THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
01/16/15	SM	Fav/1 amendment
02/17/15	JU	Fav/CS
03/04/15	CA	Favorable
04/21/15	AP	Favorable

January 16, 2015

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

Re: **CS/SB 60** – Judiciary Committee and Senator Wilton Simpson
Relief of Roy Wright and Ashley Wright

SPECIAL MASTER'S FINAL REPORT

THIS IS A SETTLED EXCESS JUDGMENT CLAIM FOR $395,000. THE CLAIM SEEKS COMPENSATION FROM THE NORTH BREVARD COUNTY HOSPITAL DISTRICT D/B/A PARRISH MEDICAL CENTER FOR ALLEGED MEDICAL MALPRACTICE COMMITTED DURING THE BIRTH OF TUCKER WRIGHT.

FINDINGS OF FACT:

Ashley Wright was admitted to Parrish Medical Center in Titusville at approximately 10:30 p.m. on July 15, 2009, to give birth to her son, Tucker Wright. Because very little prenatal information was available on Ashley Wright, an ultrasound was ordered by Dr. Denis Perez, the admitting obstetrician, to obtain an estimated birth weight of the baby. The ultrasound projected the baby's weight to be 7 pounds and 6 ounces[i] at approximately 35 or 36 weeks of gestation.

Dr. Vidya Haté, an obstetrician employed by Parrish Medical Center, visited Ashley Wright the next day, at approximately 12:30 p.m. and conducted a vaginal examination. Dr. Haté asked certified nurse midwife Cara Starkey, who was attending Ashley Wright, to call her when the patient was either fully dilated or began to push. It is unclear from the available records if this call was simply to be a status update

or if Dr. Haté would leave her office and return to the hospital upon receiving the call. After the exam, Dr. Haté returned to her office, a drive of less than 3 minutes by car, to continue seeing other patients. Medical notes indicate that the patient was pushing at 3:20 p.m. and her cervix was fully dilated at 3:45 p.m., but Dr. Haté was not called at her office and advised of this status. Dr. Haté called midwife Starkey at approximately 4:00 p.m., when midwife Starkey's work shift was ending, and asked her to work until 4:30 p.m. and stated that she, Dr. Haté, would be there by 4:30 p.m.

At some undetermined time during labor, but after 4:00 p.m., the baby's head appeared outside the mother's body and then retracted, making a "turtle sign," which signals shoulder dystocia. Shoulder dystocia is an obstetric emergency in which a shoulder is trapped behind the mother's pubic bone. Midwife Starkey performed a medical procedure known as the McRoberts maneuver and additionally rotated the posterior, or lower, shoulder to release the anterior, or upper, shoulder, permitting release of the trapped shoulder and delivery of the baby. The McRoberts maneuver is accomplished by hyperflexing the mother's legs to her abdomen which tilts the pelvis more horizontally and helps facilitate delivery of the shoulder. In some instances, suprapubic pressure is simultaneously applied to the mother's abdomen to help manipulate the shoulder downward for delivery.

Midwife Starkey recruited Ms. Wright's husband, Roy, and one of her sisters to assist with the McRoberts maneuver. They were to flex Ashley's legs back against her abdomen. Midwife Starkey requested that the attending nurse, Donna Hayashi, apply suprapubic pressure to Ashley's abdomen, thereby ultimately allowing the baby's shoulder to be dislodged and the baby delivered.

The testimony describing the amount of time that elapsed during the maneuver and delivery is in conflict. According to midwife Starkey, the procedure took approximately 1 to 2 minutes from the time she noticed the shoulder dystocia until the baby was delivered. In contrast, Ashley Wright stated that the process took approximately 10 minutes, and Roy Wright stated that it took between 10 and 15 minutes.

Also, the evidence of whether the McRoberts maneuver and delivery were properly performed is in conflict. Midwife

Starkey testified in her deposition that she rotated the shoulders of Tucker Wright and performed the maneuver correctly. In contrast, the Wrights and their medical expert argue that midwife Starkey twisted Tucker's head, instead of his shoulders, while performing the McRoberts maneuver, thereby injuring their son.

