THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
12/02/11	SM	Fav/1 amendment

December 2, 2011

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

Re: **SB 48 (2012)** – Senator Bill Montford
Relief of Odette Acanda and Alexis Rodriguez

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNOPPOSED EQUITABLE CLAIM FOR LOCAL FUNDS IN THE AMOUNT OF $799,000 AGAINST THE PUBLIC HEALTH TRUST OF MIAMI-DADE COUNTY FOR MEDICAL MALPRACTICE IN CONNECTION WITH THE POSTNATAL TREATMENT OF RYAN RODRIGUEZ, WHO DIED IN JACKSON MEMORIAL HOSPITAL ON FEBRUARY 10, 2005, WHICH WAS FIVE DAYS AFTER HIS BIRTH, FROM A NOSOCOMIAL INFECTION.

FINDINGS OF FACT:

On February 5, 2005, Ryan Rodriguez was delivered by Caesarean section at Jackson Memorial Hospital ("Jackson"), a public facility located in Miami, Florida, which the Public Health Trust of Miami-Dade County ("Trust") owns and operates. Ryan's parents are Odette Acanda (mother) and Alexis Rodriguez (father), an unmarried couple whose only child together was this one.

Ryan was born prematurely, at approximately 28 weeks, due to Ms. Acanda's medical condition; she had developed a complication of pregnancy known as the HELLP syndrome, a life-threatening variant of pre-eclampsia, the treatment for which is prompt delivery of the baby. Although Ryan's postnatal condition was complicated by his premature birth, he was relatively healthy upon delivery, with normal Apgar

scores and an absence of birth trauma or defects. In the ordinary course of events, his prospects for survival were 90 percent or better, according to expert testimony which the undersigned credits.

Because Ryan was premature, the standard of care required that he be placed in a self-contained incubator often referred to as an Isolette™. The purpose of the incubator is to keep the infant in a controlled environment, so that heat, humidity, and oxygen levels will be maintained within ranges ideal for the infant's survival and protective against infection. Unaccountably, however, no Isolette™ was available at Jackson for Ryan. As a result, the nurses placed Ryan in a basinet, which was then covered in plastic wrap to create a makeshift incubator. Use of such a crude substitute for an Isolette™ was plainly a violation of the standard of care.

Ryan's attending physician was Dr. Gerhardt, a professor of pediatrics at the University of Miami School Medicine. The infant was also seen by several doctors who were in the medical school's residency and fellowship programs, which are operated through Jackson. When they are working at Jackson, the residents and fellows are regarded as employees and agents of the Trust.

Ryan's blood was drawn regularly for testing. Initially, the lab values which returned were within normal limits. As time passed, however, critical lab values began to worsen, indicating the possibility of infection. For example, Ryan's white blood cell count and absolute neutrophil count were normal on February 6. By February 8, 2005, each had dropped considerably, reflecting a high risk of infection. On February 9, these values were so low that the risk was severe. Similarly, the level of C-reactive protein ("CRP") in Ryan's blood—which rises in response to inflammation—was at the upper end of normal on February 6 and became elevated on February 7, 2005. This elevation suggested the possibility of infection. One of the doctors gave an order to repeat the CRP test on February 8, but the order was not followed—and Ryan's CRP was never tested again.

Ryan had other clinical signs of infection. On February 7 he started having low oxygen saturation (meaning that there was too little dissolved oxygen in his blood) and episodes of apnea, i.e., suspension of breathing. This resulted in the

use of continuous positive airway pressure ("CPAP") ventilation to assist Ryan's breathing. Such ventilation is accomplished by placing a mask over the infant's face to deliver a constant airstream against the nose and mouth.

On February 8, Ryan continued to have low oxygen saturation and apnea, and his heart rate dropped to an abnormally slow pace, a condition referred to as bradycardia. A doctor ordered that he be weaned off the CPAP mask and placed in an oxy hood, which would cover his entire head and allow him to breathe in an oxygen-enriched environment. For some reason, this order was not followed; the nursing staff inexplicably weaned Ryan off the CPAP mask to room air.

On February 8, a culture was taken from Ryan's nasopharynx. Upon testing, this culture revealed a growth of pseudomonas aeruginosa, a common bacterium that thrives on many surfaces, including medical equipment. Based on credible expert testimony, the undersigned finds that the standard of care required the administration of antibiotics at this point. Antibiotic therapy was not initiated on or before February 8, 2005, however, and this omission constituted negligence.

After February 8, Ryan's condition steadily worsened. On February 9, the nurses began "bagging" Ryan, meaning that they used a handheld device known as a bag valve mask (or Ambu bag) to manually ventilate the infant. The next day, his color was gray, and he began to bleed heavily from the nose and mouth because his lungs were hemorrhaging due to acute infection. Finally, at 1:00 p.m. on February 10, 2005, antibiotics were given to Ryan for the first time. By then it was much too late, as the *P. aeruginosa* infection had already spread throughout his body, leading to a condition known as sepsis. At about that time, Ryan went into septic shock, and his organs began to fail. Efforts to revive him were not successful. He passed away on the afternoon of February 10, around 5:00 p.m.

