



THE FLORIDA SENATE
SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
2/2/22	SM	Favorable
2/7/22	JU	Fav/CS
2/23/22	RC	Favorable

February 2, 2022

The Honorable Wilton Simpson
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **CS/SB 74** – Judiciary Committee and Senator Ana Maria Rodriguez
HB 6521 – Representative Patt Maney
Relief of Harry Augustin Shumow

SPECIAL MASTER’S FINAL REPORT

THIS IS AN UNCONTESTED CLAIM FOR LOCAL FUNDS IN THE AMOUNT OF \$5,000,000. THIS AMOUNT IS THE REMAINING BALANCE OF A \$5,300,000 SETTLEMENT AGREEMENT REGARDING ALLEGED NEGLIGENCE OF MEDICAL STAFF AT JACKSON MEMORIAL HOSPITAL, OPERATED BY THE MIAMI-DADE PUBLIC HEALTH TRUST, A SUBDIVISION OF THE STATE OF FLORIDA.

FINDINGS OF FACT:

Events at Jackson Memorial Hospital

On August 22, 2017, 6-year-old Harry Augustin Shumow (Gus) presented to Joe DiMaggio Children’s Hospital with lethargy, dehydration, diarrhea, vomiting, clenched jaw, and a fever.¹ Gus was thought to be experiencing liver failure² and was subsequently transferred to the pediatric intensive care unit (PICU) at Holtz Children’s Hospital, a pediatric hospital within the Jackson Memorial Hospital

¹ Bonfiglio, M.D., Richard Paul, Physical Medicine and Rehabilitation Evaluation for Harry Shumow at p. 5 (April 8, 2021).

² Claimant’s expert, Dr. Stephen Deputy, testified that Gus was transferred to JMH because Joe DiMaggio medical staff believed Gus may need a liver transplant and JMH was capable of evaluating his transfer suitability, whereas Joe DiMaggio Children’s Hospital was not. See Special Master Hearing at 2:40:54-2:41:20.

(JMH) system, where he was treated for hepatitis, acute kidney injury, and encephalopathy.³ Once there, Gus tested positive for Influenza A, and a baseline MRI revealed that Gus had suffered several small strokes,⁴ possibly due to dehydration resulting from rhabdomyolysis.⁵ On August 28, 2017, due to concerns of microangiopathy,⁶ doctors performed a biopsy of Gus's left kidney.⁷

Over the course of approximately the next two weeks, Gus began to slowly recover cognitive and physical function.⁸ He began to smile, recognize his family members, speak, and exhibit gradual motor improvements.⁹ His liver function and renal function also improved substantially over this time.¹⁰

On September 8, 2017, at approximately 3:26 AM, medical staff attending to Gus ordered a complete blood count¹¹ (CBC) from the hospital's lab.¹² At approximately 6:50 a.m., Ms. Mona Lisa Pierre, a lab tech employed by JMH and on duty at the time, performed an analysis of the blood specimen drawn for the CBC.¹³ The analysis

³ Agency for Health Care Administration, Hospital Adverse Incident Report (hereinafter, The AHCA Report) at p. 6, (October 10, 2017).

⁴ *Id.*

⁵ Rhabdomyolysis (often called "rhabdo") is a serious medical condition that can be fatal or result in permanent disability. Rhabdo occurs when damaged muscle tissue releases its proteins and electrolytes into the blood. These substances can damage the heart and kidneys and cause permanent disability or even death. The Center for Disease Control and Prevention, Rhabdomyolysis, available at <https://www.cdc.gov/niosh/topics/rhabdo/default.html> (last visited November 22, 2021).

⁶ Microangiopathy, also known as small vessel disease, is a condition in which the walls of the small arteries in the heart are not working properly. This reduces the flow of oxygen-rich blood to the heart, causing chest pain (angina), shortness of breath, and other signs and symptoms of heart disease. The Mayo Clinic, Small Vessel Disease, available at <https://www.mayoclinic.org/diseases-conditions/small-vessel-disease/symptoms-causes/syc-20352117> (last visited November 22, 2021).