After his birth, Tucker Wright was diagnosed with Erb's palsy, a limitation of the use of the arm which results from a stretching or tearing injury to the brachial plexus nerves. The brachial plexus is a group of nerves which run from the spine through the neck and into the arm and stimulate the arm and hand. Tucker underwent surgeries when he was almost 7 months old and again at 3 years of age in an attempt to repair and give him full use of his right arm. He has regularly received physical therapy. While he will experience some limitations with the use of his right arm, the surgeon's prognosis is good that Tucker will have most of the normal function of his arm.

LITIGATION HISTORY

The Wrights filed a medical malpractice lawsuit in 2012 against North Brevard County Medical Hospital District doing business as Parrish Medical Center. The case was resolved through mediation in 2013 and a claim bill for the excess judgment was filed in 2014.

A claim bill hearing was held on October 27, 2014, before the House and Senate special masters. Bill Ogle appeared with his clients, Roy and Ashley Wright and their son Tucker, and presented the plaintiffs' case. David Doyle, who represents the North Brevard County Hospital District, attended by Skype and was available for questions by the special masters. Because the hospital district agreed that it would not oppose the claim bill, he did not present any evidence on the hospital district's behalf. However, Mr. Doyle provided documents in response to specific requests by the special masters. The hospital district has not admitted fault in this claim.

CONCLUSIONS OF LAW:

Parrish Medical Center is a public, not-for-profit hospital in Titusville which is operated by the North Brevard County Hospital District. Under the legal doctrine of *respondeat superior*, the hospital district is liable for its employees' wrongful acts, or medical negligence, committed within the scope of their employment.

When a plaintiff seeks to recover damages for a personal injury and alleges that the injury resulted from the negligence of a health care provider, the plaintiff bears the legal burden of proving, by the greater weight of the evidence, that the alleged actions of the health care provider were a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care is defined in statute as "that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers."[ii]

To establish liability in a medical malpractice action, the plaintiff must prove (1) a duty by the healthcare provider to the patient, (2) a breach of that duty, (3) that the breach of that duty caused the plaintiff's injury, and (4) damages.[iii]

These elements as outlined below are based upon depositions, testimony, and other information provided during the special master hearing. Medical malpractice cases generally "involve a battle of expert witnesses"[iv] and this claim is no exception.

Duty

A hospital generally has a duty to provide adequate staffing and care to its patients. In the matter of this claim bill, at least before settlement, the specific duty that the hospital owed to Ashley and Tucker Wright was in dispute. In the claimants' opinion, the hospital's duty required it to have an obstetrician participating in the delivery of Tucker Wright. Documents provided by the hospital indicated that it was prepared to argue that midwife Starkey's qualifications, including her training and experiences in performing the McRoberts maneuver, made her qualified to deliver Tucker Wright without the presence of an obstetrician.

Additionally, when medical personnel perform a medical procedure, they have a duty to perform the procedure in a non-negligent manner Thus, when medical personnel perform a McRoberts maneuver and delivery, those personnel have a duty to properly perform the procedures. Whether the maneuver and delivery were properly performed is the primary issue that governs the hospital's liability in this matter.

Breach of Duty

If this case had proceeded to trial, it would likely have been disputed whether the duty of care owed to Ashley Wright was breached. Based upon the evidence, each side had a plausible argument to support its case.

The Wrights' Arguments

Staffing and the Absence of Dr. Haté: In addressing the issue of whether an adequate number of staff was on hand for the delivery, the Wrights enlisted Dr. Ray King, an obstetrician and gynecologist, to provide expert medical testimony. Dr. King testified that, at a minimum for a high risk patient, three hospital staff members should be in the room or immediately available, one of whom is taking notes, and the midwife or physician performing the delivery. Because only midwife Starkey and nurse Donna Hayashi were present, he concluded that the hospital district breached its duty of care in adequately staffing the delivery room.

The Wrights argue that Dr. Haté should have been present during Tucker's delivery. Dr. Haté knew that Ashley Wright's high-risk pregnancy, caused by her obesity and gestational diabetes, could result in a large baby or a complicated delivery To support their argument, they look to Dr. Haté's deposition, which was prepared for trial, in which she asked to be called when the patient was fully dilated and pushing. Moreover, Dr. Haté was not called and informed when the shoulder dystocia was discovered. Additionally, Dr. Haté's progress notes of July 16, 2009, record that Dr. Haté discussed with Ashley the possibility of shoulder problems, among other things, in a high risk pregnancy.