Ryan died from a *P. aeruginosa* infection, which he acquired in the hospital after birth, most likely from contaminated medical equipment. Ryan's death was preventable. Had the doctors and staff at Jackson timely administered antibiotics on or before February 8, 2005, as the standard of care

clearly required given the many signs pointing to the likelihood of infection, Ryan likely would have survived.

LEGAL PROCEEDINGS:

In 2006, Ms. Acanda, as personal representative of Ryan's estate, brought suit against the Trust. The action was filed in the Circuit Court in and for Miami-Dade County, Florida.

The case proceeded to trial in 2007. On August 10, 2007, the jury rendered a verdict in favor of the plaintiff and against the Trust, awarding a total of $2 million in damages. This award consisted of compensation for past and future pain and suffering by Ms. Acanda in the amount $600,000 for each component; Ryan's father, Alexis Rodriguez, was awarded $400,000 for past suffering and $400,000 for future suffering. The resulting judgment was affirmed by the Florida Fourth District Court of Appeal. See Public Health Trust of Miami-Dade Cnty. v. Acanda, 23 So. 3d 1200 (Fla. 3d DCA 2009). In June 2011, the Florida Supreme Court affirmed the district court's decision. See Public Health Trust of Miami-Dade Cnty. v. Acanda, 6 Fla. L. Weekly S 289 (Fla. June 23, 2011).

In December 2010, while the appeal was pending before the Florida Supreme Court, the parties agreed to settle the case for $999,000, of which the Trust has paid $200,000. The Trust further agreed to support a claim bill in the amount of $799.000. Out of the $200,000 recovery, $50,000 was applied to attorneys' fees and $61,088.48 to costs. The parents received $78,411.52, which was split 60% (mother)/40%(father) in accordance with the jury's allocation of the damages.

A Satisfaction of Judgment has been filed in the civil action.

Ryan's parents reached a separate agreement with the University of Miami, pursuant to which the latter settled the claims against it for $462,500. From this amount, the claimants paid their attorneys $185,000. In addition, they paid (or put funds in trust for) costs totaling $17,500. Thus, the claimants' net recovery from this settlement was $260,000, which they divided equally between themselves.

CLAIMANTS' ARGUMENTS:

The Trust is vicariously liable for the negligent acts of its employees and agents, including but not limited to:

- Failing timely and accurately to discover Ryan's *P. aeruginosa* infection, despite numerous warning signs.

- Failing to promptly initiate antibiotic therapy once it became apparent—no later than February 8, 2005—that Ryan was likely suffering from an infection.

- Failing to follow physician's orders, including the directives that Ryan's CRP level be re-tested, and that he be weaned from the CPAP mask to an oxy hood.

- Failing to put Ryan in an actual incubator, instead of using a shabby substitute made by covering a basinet with plastic wrap.

RESPONDENT'S POSITION: The Trust supports the bill. If the bill is enacted, the Trust, which is self-insured, will use Jackson's funds to satisfy the claim.

CONCLUSIONS OF LAW: As provided in s. 768.28, Florida Statutes (2010), sovereign immunity shields the Trust against tort liability in excess of $200,000 per occurrence. See Eldred v. N. Broward Hosp. Dist., 498 So. 2d 911, 914 (Fla. 1986)(§ 768.28 applies to special hospital taxing districts); Paushter v. S. Broward Hosp. Distr., 664 So. 2d 1032, 1033 (Fla. 4th DCA 1995).

Under the doctrine of respondeat superior, the Trust is vicariously liable for the negligent acts of its agents and employees, when such acts are within the course and scope of the agency or employment. See Roessler v. Novak, 858 So. 2d 1158, 1161 (Fla. 2d DCA 2003).

The nurses who were involved in Ryan's treatment were employees of the Trust acting within the scope of their employment, as were the residents and fellowship physicians. Accordingly, the negligence of these actors is attributable to the Trust.

Each of the referenced individuals had a duty to provide Ryan with competent medical care. Such duty was breached. The negligence of the Trust's employees and agents was a direct and proximate cause of Ryan's death.

The sum that the Trust has agreed to pay, which is half the judgment, both reasonable and responsible and fully supported by the evidence in the record.

ATTORNEYS FEES: Section 768.28(8), Florida Statutes, provides that "[n]o attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement." The law firm that the claimants have retained, Diez-Arguelles & Tejedor, P.A., would receive $199,750 in fees if this bill were enacted.

SPECIAL ISSUES: The claim bill requires a technical amendment to conform to the parties' settlement agreement. On page 3, at line 59, the amount of the claim should be $799,000, rather than $799,999.

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 48 (2012) be reported FAVORABLY, as amended.

Respectfully submitted,

John G. Van Laningham
Senate Special Master

cc: Senator Bill Montford
Debbie Brown, Interim Secretary of the Senate
Counsel of Record

Attachment

635024

LEGISLATIVE ACTION

Senate . House

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The Special Master on Claim Bills recommended the following:

Senate Amendment

Delete line 59

and insert:

warrant in the sum of $799,000, payable to Odette Acanda and