



THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
404H The Capitol

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

| DATE | COMM | ACTION |
|---------|------|-----------|
| 3/24/23 | SM | Favorable |
| 3/28/23 | JU | FAV/CS |
| 4/3/23 | HP | Favorable |
| 4/18/23 | RC | Favorable |

March 24, 2023

The Honorable Kathleen Passidomo
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **CS/SB 16** – Judiciary Committee and Senator Gruters
HB 6015 – Representative Busatta Barera
Relief of Jamiyah Mitchell, Latricia Mitchell, and Jerald Mitchell

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNCONTESTED CLAIM FOR LOCAL FUNDS IN THE AMOUNT OF \$795,000, PAYABLE BY THE SOUTH BROWARD HOSPITAL DISTRICT BASED ON A SETTLEMENT AGREEMENT BETWEEN THE MITCHELLS AND THE HOSPITAL DISTRICT. THE SETTLEMENT AGREEMENT RESOLVED A CIVIL ACTION THAT AROSE FROM THE ALLEGED NEGLIGENCE OF THE HOSPITAL DISTRICT THAT CAUSED INJURY TO JAMIYAH MITCHELL.

FINDINGS OF FACT:

General Overview of Labor and Delivery

On October 8, 2008, in the late afternoon, Latricia Mitchell, who was pregnant with Jamiyah Mitchell, presented to Memorial Hospital West (the hospital), operated by the South Broward Hospital District (SBHD). She reported that she was experiencing pain and vaginal bleeding. She was triaged and subsequently connected to a fetal heart monitor by a labor and delivery nurse. The labor and delivery nurse performed an examination of Ms. Mitchell which revealed no vaginal bleeding. A stored fetal strip reflects that the fetal heart rate

was monitored beginning at 4:24 p.m. up until Dr. Facey was notified.¹

Ms. Mitchell had previously established care with her private obstetrician/gynecologist, Sheryl Facey, M.D., for the prenatal care of a prior child, and continued that care for the prenatal care of Jamiyah. Dr. Facey provided prenatal care to Ms. Mitchell at her private practice, not at Memorial Hospital West, at all times prior to and during Ms. Mitchell's pregnancy with Jamiyah Mitchell.²

At 5:06 p.m., the labor and delivery nurse called Dr. Facey and reported the findings of the fetal heart rate and vaginal examination. Dr. Facey then ordered Ms. Mitchell to be admitted to the Labor and Delivery Unit at the hospital. Dr. Facey also ordered the administration of an IV bolus and oxygen. Ms. Mitchell was transported to the Labor and Delivery Unit at approximately 5:44 p.m. and a labor and delivery nurse reported that at 6:02 p.m. the IV bolus and oxygen had been started.

At 6:28 p.m., the labor and delivery nurse called Dr. Facey to report the fetal heart rate and variability as well as nonreactive tracing (meaning the baby's heart rate was not accelerating to a certain level within a specified timeframe).³ The nurse was told that Dr. Facey was on her way to the hospital to care for Ms. Mitchell. At 7:00 p.m., there was a shift change and a new labor and delivery nurse assumed the care of Ms. Mitchell and her baby. The new nurse charted that Dr. Facey was at Ms. Mitchell's bedside and performing an evaluation at 7:01 p.m.

At 7:03 p.m., using her clinical judgment, Dr. Facey ruptured Ms. Mitchell's membranes ("broke her water"). She found blood-tinged amniotic fluid and thick meconium, indicating that the baby had defecated.⁴ The nurse repositioned Ms. Mitchell. At 7:26 p.m., Dr. Facey ordered more medications for Ms. Mitchell. At 7:36 p.m., Dr. Facey placed a fetal scalp electrode on the baby's head (to monitor the fetal heart rate). At 7:52 p.m., Dr. Facey placed an intrauterine pressure catheter and started amnio-infusion (a treatment used to

¹ Latricia Mitchell's Labor and Delivery Records, 161-165.

² See Respondent's Motion for Partial Summary Judgment, 3 (June 1, 2018).

³ Proposed Stipulated Final Claim Bill Language for Senate Bill 12 (Nov. 11, 2019).

⁴ Latricia Mitchell's Labor and Delivery Records at 24.

correct fetal heart rate changes caused by umbilical cord compression) for the baby.

At 8:00 p.m., following the nursing interventions and interventions by Dr. Facey, the fetal heart rate had not improved, now showing undetectable variability and no accelerations or decelerations. At 8:06 p.m., Dr. Facey called for a caesarean section for Ms. Mitchell. At 8:20 p.m., Ms. Mitchell was in the operating room with Dr. Facey and was given spinal anesthesia.