To further develop their breach of care theory, the Wrights' relied on Dr. King who stated that, even though he believed that Dr. Haté was a qualified physician, he believed that she deviated from the standard of care in her treatment of Ashley and Tucker Wright. He stated that Dr. Haté did not monitor the progress of Ashley Wright's labor sufficiently to be present at the time of delivery, but left her to the care of a midwife, even though she knew that Ashley Wright was a high risk delivery due to her gestational diabetes and obesity which can produce a larger baby. He concluded that it was highly unlikely that the injury to Tucker Wright would have occurred if an experienced obstetrician had been present to deliver the baby.

Dr. King stated that, although he did not have any criticisms of midwife Starkey's training, experience, or qualifications, he did not feel that she was qualified to deliver a baby whose mother was a gestational diabetic or obese without the supervision and presence of a physician. He faulted midwife Starkey, not for performing a McRoberts maneuver with suprapubic pressure, but for allegedly rotating the baby's head on the perineum as indicated in her typed delivery notes. Dr. King found that to be a deviation from the standard of care.

The Hospital District's Arguments

Staffing and the Absence of Dr. Haté: Based upon the evidence, the hospital was preparing to argue that it did not breach its standard of care to Ashley Wright. The hospital demonstrated that midwife Starkey was an experienced professional with sufficient training and qualifications to deliver a high-risk pregnancy unassisted. Cara Starkey has a bachelor's and master's degree in nursing and is a certified nurse midwife who had previously worked in a high-risk obstetrical unit. She testified in her deposition that she was trained in school and had participated in drills at Parrish Medical Center, using various maneuvers, to deliver babies having shoulder dystocia. She stated that she had likely performed the McRoberts maneuver 10 times or more in a year and had never had a child sustain a brachial plexus injury. Midwife Starkey testified in a deposition that she used an average, not excessive, amount of traction on Tucker to deliver him.

When asked why she did not call someone else into the delivery room to document what was happening, Ms. Starkey replied that she was focused on "getting the baby out" and believed that Dr. Haté was on her way to the delivery room, based upon the time and an earlier phone call from Dr. Haté.

In her deposition, Dr. Haté stated that she planned only to be the backup for Ashley Wright's delivery in case her help was needed. They were not expecting shoulder dystocia because, according to the ultrasound performed when Ashley was admitted for delivery, the baby's weight was projected at 7 pounds 6 ounces, not a large baby, and a size that would not suggest complications or shoulder dystocia. Dr. Haté explained in her deposition that shoulder dystocia does not become apparent until the head delivers. At that point, time is of the essence for the baby's survival and the healthcare workers cannot leave the patient to summon additional

assistance. If the baby is not quickly delivered, brain damage or death will be the result.

At one point in his deposition, Dr. King, the Wright's expert, was asked if Tucker could still have had the very same injury had Dr. Haté been present, and he acknowledged that Tucker could have.

The hospital district offered the deposition of Dr. Jordan Perlow, an obstetrician, as its expert witness. Dr. Perlow disagreed with Dr. King, the Wrights' medical expert, and said that it was not necessary nor below the standard of care for midwife Starkey to attend this particular delivery without a physician in the room. Dr. Perlow felt that the management that midwife Starkey provided was within the scope of her practice and that she had the backup support available from Dr. Haté if needed. He did note, though, that there was some lack of documentation and detail in the medical record of midwife Starkey.

Dr. Perlow testified that he looked specifically at the hospital's collaborative protocol and found it to be specifically within the scope of practice for a midwife to assess and provide management of shoulder dystocia. He further believed that midwife Starkey's actions were within the midwifery domain to deliver Ashley Wright's baby because she had a normal labor course, a normal estimated fetal weight, and a normal reassuring fetal heart rate. Midwife Starkey recognized the shoulder dystocia problem as soon as it occurred and then acted efficiently and appropriately in a timely fashion. Dr. Perlow said midwife Starkey resolved the shoulder dystocia in 1 to 2 minutes as evidenced by the fact that there was no fetal asphyxia and no fetal or neonatal death, and the Apgar scores were good at 5 minutes. His expert testimony, supported by his medical conclusions, lends credence to the theory that the amount of time that elapsed from the recognition of the shoulder dystocia to Tucker's delivery was 1 to 2 minutes, not 10 to 15 minutes as the Wrights suggest.