⁷ The AHCA Report at p. 6.

⁸ Special Master Hearing at 2:45:05-2:46:06.

⁹ *Id.*

¹⁰ *Id.* at 2:46:58-2:47:52.

¹¹ A complete blood count (CBC) is a blood test used to evaluate overall health and detect a wide range of disorders, including anemia, infection and leukemia. A complete blood count test measures several components and features of blood, including red blood cells, white blood cells, hemoglobin, hematocrit, and platelets. The Mayo Clinic, Complete Blood Count (CBC), available at <https://www.mayoclinic.org/tests-procedures/complete-blood-count/about/pac-20384919> (last visited November 22, 2021).

¹² JMH Clinical Laboratory/Hematology Records at p. 1.

¹³ The AHCA Report at pp. 4-6.

resulted in a hemoglobin¹⁴ (HGB) value of 3.4.¹⁵ An HGB value of less than 6 is considered a “critical” or “panic” value, per the JMH Pathology Policies and Procedures Manual (JMH Manual).¹⁶ Critical values must be reported to the patient’s attending physician or their designee within 30 minutes of obtaining such values.¹⁷ The 3.4 HGB reading also represented a decrease from the most recently obtained HGB value¹⁸ of more than 25 percent.

Ms. Pierre ran the sample again at 6:52 AM, resulting in an HGB value of 3.3. Ms. Pierre proceeded to recheck the sample again at 7:18 AM and again at 7:44 AM, resulting in HGB values of 3.2 and 3.3, respectively.¹⁹ Ms. Pierre believed the blood sample was contaminated and advised a PICU nurse that the lab had been canceled but did not indicate a reason for cancellation, instead suggesting a blood redraw be performed to obtain a new sample. Ms. Pierre did not advise anyone of the critical HGB value.

The next scheduled CBC blood draw occurred at 2:09 PM that afternoon, and the specimen, analyzed by a different lab tech now on duty, yielded an HGB value of 2.5.²⁰ The second lab tech immediately notified a PICU nurse, and another CBC blood draw was ordered to confirm the result.²¹ An abdominal ultrasound was ordered at 3:30 PM due to Gus complaining of abdominal pain and nausea.²² The ultrasound was initiated at 4:20 PM, and at 4:37 PM, following the results of the next CBC panel (which revealed an HGB value of 2.4), a blood transfusion was ordered.²³

¹⁴ Hemoglobin (Hb or Hgb) is a protein in red blood cells that carries oxygen throughout the body. A low hemoglobin count is generally defined as less than 13.5 grams of hemoglobin per deciliter (135 grams per liter) of blood for men and less than 12 grams per deciliter (120 grams per liter) for women. In children, the definition varies with age and sex. The threshold differs slightly from one medical practice to another. The Mayo Clinic, Low Hemoglobin Count, available at <https://www.mayoclinic.org/symptoms/low-hemoglobin/basics/definition/sym-20050760> (last visited November 22, 2021).

¹⁵ JMH Lab Results for Harry Shumow, Sample No. L2970061660, dated September 8, 2017.

¹⁶ JMH Pathology Services Policy and Procedure Manual, Notification of Critical Values at p. 4.

¹⁷ *Id.*

¹⁸ The most recently obtained HGB value was 8.1. See The AHCA Report at p. 4.

¹⁹ JMH Clinical Laboratory/Hematology Records at pp. 1-4.

²⁰ The AHCA Report at p. 4.

²¹ *Id.*

²² JMH Patient Safety Work Product Timeline for events of September 8, 2017 at p. 3.