It was around this time, that claimants' expert witnesses allege that Jamiyah experienced acute distress resulting in perinatal asphyxia leading to an irreversible hypoxic (lacking oxygen in the blood moving through the body) brain injury⁵ or to what others have diagnosed as perinatal asphyxia⁶ (lacking oxygen at the tissue-level). Jamiyah's medical records reflect "abnormality in fetal heart rate rhythm" and "cord around neck, with compression, complicating labor and delivery."⁷ Jamiyah had a tight nuchal cord (the mother's umbilical cord was wrapped 360 degrees around the fetus's neck) and the cord at the base had a hematoma (meaning the cord was ruptured and leaking blood into the amniotic fluid).⁸

At 8:40 p.m., the caesarian section procedure began. At 8:44 p.m., Jamiyah was born with a low heart rate of 60 and an APGAR score of 3 (on a scale from 1-10 that measures a newborn's health).⁹ At 9:03 p.m. she was handed off to the NICU team at the hospital where she was intubated.¹⁰ Jamiyah was later extubated and within two hours of being extubated, Jamiyah became apneic (meaning she temporarily stopped breathing) and seized.¹¹ Jamiyah's medical records from October 9, 2008, reflect a "slight asymmetry with hypodensity seen in the left parieto-occipital lobe" (of her brain) "likely representing infarct" (meaning a small localized area of dead tissue resulting from failure of blood supply).¹² . Jamiyah was transferred to Joe DiMaggio Children's Hospital

⁵ Deposition, Robert Cullen, M.D., 24 and 51 (Aug. 29, 2017).

⁶ Deposition, Carolyn Crawford, M.D., 88 (Feb. 28, 2018).

⁷ Latricia Mitchell's Labor and Delivery Records at 6.

⁸ Deposition, Carolyn Crawford, M.D., at 59; Jamiyah Mitchell's NICU Records at 33.

⁹ *Id.* at 28.

¹⁰ *Id.* at 33.

¹¹ Latricia Mitchell's Labor and Delivery Records at 24.

¹² Jamiyah Mitchell's NICU Records at 63.

on October 10, 2008.¹³ Radiology performed at Joe DiMaggio Children's Hospital confirmed that Jamiyah's brain tissue had been damaged.¹⁴ Jamiyah's newborn screening came back negative, suggesting that her injury was birth-related and not genetic.¹⁵ Jamiyah's brain damage was again identified in a 2013 MRI scan.¹⁶

Jamiyah's Current Health

Jamiyah is now 15 years of age and is able to walk, talk, and function in most everyday aspects of life, but suffers from attention-deficit/hyperactivity disorder, partial hearing loss, and a seizure disorder.¹⁷ Jamiyah has an IQ of 63 which classifies her as having an intellectual disability.¹⁸ The challenges and disabilities that Jamiyah now faces are consistent with and due to the brain injury that she experienced at her birth.¹⁹

In September 2019, Jamiyah was attending public school where she had an Individualized Education Program. Jamiyah has received speech therapy and, according to her father, she was receiving it twice a week in 2016.²⁰ It is unclear from the evidence presented whether Jamiyah is or is not currently receiving speech, occupational, or any other type of therapy. Jamiyah requires anti-seizure medicine and hearing aids.²¹

Jamiyah has a normal life expectancy. At the age of 18, Jamiyah will likely be eligible for social security disability and/or Medicaid and other government benefits. It is unlikely that she will be able to secure and maintain gainful employment or be able to live independently.

Dr. Facey as an Independent Contractor of the SBHD

Dr. Facey was not an employee of or a hospital-based physician for the SBHD. Dr. Facey had staff privileges (also known as admitting privileges) at multiple hospitals, including Memorial Hospital West, operated by the SBHD. Dr. Facey

¹³ Latricia Mitchell's Labor and Delivery Records at 24.

¹⁴ Jamiyah Mitchell's MRH Brain MRI (Oct. 12, 2008).

¹⁵ Jamiyah Mitchell's NICU Records at 75-76.

¹⁶ Jamiyah Mitchell's JDCH Brain MRI (Feb. 3, 2013). "Old infarct is identified."

¹⁷ Deposition, Nancy Parsons, Ph.D., 187, 188, 197 (July 17, 2017).

¹⁸ Deposition, Carolyn Crawford, M.D. at 71-72.

