



## THE FLORIDA SENATE

### SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
12/31/14	SM	Fav/1 amendment
2/3/15	JU	Fav/CS
3/4/15	AHS	Recommend:Fav/CS
4/21/15	AP	Fav/CS

December 31, 2014

The Honorable Andy Gardiner  
President, The Florida Senate  
Suite 409, The Capitol  
Tallahassee, Florida 32399-1100

Re: **CS/CS/SB 34** – Appropriations Committee (Recommended by  
Appropriations Subcommittee on Health and Human Services);  
Committee on Judiciary; Senator Miguel Diaz de la Portilla  
Relief of Asia Rollins

### SPECIAL MASTER'S FINAL REPORT

THIS IS AN EQUITABLE CLAIM FOR \$699,999, BASED ON A PRESUIT SETTLEMENT OF A MEDICAL MALPRACTICE CLAIM, AGAINST THE MIAMI-DADE PUBLIC HEALTH TRUST, WHICH OPERATES JACKSON MEMORIAL HOSPITAL. ASIA ROLLINS, THE CLAIMANT, HAS SEVERE BRAIN INJURIES AND IS DEPENDENT ON OTHERS FOR HER BASIC NEEDS BECAUSE THE HOSPITAL FAILED TO TIMELY INTUBATE HER.

#### FINDINGS OF FACT:

On October 26, 2011, 3 year old Asia Rollins, who had history of epileptic seizures, had a seizure at daycare. The daycare providers gave her medicine and sent her to Jackson Memorial Hospital by ambulance. Upon arrival at the hospital's emergency room, Asia was breathing poorly. To help Asia breathe, the hospital's physicians decided to intubate her.

The staff mal-intubated Asia three times with several minutes elapsing between intubations. The delays deprived Asia of oxygen for extended time periods. Eventually, Asia's oxygen levels and heart rate decreased until she went into asystole, meaning her heart stopped. By the time Asia was breathing

again, she had suffered a global ischemic brain injury,<sup>i</sup> which is a brain injury caused by the lack of blood flow.

Later, Asia's neurologist, Dr. Ian Miller of Miami Children's Hospital, diagnosed Asia as having hypoxic ischemic encephalopathy,<sup>ii</sup> a condition in which the brain does not receive enough oxygen. She was also diagnosed as having cortical blindness,<sup>iii</sup> a type of blindness caused by a brain injury.

Currently, Asia is 6 years old and she is completely dependent on others.<sup>iv</sup> She cannot dress herself, talk, or walk. She is wheelchair bound. She cannot feed herself and must be fed through a gastronomy tube. Asia's breathing must be monitored and her airways must be suctioned regularly to prevent the accumulation of mucus. Asia also receives regular physical therapy to prevent or minimize muscle stiffness.

Asia has many disabilities and few abilities. According to her mother's comments, which were recorded in Asia's medical records, Asia looks around when her name is called.<sup>v</sup> She smiles, laughs, and enjoys petting her dog.

Asia's current condition is not likely to significantly improve, and she will need full-time care for the rest of her life.

#### CONCLUSIONS OF LAW:

Jackson Memorial Hospital is a public hospital that is operated by the Miami-Dade Public Health Trust.<sup>vi</sup> Additionally, the hospital or trust, under the doctrine of *respondeat superior*, is responsible for the medical negligence of its doctors.<sup>vii</sup>

Under Florida law, to establish the liability of a physician in a medical malpractice action, the plaintiff has a burden of proving that (1) the physician had a duty to the patient, (2) the physician breached the duty, and (3) the breach of the duty caused the plaintiff's damages.<sup>viii</sup> The Florida Supreme Court has explained these elements as follows:

The duty element requires a physician to act within the standard of professional care. See § 766.102, Fla. Stat. (2013). The standard of professional care is a level of care, skill, and treatment that, in consideration of all surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably prudent health care providers. In short, it is to provide the care that a reasonably prudent physician would

provide. A physician breaches that duty when he or she does not provide the care that a reasonably prudent physician would provide. See § 766.102, Fla. Stat. (2013). Therefore, in a medical malpractice action, the burden is on the plaintiff to establish that the care provided by the physician was not that of a *reasonably prudent physician*.<sup>ix</sup>

During the special master proceeding, the claimant proved the elements of its medical malpractice claim through the use of a Verified Medical Opinion by Dr. Anthony C. Mustalish.<sup>x</sup> According to the opinion, Dr. Mustalish practices emergency medicine and, among other credentials related to the practice of emergency medicine, was certified by the American Board of Emergency Medicine in 1990 and 1999. The hospital had no objection to the opinion and did not offer any evidence contradicting the opinion.