²³ *Id.*

The ultrasound ultimately revealed that Gus had been bleeding internally following his earlier kidney biopsy.²⁴ Gus went into cardiac arrest, and although he was ultimately resuscitated by JMH medical staff, the resuscitation process took roughly 1 hour and 11 minutes.²⁵ By the time Gus stabilized, he had suffered severe hypoxic ischemic encephalopathy, a type of brain injury caused by impaired cerebral blood flow and oxygen delivery to the brain.²⁶

JMH performed an internal Root Cause Analysis following the incident. The analysis determined the primary cause of Gus's injuries to be Ms. Pierre's failure to adhere to JMH Manual guidelines.²⁷ In addition to the internal analysis, the AHCA Report similarly stated that Gus's injury was caused by Ms. Pierre's failure to report a change of 25% from the immediately preceding HGB value.²⁸

At the final hearing, Gus's attorney presented MRIs taken before and after Gus's cardiac arrest for comparison. Dr. Stephen Russell Deputy, a practicing physician board certified in neurology and specializing in pediatric neurology, testified that a comparison of the MRIs shows damage to various regions of Gus's brain consistent with severe dystonia, incontinence, and several other conditions Gus is currently experiencing. The MRIs following the cardiac arrest showed significant injury to the basal ganglia, a region of the brain largely responsible for motor skills.²⁹ Dr. Deputy opined that this is a direct result of the cardiac arrest, and that significant rehabilitative progress among patients with neurological injuries similar to those Gus experienced is generally limited to the three months immediately following the date of injury.³⁰

²⁴ The AHCA Report at p. 4.

²⁵ *Id.*

²⁶ Deputy, M.D., Stephen, Report and Opinions Concerning Harry Shumow at p. 11 (May 28, 2021).

²⁷ JMH Root Cause Analysis and Action Plan at p. 3

²⁸ The AHCA Report at p. 6.

²⁹ Special Master Hearing at 2:56:00-2:59:00.

³⁰ Special Master Hearing at 2:47:50-2:48:00.

Dr. Deputy explained that Gus currently suffers from dystonia³¹ and quadriplegic dystonic cerebral palsy.³² He opined that both are permanent conditions that will affect him for the rest of his life,³³ and that Gus likely would have made a full recovery from his original illnesses but for the hemorrhagic stroke caused by the cardiac arrest.³⁴

Gus's Current Condition

At the time of the incident Gus was 6 years old. He is now 10 years old and lives with his mother, Rose, who cares for Gus and his two siblings full time. On October 22, 2019, Rose's husband and Gus's father, Moses Shumow, was killed in a bicycle accident. Following Moses's death, Rose and the children moved to Largo to be closer to her family, and she is now the sole guardian and caretaker of Gus and his siblings.

At the final hearing, Rose detailed the various medications, therapies, and other treatments that she and others provide to Gus. Rose homeschools Gus and takes him to numerous physical therapy appointments, as well as appointments for a dystonia recovery program, targeted development intervention,³⁵ and a number of other therapies.³⁶ She also takes him to appointments with several specialists and his primary care physician. Rose previously worked as a master's level librarian before Gus's accident, however she is not currently employed as all of her available time is spent taking care of Gus and her other two children.

³¹ Dystonia is a movement disorder in which muscles contract involuntarily, causing repetitive or twisting movements. The Mayo Clinic, Dystonia, available at <https://www.mayoclinic.org/diseases-conditions/dystonia/symptoms-causes/syc-20350480> (last visited November 22, 2021).

³² Dystonic cerebral palsy is a condition that causes increased muscle tone and uncontrollable, involuntary posture and movement. American Academy for Cerebral Palsy and Developmental Medicine. (2018), Dystonia in Cerebral Palsy, available at <https://www.aacpdm.org/publications/care-pathways/dystonia-in-cerebral-palsy> (last visited November 22, 2021).

³³ Special Master Hearing at 2:58:40-3:03:56.

³⁴ Special Master Hearing at 2:55:10-2:55:35.