In assessing Ashley Wright's medical condition, Dr. Perlow noted that Ashley Wright was not medication-dependent for her gestational diabetes and was perhaps not as high-risk as others with gestational diabetes who were medication dependent.

When asked his opinion of Dr. Haté's prenatal medical care, Dr. Perlow responded that Dr. Haté's conduct was appropriate and within the standard of care. She continued to provide care to Ashley Wright when concerned about her noncompliance[v] and gestational diabetes, wanted her referred back to her previous obstetrician, and tried to refer her to a high-risk obstetrician. Dr. Haté remained within 3 minutes' drive from the hospital and was available to the nurse-midwife.

When the Wrights' attorney asked if Dr. Perlow believed that there were enough staff in the delivery room, he stated that he thought it met the standard of care although more staff and better notification for more people to come would have been ideal. Nevertheless, he said that in all probability, the shoulder dystocia would have likely been resolved by the time that additional staff would have arrived.

The McRoberts Maneuver and Delivery: Each side has a seemingly valid argument as to whether the McRoberts maneuver and delivery were properly performed.

The Wrights argue that they were not properly performed. In support of their position they look to midwife Starkey's delivery notes which state that "moderate shoulder dystocia relieved with McRoberts, suprapubic pressure and *rotation of the head on the perineum ….*" Because of this notation, the Wrights argue that midwife Starkey rotated the baby's head on the mother's perineum which should not have been undertaken because the rotation of the head would damage the fragile brachial plexus nerves that control the use of the baby's arm, and thereby cause Erb's palsy. A proper execution of the McRoberts maneuver and delivery would have only involved rotating the infant's shoulder, not his head.

The hospital district relied on midwife Starkey's deposition testimony and its medical expert, Dr. Perlow to support its position that the McRoberts maneuver was properly executed.

Midwife Starkey stated that when Tucker's head came out and retracted, she realized, based upon her training, that she had encountered shoulder dystocia and quickly needed to perform a McRoberts maneuver to help manipulate the shoulder downward for delivery. Ms. Starkey called for Donna Hayashi, the attending nurse, who came to the bed and began applying suprapubic pressure while Ashley Wright's legs were pulled back by family members. Ms. Starkey said that while she had

her hands supporting Tucker's head, she rotated the left shoulder which allowed for the release of the right shoulder and delivery of the baby. She testified that she did not pull on the baby's head in the delivery process and was able to get behind the baby's shoulder to rotate him.

Dr. Perlow, the hospital district's expert, said that midwife Starkey recognized and resolved the shoulder dystocia problem, prevented any neurologic injury from the brain, and concluded that she saved the baby's life. When asked about the seeming contradiction between the delivery notes, which said midwife Starkey rotated the baby's head versus her deposition testimony in which she said that she rotated the shoulder, Dr. Perlow felt that she wrote the note after dealing with a true obstetrical emergency and either misstated what she did or perhaps didn't accurately write what she did but that her actions were not below the standard of care.[vi]

Causation

The Wrights argue that midwife Starkey's improper rotation of Tucker's head caused the brachial plexus injury and the resulting Erb's palsy. They also argue that if the more experienced Dr. Haté had been present to deliver Tucker, his injury would not have occurred.

Dr. John Grossman, the Wright's expert, a hand and peripheral nerve surgeon who specializes in performing brachial plexus surgeries has operated on Tucker twice. It is his opinion that the damage to the nerves was caused by traction to the brachial plexus during delivery. He did not believe that the injury could have been caused by the maternal pressure of the delivery.