According to the Verified Medical Opinion, the hospital deviated from the standard of care for reasonably prudent similar providers by:

- Failing to provide proper care and treatment to the patient;
- Failing to properly intubate the patient;
- Failing to properly have and maintain an adequate airway for the patient;
- Failing to properly insure the patient was properly oxygenated;
- Failing to timely recognize an inappropriate intubation;
- Failing to timely and properly correct an inappropriate intubation;
- Improperly allowing the patient to suffer a prolonged period of anoxia, which is oxygen deprivation;
- Improperly allowing the patient to suffer cardiac arrest; and
- Inappropriately causing the patient to suffer a severe hypoxic ischemic injury.

The Verified Medical Opinion concluded with a finding that “within a reasonable degree of medical certainty, the . . . deviations from the standard of care caused or contributed to Asia Rollins’ injuries.”<sup>xi</sup>

As a result of s. 768.28(5), F.S., the hospital’s liability for medical malpractice claims or judgments is limited to \$200,000 per claim or judgment and \$300,000 for all claims or judgments arising out of the same incident. Amounts in

excess of these limits may be paid only if authorized by the Legislature in a claim bill. Thus, Asia Rollins will not receive the full amount of the settlement with the hospital unless the Legislature approves a claim bill for her benefit.

SETTLEMENT AGREEMENT:

The parties to the claim bill settled the claim without resorting to a lawsuit, pursuant to the presuit procedures in chapter 766, F.S.<sup>xii</sup> Under the terms of the settlement, the parties agreed to settle the medical negligence claim for \$999,999. Of that amount, \$300,000<sup>xiii</sup> has been paid and \$699,999 remains unpaid. The agreement further provides that the hospital supports a claim bill in the amount of \$699,999. The hospital will oppose a claim bill that exceeds the amount of the settlement.

Because the amount of the settlement in this matter exceeds certain statutory thresholds, the settlement agreement had to be approved by a court, and the court had to appoint a guardian *ad litem* to represent Asia's interests.<sup>xiv</sup> Asia's guardian *ad litem*, attorney Stephen F. Cain, reviewed the settlement agreement and issued a report to the court recommending that the settlement be approved.<sup>xv</sup> In its order approving the settlement, the court ordered that the funds from the settlement be deposited into a special needs trust for the benefit of Asia Rollins.

SPECIAL NEEDS TRUST:

A special needs trust is a mechanism authorized by federal law that prevents a beneficiary, like Asia Rollins, from being disqualified from government benefits like Medicaid.<sup>xvi</sup> Thus, the funds in Asia's special needs trust will supplement, not supplant the government benefits she is receiving. However, federal law also requires that any funds remaining in a special needs trust after the death of the beneficiary be used to reimburse the state providing the benefits.

Typically, in claim bills for the benefit of individuals like Asia Rollins, the Legislature expressly requires that the proceeds of a claim bill be paid into a special needs trust.<sup>xvii</sup> This claim bill, however, does not contain the typical requirement for a special needs trust. Instead, the bill requires that funds be paid directly to Asia Rollins. To avoid any argument that the court order approving the settlement agreement applies only to the amounts already paid by the hospital, the Legislature should amend the claim bill to expressly require that the proceeds be placed in a special needs trust.

ATTORNEYS FEES:

Claim bills can raise several related attorney fee issues. The first issue is whether the claimant's attorney has complied with the 25 percent limit on attorney fees in s. 768.28(8), F.S., or will comply with the limit on attorney fees in the bill. In this matter, a closing statement submitted by Stuart Ratzan, the attorney for the claimant, shows that he or his firm was paid \$75,000 in attorney fees from the initial \$300,000 from Jackson Memorial Hospital. Thus, the payment for attorney fees is consistent with the 25 percent limit on attorney fees in s. 768.28(8), F.S. Additionally, Mr. Ratzan submitted an affidavit stating that the attorney fees related to the bill will be limited to 25 percent of the amount awarded.

The second issue relating to attorney fees is whether the claim bill contains a fee limitation and whether that limitation is appropriate. This issue arises in the underlying claim bill because it contains an unusual fee limitation. Since 2008, most claim bills passed by the Legislature expressly limit the amount of proceeds available to pay attorney fees, lobbying fees, and related costs to 25 percent of the proceeds. In contrast, if the facts of this claim bill related to a nongovernmental defendant, Florida Rule of Professional Conduct 4-1.5(f)(4)(B), would have limited the attorney fee to 33 1/3 percent of the proceeds.