¹⁹ *Id.*; Deposition, Robert Cullen, M.D. at 77-78; Deposition, Jerome Barakos, M.D., 140 (Oct. 11, 2017).

²⁰ Jerald Mitchell Direct Testimony from Trial, 34-37 (Aug. 2, 2018).

²¹ Deposition, Nancy Parsons, Ph.D. at 90.

testified that there was not and had never been an employment agreement between herself and the SBHD.²² The Patient Safety Initiative Training Participation Agreement dated April, 28, 2008, by and between the SBHD and Dr. Facey explicitly states that Dr. Facey is not an employee of the SBHD, but rather an “independent contractor.”²³

Litigation History and Settlement²⁴

Litigation History

The underlying case was filed as a medical malpractice case by Latricia Mitchell and Jerald Mitchell, both individually and as legal guardians of Jamiyah Mitchell, a minor, against the SBHD and Dr. Facey in Dade County, Florida on or about October 10, 2013, and subsequently transferred to Broward County Circuit Court on March 14, 2014. During the litigation, it was discovered that Dr. Facey did not have medical malpractice insurance and had filed for Chapter 13 bankruptcy.²⁵ While Dr. Facey was dropped as a party defendant, she would likely have been included in a jury verdict as a Fabre defendant.

Claimants alleged that the SBHD was negligent in its care and treatment of Jamiyah and Latricia Mitchell, by and through its labor and delivery nurses and Dr. Facey, and that such negligence resulted in permanent injuries to Jamiyah. The respondent denied all allegations of negligence including proximate causation. On July 9, 2018, the Trial Court granted respondent's Motion for Partial Summary Judgment, finding that Dr. Facey was not an agent of the SBHD. A trial in the case was commenced in Broward County, Florida, beginning July 12, 2018. On August 3, 2018, the trial court granted a mistrial.

Counsel for claimants has indicated that she would have requested the jury award Jamiyah in “excess of \$15,000,000” in compensatory damages to fully compensate her for injuries sustained in this case.²⁶

²² See Respondent's Motion for Partial Summary Judgment at 3 (June 1, 2018).

²³ Patient Safety Initiative Training Participation Agreement (attached as an exhibit to Respondent's Motion for Partial Summary Judgment (June 1, 2018)), 7.

²⁴ *Latricia Mitchell and Jerald Mitchell, individually and on behalf of Jamiyah Mitchell v. South Broward Hosp. District d/b/a/ Memorial Hosp. West, Sheryl Facey, M.D., Sheryl Facey, M.D., P.A.*, Case No. CACE 14-005044 (Fla. 17th Jud. Cir. Ct. 2014).

²⁵ Suggestion of Bankruptcy (filed Jun. 29, 2015); Special Master Hearing at 1:06:13-1:07:07.

²⁶ Special Master Hearing at 1:29:17-1:32:03.

*Settlement*²⁷

The parties attended mediation on July 3, 2019, and entered into a settlement agreement resolving all claims that had been or could have been raised by claimants. The agreement clarifies that the SBHD's decision to resolve this matter is in no way an admission of liability. The settlement agreement provides for the entry of a consent judgment in the amount of \$995,000, which limits execution to \$795,000 pursuant to the statutory limit under section 768.28, Florida Statutes. The SBHD agreed to support and not oppose this claim bill. Counsel for respondent indicated that \$200,000 has already been tendered to the Special Needs Trust for the benefit of Jamiyah Mitchell, pursuant to the agreement.

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.

Section 768.28, Florida Statutes, waives sovereign immunity for tort liability up to \$200,000 per person 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.

In this matter, the claimants allege negligence on behalf of the SBHD as a result of the actions of Dr. Facey and the hospital's labor and delivery nurses. The hospital is operated by the SBHD. The claimants seek for the Legislature to authorize payment of \$795,000 by the SBHD.

Agency Liability

There are three main types of agency liability in which a principal is responsible for the tortious conduct of its agent: *respondeat superior*, actual authority, and apparent authority.

Respondeat Superior

Under the doctrine of *respondeat superior*, an employer is liable for acts of employees performed within the course of their employment.²⁸

²⁷ See Settlement Agreement (July 2, 2019); see also Order Granting Motion to Approve Settlement (Oct, 15, 2019).

²⁸ *Dias v. Assoc. Loan Co.*, 99 So.2d 279, 280-281 (Fla. 1957); *Stinson v. Prevatt*, 94 So. 656, 657 (Fla. 1922).