In contrast, the hospital district does not believe that midwife Starkey's actions were necessarily the cause of Tucker's injury as one might assume. Dr. Perlow noted that "there can be rotation of the head to a degree in order to effect the delivery." He explained that when the baby's head comes out, he or she is "essentially looking straight down at the ground" and there has to be a process of "restitution where the head then goes 90 degrees one way or the other, depending upon the baby's position … [and] there can be a need for some rotation to get to that point." Dr. Perlow believed that midwife Starkey also completed a technique referred to as a Rubin maneuver, which involves the rotation of the shoulder, and a resulting rotation of the head on the perineum. If, however,

midwife Starkey rotated the baby's head as opposed to rotating the baby's shoulder, he concluded that it would be a violation of the standard of care.

Dr. Perlow noted that medical literature has recognized that shoulder dystocia in itself, the stretching of the baby's neck as it continues down the birth canal with the shoulder hung up at the pubic symphysis, would be sufficient to cause the baby's injury without additional traction forces. The special master found this statement was corroborated by medical research.

The American College of Obstetricians and Gynecologists released a 2014 report entitled "Neonatal Brachial Plexus Palsy." The report stated that neonatal brachial plexus palsy, or NBPP, which includes Erb's palsy and Klumpke palsy, is a rare event and occurs only in approximately 1.5 of every 1,000 births. The report addressed the difficulty of determining which risk factors are statistically reliable predictors of NBPP. While noting that NBPP occurs more often as birth weight increases, the report concluded that the majority of NBPP cases occur with mothers who do not have diabetes and in babies who weigh less than 8.8 pounds. For women who have diabetes and an estimated baby birth weight greater than 9.92 pounds, the ability to accurately predict NBPP was only 5 percent. In addressing the issue of causation, the report stated that risk factors for shoulder dystocia are not very reliable. The report also provided that, while it was routinely believed during most of the last century that NBPP was caused by force used by the person delivering the baby, there was no clinical data supporting that conclusion. More recently, data began appearing which indicated that other forces unrelated to the injury, such as congenital and uterine abnormalities or malpositioning of the fetus within the uterus, played a role in NBPP.[vii]

When the hospital district deposed Dr. Andrew Price, who has assisted Dr. Grossman in Tucker's surgeries, Dr. Price testified that Tucker's injury was due to traction forces, but had no opinion as to the mechanical causes of the injury. He also noted that he had seen children with brachial plexus injuries who were delivered by Cesarean sections.

Damages

Because Tucker has Erb's palsy, his doctors have testified that Tucker will have a weakness in his right arm throughout his life.

Dr. Price testified that there will be some limitations on Tucker's future activities and career opportunities. He projects that Tucker will experience muscle weakening and his right arm will be somewhat smaller, perhaps a centimeter or two smaller, than his left arm. The shoulder girdle will also be a little smaller creating an asymmetry. Tucker does not have any impairment in the function of his hand or wrist. Sports that require the use of both hands will not be easy for Tucker, but Dr. Price testified that Tucker should be able to play sports such as football, basketball, baseball, soccer, tennis, swimming, martial arts, most everything else.

Dr. Price testified that Tucker's injury should not impair his academic performance but that some careers would be difficult for him. He would not likely be able to perform many upward motion labors requiring significant strength and he would probably not be able to pursue a military career or work as a firefighter, law enforcement officer, or mechanic. But a wide range of other careers should be open to him.

Unlike the claim bill, Dr. Price declined to characterize and refer to Tucker as having "partial paralysis," but rather as having deficits of strength and flexibility.

Dr. Price noted that Tucker does not need any adaptive equipment to compensate for his injury and is not on any medications for his injury nor should he need any future medications for the injury.

Final Conclusion in Light of the Evidence

The evidence made available to the special masters indicates that the hospital district had a plausible defense to the medical malpractice claims by the Wrights. However, the Wrights claims are also at least plausible. A negligently performed McRoberts maneuver and delivery can cause Erb's palsy, but no independent verifiable evidence such as a video tape exists to prove what actually happened as Tucker Wright was being born. Similarly, one might agree with Dr. Perlow as he stated in his deposition, "I would say that the nurse, Nurse Starkey, saved this baby's life" even though Tucker was born with Erb's palsy. Thus, considering the costs of litigation and the uncertainty of juries, the settlement agreement is reasonable under the circumstances.

