



STORAGE NAME: h6535.CJC

DATE: 3/10/2017

March 9, 2017

SPECIAL MASTER'S FINAL REPORT

The Honorable Richard Corcoran
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 6535 - Representative Jenne
Relief/Vonshelle Brothers/Department of Health

THIS IS AN UNCONTESTED CLAIM FOR \$1,000,000 BASED ON A SETTLEMENT AGREEMENT BETWEEN VONSHELLE BROTHERS, AS THE NATURAL PARENT AND LEGAL GUARDIAN ON IYONNA HUGHEY, AND THE DEPARTMENT OF HEALTH AFTER IYONNA SUFFERED INJURIES FROM THE DEPARTMENT'S NEGLIGENCE. THE DEPARTMENT HAS PAID THE STATUTORY LIMITS OF \$200,000.

FINDING OF FACT:

On March 16, 2010, twenty-three year old Vonshelle Brothers visited the Brevard County Health Department (BCHD) for her initial pre-natal visit. Vonshelle was nine-weeks pregnant with Iyonna Hughey, her third child. Nurse Elena Cruz-Hunter conducted a Pap test¹ on Vonshelle and sent the test to Quest Diagnostics for analysis.

Quest Diagnostics analyzed the Pap test and returned the test results to the BCHD. In the test results, Quest Diagnostics had the following interpretations:

- Negative for intraepithelial lesion or malignancy.

¹ A Pap test, also known as a Pap smear, is a procedure to test for cervical cancer in women. It involves collecting cells from the cervix, the lower, narrow end of the uterus that is at the top of the vagina. Mayo Clinic, <http://www.mayoclinic.org/tests-procedures/pap-smear/basics/definition/prc-20013038>.

- Cellular changes consistent with Herpes simplex virus
- Shift in vaginal flora suggestive of bacterial vaginosis.

Additionally, the test result stated "Queued for Alerts call."

The BCHD had a policy in place in how to handle lab slips from entities such as Quest Diagnostic. The policy provides that lab slips will be reviewed by a nurse and initialed. Specifically, negative lab slips should be filed in the client's medical records. Positive lab slips should be pulled and given greater scrutiny. BCHD's policy also provided that any abnormal results needed to be signed by a clinician.

The BCHD received Vonshelle's test results and placed them in her file. There is proof that someone at the health department read the report as there is a check mark adjacent to the interpretations. Nothing from the records show that anyone from Quest Diagnostics called the BCHD or vice versa. The test results were added to Vonshelle's files but no further action was taken regarding the test results. The BCHD did not do any follow up tests to confirm whether Vonshelle had herpes. The BCHD never disclosed the test results to Vonshelle. In fact, Vonshelle returned 15 times during her pregnancy for follow-up appointments, prenatal visits, and ultra sounds. At none of these visits was she told about the herpes results nor were evasive actions taken by her doctor.

On October 14, 2010, at only 36 weeks in to the pregnancy, Vonshelle gave birth to Lyonna Hughey via vaginal delivery at Wuesthoff Medical Center. Vonshelle and Lyonna were discharged from the hospital in good condition on October 16, 2010.

Two weeks later, on the night of October 31, 2010, Vonshelle noticed Lyonna was running a fever. She took Lyonna to a Holmes Regional Medical Center but left after waiting for thirty minutes. She reported that a nurse instructed her to place a wet cloth on Lyonna. It is unconfirmed what was said to her or why Vonshelle left without receiving further medical attention for her daughter.

The next day, November 1, 2010, Vonshelle returned to Wuesthoff Medical Center's Emergency Department with Lyonna, whose condition had only gotten worse. Lyonna was lethargic, not eating, and was continuing to run a fever. A lumbar puncture was performed in which cerebral spinal fluid was collected. Initial diagnosis of Lyonna was that she had meningitis and she was transferred to Arnold Palmer Hospital for further evaluation. However, on November 3, 2010, the final results of the cerebral spinal fluid were reported and indicated Lyonna tested positive for herpes simplex virus type 2.

There are two types of the herpes virus. Herpes simplex virus

type 1 ("HSV-1") is mainly transmitted by oral contact and can cause cold sores and fever blisters around the mouth. Herpes simplex virus type 2 ("HSV-2") is a sexually transmitted infection that causes genital herpes. HSV-2 can be spread through sexual contact or skin-to-skin contact, and in rare circumstances, can be transmitted from a mother to her infant during delivery.² If a person with either HSV-1 or HSV-2 is pregnant, their physician may consider a delivery by cesarean section. Both of these viruses remain in the body throughout a person's life, even when they are not showing signs of infection.³

Not only was it discovered through the lumbar puncture that Lyonna had HSV-2, it was clear that she had herpes meningoencephalitis. Essentially, the HSV-2 had infected Lyonna's brain. She stayed at the Arnold Palmer Hospital for over a month receiving treatment, including being placed on Acyclovir to help suppress the infection.