³⁵ Targeted Development Intervention is a therapy program developed by the National Association for Child Development that utilizes a number of therapeutic techniques catered to the individual patient, with the goal of accelerating neurological development and function. The National Association for Child Development, *The Important of TDI Targeted Development Intervention*, available at <http://www.nacd.org/the-importance-of-tdi-targeted-developmental-intervention/> (last visited November 22, 2021).

³⁶ Special Master Hearing at 40:05-48:00.

Dr. Richard Paul Bonfiglio, a physician board certified in physical medicine and rehabilitation, testified at the final hearing regarding Gus's condition. He evaluated Gus in person on April 8, 2021 and explained that Gus has global developmental delays and cannot walk independently or produce words, however he is aware of his environment and can engage with others.³⁷ Dr. Bonfiglio stated that while Gus has made progress with the therapies and care that he has received and will likely continue to do so, it is very unlikely Gus will ever be independent with day-to-day activities, and will require assistance and supervision 24 hours a day for the remainder of his life.³⁸

Settlement and Estimated Economic Losses

The parties have entered into a settlement agreement for a total of \$5,300,000.³⁹ The source of funds for the settlement are as follows: The Public Health Trust has a self-insured retention of \$1,000,000 and an excess insurance policy through Aon UK Limited.⁴⁰ The sovereign immunity cap of \$300,000 has been paid through the self-insured retention, an additional \$700,000 will be paid from the remainder of the self-insured retention, and the remaining \$4,000,000 falls under the excess insurance policy.⁴¹

All proceeds of the settlement agreement are to be invested in a structured settlement/annuity and held in a special needs trust (SNT) that has been established for Gus's benefit. The proceeds are to be disbursed from the SNT in accordance with the details of the structured settlement/annuity and terms of the SNT.⁴² The full amount (\$300,000) of the respondent's statutory limit has been paid into Gus's SNT.

Gus's attorney submitted a future needs analysis based on a life care plan developed for Gus.⁴³ The future needs

³⁷ Special Master Hearing at 2:15:32-2:16:35.

³⁸ Special Master Hearing at 2:20:15-2:21:45.

³⁹ Release of All Claims, Rose Shumow Et Al v. Miami-Dade Public Health Trust, Case No. 2019-015810-CA-01 (Fla. 11th Circ. Ct.) (September 23, 2021).

⁴⁰ Letter from Claimant's Attorney to Special Masters at p. 5 (October 4, 2021).

⁴¹ *Id.*

⁴² Amended Interim Closing Statement submitted by claimant's attorney on November 3, 2021; Claimant's attorney also submitted documentation from each creditor to corroborate the status and values of the liens.

⁴³ Future Needs Analysis for Harry (Gus) Shumow, (October 29, 2021).

analysis produced an estimated total of lifetime costs exclusive of those costs delineated in the life care plan that are likely to be covered by government benefits, including Medicaid and the Medicaid Home and Community Based Services waiver.⁴⁴ The analysis estimated the total lifetime cost of Gus's needs not covered by such collateral sources to be approximately \$6,200,963.99.⁴⁵ After reviewing the life care plan and future needs analysis, Dr. Bonfiglio opined that the treatments and medications listed in the plans are medically necessary, both for maintaining Gus's current health and for preventing additional complications from occurring.⁴⁶ He also testified that the various therapies Gus currently receives are important to Gus's ongoing rehabilitation.⁴⁷

Liens

Several creditors have asserted liens on proceeds due to Gus from the settlement.⁴⁸ AvMed has asserted a medical lien of \$824,962.20, which has conditionally been reduced to \$250,000 upon passage of the claim bill. Harvard Pilgrim has asserted two medical liens, one of \$67,090.58 and another of \$2,479.76. Both of these liens have been reduced to \$0. Mass Health has asserted a medical lien of \$1,079.37. CMS has asserted a medical lien of \$32,674.74, which has been reduced to \$10,000. The total outstanding amount⁴⁹ of the liens is \$266,377.13.