In this case, the labor and delivery nurses who cared for Ms. Mitchell during her labor and delivery of Jamiyah were employees of the SBHD. The SBHD is liable for negligent acts of their employees performed within the course of their employment.

Dr. Facey was the attending obstetrician responsible for the care of Ms. Latricia Mitchell and the delivery of her daughter, Jamiyah Mitchell. Dr. Facey was an independent contractor and has never been an employee of the SBHD.

Actual Authority

To establish actual authority, a plaintiff must prove acknowledgment by the principal that the agent will act for him, the agent's acceptance of the undertaking, and control by the principal over the actions of the agent.²⁹ Claimants did not allege that the hospital acknowledged Dr. Facey to act for it in the course of treatment provided to Ms. Mitchell and Jamiyah. Actions taken by Dr. Facey were made using her own clinical judgment.

Apparent Authority

“Our law is well settled that an apparent agency exists only if each of three elements are present: (a) a representation by the purported principal; (b) a reliance on that representation by a third party; and (c) a change in position by the third party in reliance on the representation.”³⁰ Apparent authority exists only where the *principal* creates the appearance of an agency relationship.

To establish apparent authority, a plaintiff must prove: “(1) acknowledgment by the principal that the agent will act for him, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent.”

Courts have consistently held that “a hospital's granting of staff privileges to a particular health care provider, without more, is insufficient as a matter of law to create a jury question on whether the hospital impliedly represented to the public that the health care provider was the hospital's apparent agent.”³¹

²⁹ *Florida Power & Light Co. v. McRoberts*, 257 So. 3d 1023, 1026 (Fla. 4th DCA 2018).

³⁰ *Mobil Oil Corp. v. Bransford*, 648 So.2d 121 (Fla. 1995).

³¹ *Jones v. Tallahassee Memorial Regional Healthcare, Inc.*, 923 So. 2d 1245, 1247 (Fla. 1st DCA 2006).

Florida courts have taken differing approaches on whether lack of patient choice as to a treating physician is enough to create a question of fact for the jury on the issue of a hospital's apparent authority over the physician.³² In the case at hand, Ms. Mitchell did have a choice. Ms. Mitchell testified that within the confines of her husband's health insurance plan,³³ she "did some research on her own"³⁴ and selected Dr. Facey to treat her beginning in March 2007.³⁵ She later selected Dr. Facey to treat her for the prenatal care and delivery of Jamiyah.³⁶

Claimants failed to show that a representation was made by the hospital that Dr. Facey was an agent of the SBHD. Dr. Facey was not acting with the apparent authority of the hospital.

Agency Liability Findings

Because claimants have failed to establish an agency relationship between Dr. Facey and the SBHD in this case, the SBHD is not liable for Dr. Facey's actions or negligence resulting from her care. The nurses were employed by and actual agents of the SBHD. Therefore, under the doctrine of *respondeat superior*, the SBHD is liable for the nurses' actions or negligence resulting from their care.

Negligence

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.³⁷

Duty

A health care provider generally has a duty when providing health care services, to provide such services in a non-negligent manner. This duty is known as the "standard of care." Section 766.102(1), Florida Statutes, establishes that

³² *Id.* at 1248.

³³ Deposition, Latricia Mitchell, 77 and 78 (Nov. 6, 2015).

³⁴ *Id.* at 62, 86.

³⁵ *Id.* at 79.

³⁶ *Id.* at 68.

³⁷ *Williams v. Davis*, 974 So.2d 1052, at 1056–1057 (Fla. 2007).

the prevailing professional standard of care in a medical malpractice claim against a health care provider is “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.” The standard of care in medical malpractice cases is determined through consideration of expert testimony.³⁸

Breach

Claimants rely on testimony from expert witness, Laura Mahlmeister, R.N., Ph.D., to prove that the labor and delivery nurses at the hospital had deviated from the standard of care during Ms. Mitchell’s labor and delivery of Jamiyah. Dr. Mahlmeister testified that she believed the labor and delivery nurses should have advocated, at multiple points throughout the evening of October 8, 2008, for Dr. Facey to schedule the cesarean section sooner than she did.³⁹ Dr. Mahlmeister goes on to say that it is not the nurse’s decision, but the doctor’s decision, to call for a cesarean section to be performed.⁴⁰

Causation

Claimants have introduced evidence suggesting that if Jamiyah were delivered approximately twenty minutes earlier, Jamiyah would have avoided an acute event resulting in less substantial injury. Claimants have also introduced evidence suggesting that the decision of when to schedule the cesarean section is that of the doctor. It appears that Dr. Facey may have been making medical decisions in her treatment of Ms. Mitchell as early as 5:06 p.m. on October 8, 2008, before she called for a cesarean section at 8:06 p.m.⁴¹