As a result of the HSV-2, Lyonna has suffered significant and long lasting developmental delays in both her cognitive and executive functions. Lyonna is now six years-old and cannot speak but a few words. She cannot fully walk on her own. She relies upon others to use the restroom. Dr. Daniel Adler, M.D., who examined Lyonna, states she has a chronic and permanent neurological disability.

Lyonna is now in elementary school but has no wheelchair or walker. She's in a special needs program at Palm Bay Elementary. She resides with her mother and her four sisters in a second floor apartment, in which her mother must carry Lyonna up and down the stairs every day to catch the bus.

LITIGATION HISTORY:

On October 9, 2012, Vonshelle Brothers, individually, and as natural parent of Lyonna Hughey, filed a complaint in Circuit Court of the Eighteenth Judicial Circuit in Brevard County alleging negligence against the BCHD, a department of the Florida Department of Health (DOH). On April 25, 2016, a week before the scheduled jury trial was to begin, the parties entered into a settlement agreement in the amount of \$3,200,000. As a term of the settlement agreement, DOH reserved the right to contest a claim bill. DOH paid the \$200,000 statutory cap, of which \$50,000 went towards the purchase of an annuity which will begin payments when Lyonna turns 18 years-old.

Following the filing of the claim bill in January 2017, the parties reached another settlement. This settlement provides that the

² World Health Organization, "Herpes simplex virus" <http://www.who.int/mediacentre/factsheets/fs400/en/> .

³ Johns Hopkins Medicine, "Herpes Meningoencephalitis" http://www.hopkinsmedicine.org/healthlibrary/conditions/nervous_system_disorders/herpes_meningoencephalitis_134,27/ .

amount requested in the claim bill will only be \$1,000,000 and DOH will not contest enactment of the claim bill.

CLAIMANT'S POSITION:

Vonshelle, as parent and guardian of Lyonna Hughey, (Claimant) argues the BCHD was negligent when they failed to conduct further testing and analysis when they received the results of the Pap test. The standard of care required the BCHD to have conducted more tests and take further precautions in the pregnancy, such as starting anti-viral medication or delivering Lyonna via cesarean section. If these precautions were followed, then Lyonna would not have suffered irreparable brain damage.

RESPONDENT'S POSITION:

DOH does not contest the claim bill and requests the Legislature provide an additional appropriation from General Revenue Fund to DOH to pay the claim.

CONCLUSION OF LAW:

Whether or not there is a jury verdict or a settlement agreement, as there is here, every claims bill must be based on facts sufficient to meet the preponderance of evidence standard.

Duty

In Florida, to prevail on a medical malpractice claim, a claimant must show what standard of care was owed by the defendant, how the defendant breached that standard of care, and that the breach was the proximate cause of damages.⁴ The professional standard of care is the level of care, skill, and treatment which, in light of all surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.⁵ "Generally, expert testimony is required to establish the standard of care prevalent in a particular medical field. Thus, from a professional standpoint, the services rendered by a physician are scrutinized by other physicians in order to determine whether there was a failure to adhere to the requisite standard of care."⁶

Claimant has presented several different experts that testified the BCHD deviated from the standard of care. Sharon Hall, a registered nurse and expert on labor and delivery, stated that the standard of care required the nurses at the BCHD to report any abnormal results in the Pap test and failure to do so was a deviation from the standard of care. Additionally, Dr. Berto Lopez, a practicing medical doctor certified in Obstetrics and Gynecology, provided that the standard of care for ordering tests on patient's samples requires the physician to follow up and be responsible for knowing those test results. Under Dr. Lopez's view of the standard of care, the nurse reviewing the test results and being the arbitrator of what is important falls

⁴ *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984).

⁵ s. 766.102(1), F.S.

⁶ *Moisan v. Frank K. Kriz, J.K., M.D., P.A.*, 531 So. 2d 398, 399 (Fla. 2d DCA 1988).

below the standard of care. The failure of the treating physician to not review the lab results deviates below the standard of care.

From the expert testimony provided, I find the BCHD had a duty to review the lab results and to follow up with further diagnostic testing.

Breach

If the standard of care required the BCHD to follow up on any abnormal reports, then the BCHD clearly breached their duty. From the BCHD's own policy regarding lab results, the BCHD failed to have a clinician review any abnormal test results.

Causation

In order for a defendant to be liable to a claimant, the claimant must show the defendant's actions were the proximate cause of claimant's injuries.⁷ In this case, causation was the most contentious issue prior to settlement. the BCHD failed to notice the abnormal test and failed to follow up with any further diagnostic testing. It is clear Lyonna has HSV-2 and herpes encephalitis. At contention in litigation was how Lyonna contracted HSV-2?

The lab results from Quest Diagnostics stated that Vonshelle's Pap test showed "cellular change consistent with Herpes simplex virus." She was not given a more extensive test while pregnant with Lyonna. In the midst of litigation, Vonshelle was tested three times for HSV-2. In two of the tests, which analyzed her blood, Vonshelle tested negative for HSV-2. In a more thorough test, in which Vonshelle's DNA was analyzed, she tested positive for HSV-1 and indeterminate for HSV-2. Dr. Lopez testified that Vonshelle's negative test results for HSV-2 do not preclude her from actually having HSV-2. According to Dr. Lopez, Vonshelle's viral load may not have been sufficient at the time the tests were performed to trigger a positive test result. Vonshelle stated that she had two boils during her pregnancy with Lyonna, one under her arm and another near her genitals. It is unclear whether or not these boils were lesions consistent with HSV-2.