Litigation History

Moses and Rose filed a case in Miami-Dade County seeking relief on behalf of Gus as a result of the incident at JMH.⁵⁰ Prior to trial, the parties arrived at a mediated settlement agreement⁵¹ and the case was subsequently closed.

⁴⁴ Gus is Medicaid eligible until age 21; at that time, Gus will likely be eligible for the Medicaid Home and Community Based Services Waiver for individuals with disabilities.

⁴⁵ The future needs analysis assumed a life expectancy of 65.9 years. At the final hearing, Dr. Bonfiglio opined that this is a reasonable assumption if Gus continues to receive the ongoing care that he has to this point.

⁴⁶ Special Master Hearing at 2:24:00-2:24:57.

⁴⁷ Special Master Hearing 2:27:45-2:28:15.

⁴⁸ *Id.* at p. 2.

⁴⁹ This calculation assumes a negotiated final amount of \$250,000 for the AvMed lien.

⁵⁰ *Rose Shumow Et Al v. Miami-Dade Public Health Trust*, Case No. 2019-015810-CA-01 (Fla. 11th Circ. Ct.).

⁵¹ Special Master Hearing at 16:59:00-17:25:00.

The respondent did not admit liability or responsibility for the incident but did reach a mediated settlement agreement of \$5,300,000.⁵² As part of the agreement, the respondent agreed to not support or oppose the bill, and did not present a case or argument at the special master hearing.⁵³

CONCLUSIONS OF LAW:

A *de novo* hearing was held as the Legislature is not bound by settlements or jury verdicts when considering a claim bill, passage of which is an act of legislative grace.

As a result of section 768.28(5), Florida Statutes, 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. Sums exceeding this amount are payable by the State and its agencies or subdivisions by further act of the Legislature.

JMH is a public hospital operated by the Miami-Dade Public Health Trust.⁵⁴ Additionally, the hospital or trust, under the doctrine of *respondeat superior*, is responsible for the medical negligence of its employees.⁵⁵ Ms. Pierre was acting within the scope of her employment with JMH while analyzing Gus's blood samples.

There are four elements to a negligence claim: (1) duty – where the defendant has a legal obligation to protect others against unreasonable risks; (2) breach – which occurs when the defendant has failed to conform to the required standard of conduct; (3) causation – where the defendant's conduct is foreseeably and substantially the cause of the resulting damages; and (4) damages – actual harm.⁵⁶

Duty

In cases involving the negligence of medical personnel, the duty of care owed is the level of care, skill, and treatment which, in light of all surrounding circumstances, is recognized

⁵² Order Granting Plaintiff's Motion to Approve Minor Settlement and Dismissing Case, Rose Shumow Et Al v. Miami-Dade Public Health Trust, Case No. 2019-015810-CA-01 (Fla. 11th Circ. Ct.).

⁵³ Mediation Settlement Agreement at p. 2.

⁵⁴ *Public Health Trust Bylaws and Rules and Regulations of the Medical Staff*, available at <https://storage.googleapis.com/jackson-library/Credentialing/2015-05-26-medical-staff-bylaws-final.PDF>

⁵⁵ *Roessler v. Novak*, 858 So. 2d 1158, 1161 (Fla. 2d DCA 2003).

⁵⁶ *Williams v. Davis*, 974 So.2d 1052, at 1056–1057 (Fla. 2007).

as acceptable and appropriate by reasonably prudent similar health care providers.⁵⁷

The JMH Manual clearly delineated the duties owed by JMH laboratory personnel. Specifically, any change in HGB levels that deviate by 25% or more from those derived in the previous blood sample must be reported to a person in charge after investigation and verification of the results. Lab personnel are also required to report critical values to an attending physician or designee within 30 minutes of obtaining such values.⁵⁸

Additionally, Gus's attorney submitted a Verified Affidavit from Dr. Aaron Zucker, a physician board certified in pediatrics with a subspecialty in pediatric critical care, following the final hearing. The Verified Affidavit stated that Ms. Pierre had a duty to do the following:

