, the jury's award of \$4,500,000 does not appear out of range.

ATTORNEY'S/
LOBBYING FEES:

The bill provides that the total amount paid for attorney's fees, lobbying fees, costs, and other similar expenses relating to this claim may not exceed 25 percent of the total amount awarded under the bill.

RECOMMENDATIONS:

Based on the record before me, I find that the Claimants have met their burden to demonstrate by a greater weight of the evidence that the damages sustained by Amara and Daniel Estrada were caused by the negligent act of the University of South Florida, through its employee, Boris Kousseff, M.D. I further find that the amount requested for this claim, the amount awarded by the jury, is justifiable. Therefore, I recommend that this claim bill be reported FAVORABLY.

Respectfully submitted,

TOM THOMAS
House Special Master

cc: Representative Abruzzo, House Sponsor
Senator Jones, Senate Sponsor
Judge John G. Van Laningham, Senate Special Master