On the other hand, there was evidence of fetal distress in the initial fetal monitoring strips obtained shortly after the mother arrived at the hospital. The hospital nurses could have and probably should have consulted a staff physician to determine if an emergency C-Section was warranted. The hospital nurses could have and probably should have had Ms. Mitchell and the surgical suite prepped for an immediate C-Section as soon as the fetal monitoring showed early signs of distress. Had the nurses acted promptly and diligently, Jamiyah may have been delivered by C-Section before significant distress

³⁸ *Pate v. Threlkel*, 661 So.2d 278, 281 (Fla.1995).

³⁹ Deposition, Laura Mahlmeister, R.N., Ph.D., 114-115 (Dec. 2, 2016).

⁴⁰ *Id.* at 115-116.

⁴¹ Proposed Stipulated Final Claim Bill Language for Senate Bill 12 (Nov. 11, 2019).

and the resultant cerebral injury. Instead, the nurses deferred to Dr. Facey who was then only available by telephone. A reasonable jury could find that the conduct of the labor and delivery nurses foreseeably and substantially caused or contributed to Jamiyah's birth injuries.

Damages

Through the provision of medical records and supporting evidence, claimants have established that Jamiyah suffered an irreversible injury during labor and delivery due to lack of oxygen. The challenges and disabilities that Jamiyah now faces are consistent with and caused by the birth injury that she experienced.

It is possible that inattentive care provided to Jamiyah, such as failing to administer seizure medication, to require her to wear hearing aids, or follow doctors' instructions may have an adverse effect on Jamiyah's conditions.

Comparative Fault

It was argued in the underlying case that Ms. Mitchell was comparatively negligent in contributing to Jamiyah's injury. The undersigned acknowledges it is possible that Ms. Mitchell may have been slightly comparatively negligent in her care of infant Jamiyah, but makes no finding as to whether or not Ms. Mitchell's conduct contributed to Jamiyah's injury as Ms. Mitchell does not stand to benefit from the claim. Of course, there can be no comparative fault on the part of Jamiyah. On the other hand, the evidence strongly suggests that the employees of South Broward Hospital District and/or Dr. Facey's conduct contributed to Jamiyah's injury.

Conclusion

As stated above, the claimant's attorney intended to ask the jury for a verdict in excess of \$15 million. It is possible that the jury could have found the hospital district 100% at fault and for a \$15 million award. Because this is a settled claim, we do not have the benefit of a defense case. However, it appears from the tone and lines of questioning at the depositions (while the hospital district was still contesting the case) that the district would likely have tried to avoid liability by blaming Dr. Facey. There is evidence of negligence committed by both the hospital district and Dr. Facey, and it is entirely possible that a reasonable jury may have assigned much or even all of the

malpractice fault on Dr. Facey, thereby significantly diminishing the liability of the hospital district and thus the award to the claimant. Without hearing the defense witnesses, the Special Master cannot suggest what outcome is likely.

Based upon the arguments and documents provided before, during, and after the special master hearing, the undersigned believes that reasonable juries would come to different verdicts as to liability and damages in this case, and that the settlement represents a fair middle ground between a possible significant verdict against the hospital district and an equally possible minimal award, or perhaps even a defense verdict.

The settlement thus is a fair approximation of the risks, rewards, and costs had the parties conducted a second trial.

ATTORNEY FEES:

Language in the bill states that attorney fees may not exceed 25 percent of the amount awarded. Correspondence from the attorney for the claimant confirms that the attorney will comply with this limit.

RECOMMENDATIONS:

Recommended Amendments

Lines 82-83 of the bill should be amended so the full amount is payable to “the Special Needs Trust for the benefit of Jamiyah Mitchell,” pursuant to the parties’ settlement agreement.

Recommendation on the Merits

Based upon the arguments and documents provided before, during, and after the special master hearing, I find that the claimants meet the burden of proving that the SBHD or an agent of the SBHD was negligent, resulting in Jamiyah Mitchell’s birth injury. I recommend that Senate Bill 16 (2023) be reported FAVORABLY.

Respectfully submitted,

Nathan L. Bond
Senate Special Master

cc: Tracy Cantella, Secretary of the Senate

CS by Judiciary:

The amendment changes the payee of the claim to the trustee of Jamiyah's special needs trust. This change has been agreed upon by the parties and is in the best interest of the child.