- Notify Gus's supervising physician that the 3:26 AM CBC resulted in a HGB level of 3.4; and
- Notify a person in charge that 3:26 AM CBC resulted in a HGB level that had changed by more than 25% from the immediately preceding CBC.⁵⁹

Breach

If the duty of care required JMH laboratory personnel to follow up on any critically low values and report them to a person in charge within 30 minutes, Ms. Pierre clearly breached her duty. Ms. Pierre rejected Gus's blood specimen because she believed the sample was contaminated. The JMH Manual details specific criteria for specimen rejection, and a belief that a specimen is contaminated is not among the listed criteria.⁶⁰ By improperly rejecting the sample and failing to notify proper personnel of an HGB value that was both critical, per JMH pathology guidelines, and that represented a change greater than 25% from the immediately preceding HGB value, Ms. Pierre breached her duty to Gus.

⁵⁷ Section 766.102(1), F.S.

⁵⁸ The JMH Manual defines a critical HGB value as less than 6.

⁵⁹ Zucker, M.D., Aaron, Declaration of Aaron Zucker, MD. (November 15, 2021).

⁶⁰ See JMH Pathology Services Policy and Procedure Manual, Specimen Rejection Criteria.

Causation

Dr. Deputy testified that Gus's healing trajectory during the period between his admission to JMH and the events of September 8, 2017, was such that he would have made a full recovery with regard to his mental status but for the events of September 8, 2017.⁶¹

Additionally, Dr. Zucker's Verified Affidavit stated that if Ms. Pierre had followed the JMH Manual guidelines by reporting the panic HGB levels, Gus's medical team likely would have been able to timely diagnose and treat his severe anemia, and Gus ultimately would not have suffered the hemorrhagic stroke that resulted in his cardiac arrest and subsequent injuries.⁶²

The testimony of multiple experts, the JMH Root Cause Analysis, and the AHCA Report all show that Ms. Pierre's actions were a direct and proximate cause of Gus's injuries. Ms. Pierre's failure to report the critical HGB value caused Gus's anemia to go undiagnosed for roughly eight hours. Had Ms. Pierre reported the critical HGB value of 3.4 to a person in charge, Gus's medical team would have been able to order a blood transfusion quickly enough to prevent the cardiac arrest that caused Gus's injuries.

Damages

As a result of the cardiac arrest, doctors indicated Gus suffered traumatic brain and spinal cord injuries. Multiple experts opined that Gus's injuries are permanent and he will require 24-hour supervision and assistance for life. Doctors expect Gus to live into his seventies with proper medical and therapeutic care.

Given the submissions and testimony from various experts, including the life care plan and special needs analysis, the undersigned finds the preponderance of evidence demonstrates \$5.3 million is a reasonable amount of damages.

⁶¹ Special Master Hearing at 2:50:00-2:50:57.

⁶² Zucker, M.D., Aaron, Declaration of Aaron Zucker, MD. (November 15, 2021).

ATTORNEY FEES:

Language in the bill states attorney fees may not exceed 25 percent of the amount awarded. Gus's attorney indicated attorney fees will be 20 percent, and lobbying fees will amount to 5 percent, of the total funds awarded through the claim bill.⁶³

RECOMMENDATIONS:

Based on the foregoing, the undersigned recommends that Senate Bill 74 be reported FAVORABLY.

Respectfully submitted,

Peter Delia
Senate Special Master

cc: Secretary of the Senate

CS by Judiciary:

The committee substitute replaces a provision of the underlying bill which limited attorney fees to 25 percent of the claim bill award with specific dollar amounts that may be used for attorney fees, lobbying fees, and costs.

⁶³ Amended Interim Closing Statement submitted by claimant's attorney on November 3, 2021. (noting total attorney's/lobbying fees of \$1,325,000.00).