Claimant's attorney argues that despite the inconclusive test results of Vonshelle, based on the timing of the onset of symptoms, it is more likely than not that Lyonna contracted HSV-2 from Vonshelle via vaginal delivery. Nurse Hall, an expert on labor and delivery, stated symptoms of HSV-2 will show up 12 to 14 days after exposure. Dr. Carl Barr, DOH's own medical expert, testified that the most common cause of exposure for infants with HSV-2 was through vertical transmission from mother to child during birth. Dr. Catherine Lamprecht, a pediatric infectious disease specialist, stated the

⁷ *Y.H. Invs. v. Godales*, 690 So. 2d 1273, 1279 (Fla. 1997).

timing of Lyonna's symptoms in late October is consistent with exposure to HSV-2 during labor and delivery. She even stated that 98% of the time a baby contracts neonatal herpes, it is from exposure in labor and delivery. Dr. Daniel Adler, an expert on neonatal herpes simplex encephalitis and how newborns contract HSV, stated it was more likely than not an acquisition of HSV-2 occurred during delivery via the birth canal.

Based on the onset of symptoms and the experts presented, I find Lyonna contracted HSV-2 through vaginal delivery. Dr. Lopez testified that if further testing was done of Vonshelle following the Pap test, Lyonna may have never contracted HSV-2. Specifically, a doctor could have started Vonshelle on antiviral therapy which would have lessened the chances of an active lesion and exposure to Lyonna. If there was an acute outbreak of herpes, Vonshelle could have undergone a cesarean section to prevent the transmission of herpes to her child.

Comparative Negligence

One of the questions that would have been presented to a jury is whether anyone else is responsible for Lyonna's injuries besides the BCHD? Certainly Quest Diagnostics knew of an abnormal result and there is no evidence anyone from Quest Diagnostics called the BCHD. Claimant's attorneys stated at the special master hearing that they looked into any claim of liability against Quest Diagnostics and it was seen to be without merit. Their own experts stated the lab company owed no duty to Vonshelle or Lyonna, only to inform the clinician ordering the tests. Additionally, Claimant's attorneys pursued a claim against Wuesthoff Medical Center, the hospital that delivered Lyonna, on whether they should have thoroughly reviewed Vonshelle's medical history and charts before delivery. Again, Claimant's attorney's experts stated that the hospital did not deviate from the standard of care.

Certainly one may choose to blame Vonshelle for contracting HSV-2 and transferring it to her daughter. It is unclear whether Lyonna's father has HSV-2 and gave it to Vonshelle. It is unclear when or how Vonshelle contracted HSV-2. She reported boils on her skin but it is not clear whether they were associated with HSV-2. On October 31, 2010, she left the hospital without letting Lyonna see a doctor, but later returned the next day. It is unclear whether those hours may have altered Lyonna's condition in anyway. It is uncertain if a jury would hold Lyonna responsible for the actions of her mother and reduce any award to Lyonna. What is clear is that Vonshelle's entire claim against DOH has been satisfied and any amount awarded in a claim bill will go to Lyonna's claims and her future care.

Damages

lyonna's damages are severe and lifelong. Her neurological development is stunted and may never meet that of her peers. She is dependent on others to use the restroom, to bathe, and to walk. Dr. Paul Deutsch, a certified life care planner, opined that lyonna will remain dependent throughout the remainder of her life. She is receiving therapy at her school but is currently not enrolled in any form of speech therapy. Claimant's attorneys submitted a life care plan which estimates lyonna's total economic loss at \$10,062,029. Even if this life care plan overestimates the cost of her future care, lyonna will be dependent and require care for the rest of her life. The settlement amount awarded in the bill of \$1,000,000, in addition to the \$50,000 annuity purchased, is a fair and appropriate amount to compensate lyonna for her injuries.

ATTORNEY'S/
LOBBYING FEES:

Claimant's attorney has an agreement with Claimant to take a fee of 15% of Claimant's total recovery. Claimant's attorney has hired a lobbyist and has agreed to pay 5% of any amount of the claim bill in lobbying fees; such payment is included in the attorney's 15% fee. Outstanding costs total \$2,214.

LEGISLATIVE HISTORY:

This is the first time this instant claim has been presented to the Legislature

RECOMMENDATIONS:

The bill needs to be amended to reduce the total amount awarded in the bill to \$1,000,000 and to provide that the award will be paid to a special needs trust for the care and benefit of lyonna Hughey with an institutional trustee.

Accordingly, I respectfully recommend that House Bill 6535 be reported **FAVORABLY**.

Respectfully submitted,

PARKER AZIZ

House Special Master

cc: Representative Jenne, House Sponsor
Senator Rodriguez, Senate Sponsor
Eva Davis, Senate Special Master