This bill limits the amount of the proceeds available to pay attorney fees, lobbying fees, and related cost to 15 percent of the proceeds unless the claimant, meaning Asia's mother, executes a waiver agreeing to a 25 percent fee limit. Perhaps the Legislature should decide the appropriate fee limit instead of Asia's mother.

Weighing in favor of a lower amount of fees, the claim was settled without the time and expense of litigation, and Asia Rollins has suffered severe injuries and has great needs.<sup>xviii</sup> Weighing in favor of the higher amount, the 25 percent fee limit is consistent with past practices of the Legislature and is significantly lower than the 33 1/3 percent authorized by The Florida Bar rule regulating contingency fees.

RECOMMENDATIONS:

For the reasons set forth above, the undersigned recommends that Senate Bill 34 (2015) be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

Thomas C. Cibula  
Senate Special Master

cc: Secretary of the Senate

**CS/CS by Appropriations on April 21, 2015:**

The committee substitute provides for the proceeds of the claim bill to be paid into a special needs trust instead of directly to the claimant as had been provided in the underlying bill.

**CS by Judiciary on February 3, 2015:**

The underlying bill limits attorney fees, lobbying fees, and related costs to 15 percent of the amount awarded by the claim bill unless the claimant agrees to a 25 percent fee limit. The committee substitute replaces this fee limit with the customary fee limit for claim bills which limits attorney fees, lobbying fees, costs, and other similar expenses to 25 percent of the amount awarded by the claim bill.

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<sup>i</sup> Columbia Neurosurgeons, Department of Neurosurgery, Columbia University Medical Center, *Cerebral Ischemia*, <http://www.columbianeurosurgery.org/conditions/cerebral-ischemia/> (last vided December 9, 2014).

<sup>ii</sup> Diana Kohnle, NYU Langone Medical Center, *Hypoxic Ischemic Encephalopathy*, <http://www.med.nyu.edu/content?ChunkIID=230598> (last editorial review May 2014).

<sup>iii</sup> MedicineNet.com, *Definition of Cortical Blindness*, <http://www.medicinenet.com/script/main/art.asp?articlekey=23943> (last editorial review June 6, 2012).

<sup>iv</sup> Asia was born in May 2008.

<sup>v</sup> Sayed Naqvi, M.D., Neurology Note for Asia Rollins (June 16, 2014).

<sup>vi</sup> *Bylaws of the Board of Trustees of the Public Health Trust of Miami-Dade, County, Florida*, available at <http://www.jacksonhealth.org/library/trust/public-health-trust-bylaws-2013.pdf>.

<sup>vii</sup> *Roessler v. Novak*, 858 So. 2d 1158, 1161 (Fla. 2d DCA 2003).

<sup>viii</sup> *Saunders v. Dickens*, 2014 WL 3361813, \*6 (Fla. 2014).

<sup>ix</sup> *Id.* (citations omitted).

<sup>x</sup> Anthony Mustalish, M.D., Verified Medical Opinion (November 7, 2012). The opinion was likely prepared to show that the claimant conducted a presuit investigation of a medical negligence claim, which is a prerequisite to filing a medical malpractice lawsuit under chapter 766, F.S.

<sup>xi</sup> *Id.*

<sup>xii</sup> The presuit procedures in chapter 766, F.S., require claimants and prospective defendants to a medical malpractice action to investigate medical malpractice claims before the claimant may file a lawsuit.

<sup>xiii</sup> If the matter in this claim bill proceeded to trial, there likely would have been two plaintiffs, Asia Rollins and her mother, Indya Marc. Each would have asserted a different injury resulting from the hospital's negligence. As such, the \$300,000 payment is consistent with the limits of \$200,000 per claim and \$300,000 per incident in s 768.28(5), F.S.

<sup>xiv</sup> Sections 744.3025 and 744.387, F.S.

<sup>xv</sup> Report of Guardian *Ad Litem*, In Re: Guardianship of Asia Rollins, No. 13-3642 (Fla. 11th Cir. Ct. December 3, 2013).

<sup>xvi</sup> See 42 U.S.C. 1396p(d)(4).

<sup>xvii</sup> A review of previously enacted claim bills shows that the Legislature occasionally requires all of the proceeds of a special needs trust to revert to the payor upon the death of the beneficiary. Such a requirement may make sense if the claim bill awards an unusually large amount of funds or the claimant's life expectancy or the cost of the claimant's future medical care is unknown or in dispute.

<sup>xviii</sup> Asia's guardian *ad litem*, attorney Stephen F. Cain, explained the financial magnitude of Asia's damages as follows: "A reasonable estimate of the full damages in this case would likely exceed \$35,000,000." Report of Guardian *Ad Litem*, *supra* note xv.