SETTLEMENT AGREEMENT

Per the terms of its settlement with the Wrights, the North Brevard County Hospital District did not present evidence or make any arguments during the de novo special master hearing. The district, however, did provide information or evidence in response to specific requests. Much of the information was prepared as part of its defense to the Wright's medical malpractice lawsuit. However, the information or evidence provided by the hospital district suggests that the hospital district, at least initially, intended to dispute the Wright's negligence allegations.

The Wrights initially offered to settle the claim for $2,500,000. However, the parties settled this suit at mediation for $595,000, of which $200,000 has been paid. The Order Approving Settlement authorized the payment of attorney fees of 25 percent, or $50,000, and attorney costs of $15,790.15 from the initial $200,000. A petition to reduce medical liens was approved and their payment authorized in two installments, with the first installment of $28,123.20 coming from the initial allocation and the second installment being paid contingent upon passage of the claim bill. Roy and Ashley Wright received 25 percent or $26,521.66 and the Tucker Wright Trust received 75 percent of the net balance or $79,564.99.

Should the claim bill pass, the proceeds would be distributed first to pay attorney fees of 25 percent or $98,750, plus costs followed by a net award of 25 percent distributed to Roy and Ashley Wright for the expenses they have incurred caring for Tucker and the remaining 75 percent to Tucker's trust. Roy and Ashley Wright were approved as co-trustees to manage the assets of Tucker until he reaches majority. The funds are restricted to his educational and healthcare needs and may be invested only in secure, conservative minimal risk investments.

The settlement release, dated December 20, 2013, states that neither the release nor payments are to be construed as an admission of liability on the part of the North Brevard County Hospital District. The Hospital District does not oppose the claim bill. The claim bill will be solely funded by a dedicated trust fund of the North Brevard County Hospital District d/b/a Parrish Medical Center because the district does not maintain professional liability insurance that applies to the claim.

Because the settlement amount exceeds $50,000, the settlement agreement had to be approved by a judge who was required to appoint a guardian ad litem to represent Tucker's interests.[viii] Tucker's guardian ad litem, attorney Arthur W. Niergarth, Jr., reviewed the proposed settlement on behalf of Tucker and filed his recommendation with the court in support of the proposed settlement

ATTORNEYS FEES: Section 768.28, F.S., limits the claimant's attorney fees to 25 percent of the claimant's total recovery by way of any judgment or settlement obtained pursuant to s. 768.28, F.S. The claimant's attorney has acknowledged this limitation and verified in writing that nothing in excess of 25 percent of the gross recovery will be withheld or paid as attorney fees.

RECOMMENDATIONS: Based upon the foregoing, the undersigned recommends that Senate Bill 60 be reported FAVORABLY.

Respectfully submitted,

Eva M. Davis
Senate Special Master

CS by Judiciary on February 17, 2015:
The committee substitute corrects the spelling of midwife Starkey, clarifies that the McRoberts maneuver does not involve the rotation of an infant's head during delivery, states that an additional procedure was performed to deliver the baby, deletes a reference to the infant's arm being paralyzed, and removes references to the negligence of "an employee of" the Parrish Medical Center.

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[i] When Tucker was born, he actually weighed over a pound more than what the sonogram projected. Even at that birth weight, however, he did not meet the definition of "macrosomic" or excessively large baby.
[ii] Section 766.102(1), F.S.
[iii] *Saunders v. Dickens*, No. SC12-2314, 2014 WL 3361813, at *6 (Fla. July 10, 2014).
[iv] *Id.*, at *7.
[v] In her progress notes on the date of the delivery, Dr. Haté described Ashley Wright as being noncompliant. She stated that Ashley Wright left her first obstetrician late in the pregnancy and refused to return to that obstetrician's care when encouraged to do so. Ashley chose to discontinue taking insulin to treat her gestational diabetes, and did not keep her high risk appointment when referred to a high risk specialist. The facts are in dispute as to why she did not keep the appointment.
[vi] Dr. Perlow indicates that he believed that midwife Starkey might have actually performed a Rubin maneuver in addition to a McRoberts maneuver. The Rubin maneuver involves reaching in and rotating a shoulder of the baby to help dislodge it.

[vii] American College of Obstetricians and Gynecologists, Task Force on Neonatal Brachial Plexus Palsy, *Neonatal Brachial Plexus Palsy*, 2014.
[viii] Sections 744.3025 and 744.387, F.S.