



THE FLORIDA SENATE
SPECIAL MASTER ON CLAIM BILLS

Location

402 Senate Office Building

Mailing Address

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

DATE	COMM	ACTION
12/27/07	SM	Favorable

December 27, 2007

The Honorable Ken Pruitt
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 38 (2008)** – Senator Ted Deutch
HB 483 (2008) – Representative Kelly Skidmore
Relief of Shakima Brown and Janaria Miller (daughter)

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNOPPOSED CLAIM FOR \$300,000 BASED ON A CONSENT FINAL JUDGMENT IN FAVOR OF CLAIMANTS SHAKIMA BROWN AND HER DAUGHTER, JANARIA MILLER, FOR THE PERMANENT INJURIES SUFFERED BY JANARIA AT MEMORIAL REGIONAL HOSPITAL, A FACILITY OF THE SOUTH BROWARD HOSPITAL DISTRICT.

FINDINGS OF FACT:

On December 13, 2002, Shakima Brown went to Memorial Regional Hospital in Fort Lauderdale, complaining of abdominal pains. Ms. Brown was 8 months pregnant. She was kept overnight at the hospital because of concern that she might be in premature labor.

A fetal heart monitor was attached to Ms. Brown's abdomen. The monitor was designed to continuously record the fetus' heart rate and to give an audible alarm if the heart rate deviated above or below a safe range. Beginning at about 12:57 a.m. on December 14, 2002, the fetal monitor recording strips began to only intermittently record the fetus' heart rate. That caused the alarm to go off and the attending

nurse with responsibility for checking the heart rate monitor, Nellie Miller, turned off the alarm. The monitor continued to only intermittently record a heart rate for the next hour and a half. Although Ms. Miller made a written notation of "poor tracing" at 1:00 a.m. and again at 2:00 a.m., she took no action to make certain that the fetus was not in distress.

At 2:24 a.m., the monitor began to record a heart rate below safe levels or no heart rate. Despite the negative indications, Ms. Miller did nothing. There is no notation from her to show that she even checked the heart rate monitor during this critical period of time. Ms. Miller did not intervene to resuscitate the fetus nor did she contact the doctor. Finally, at about 3:15 a.m., she called the doctor. He immediately ordered a caesarian section and Janaria was delivered about an hour later.

A fetus obtains oxygen from the blood supplied through the umbilical cord. A low fetal heart rate threatens asphyxiation. A test of Janaria's blood following her birth showed metabolic acidosis, which is consistent with asphyxia. Janaria suffered irreversible brain damage as a result of lack of sufficient oxygen to her brain. She has cerebral palsy, partial paralysis, and cognitive impairment. Now 4 years old, Janaria has never spoken. She has weakness on her left side and 60 percent deafness in her left ear. She has had delayed cognitive development throughout her life. Although her life expectancy is normal, Janaria is unlikely to ever attend a regular school or hold a regular job.

The Medicaid lien that resulted from Janaria's medical costs has been satisfied.

Janaria receives Medicaid payments of \$626 per month, which will continue until she is 18 years old. She also receives Medicare payments of \$623 each month, which she should be eligible for the rest of her life.

The Claimants' attorney investigated and made tentative arrangements for using the proposed claim bill proceeds (after fees are deducted) to fund an annuity for the benefit of Janaria. Under one option, the annuity could pay Janaria \$1,981.18 each month for her entire life and terminate upon her death. Under a second option, the annuity would pay Janaria \$1,939.59 each month for her entire life and, if she

died before the 40th year of the annuity, the monthly payment would go to her estate until the end of the 40th year. Under either option, the payments would not begin until Janaria's 18th birthday.

LITIGATION HISTORY:

Ms. Brown sued the South Broward Hospital District in circuit court in Broward County, alleging negligence. The District agreed to a Consent Final Judgment in the amount of \$500,000. The District has already paid the Claimants \$200,000, exhausting the sovereign immunity cap. Of this amount, the Claimant netted \$80,000. This claim bill seeks the balance of \$300,000.

CLAIMANTS' POSITION:

Ms. Miller was negligent in failing to take appropriate action in response to Janaria's abnormally low heart rate as reported by the heart rate monitor.

Because Ms. Miller was acting within the course and scope of her employment by Memorial Regional Hospital, the Hospital is equally liable for the negligence and for the injuries that were proximately caused by the negligence.

The settlement agreement is fair and reasonable, but the amount of the settlement does not fully compensate the Claimants for their damages.

THE DISTRICT'S POSITION:

The District does not oppose the claim bill in the amount of \$300,000.

CONCLUSIONS OF LAW:

The attending nurse's actions and inactions fell below the standard of professional care applicable under the circumstances. The consequences of a below normal fetal heart rate are so critical that, even if the nurse was suspicious that the monitor was not working properly, her proper response should have been to take immediate steps to determine whether the fetus was in distress, to intervene with resuscitation measures if needed, and to alert a doctor. Her failure to take appropriate action was negligence and was the proximate cause of the injuries suffered by Janaria. South Broward Hospital District, doing business as Memorial Regional Hospital, is liable as the nurse's employer.

There are many reasons for entering into a settlement agreement other than the perceived merits of the claim and, therefore, I am not precluded from reviewing the terms of the parties' settlement agreement in this matter and determining whether they are reasonable under the totality of the circumstances. In this case, the settlement amount is far less than the usual jury verdict for injuries of this nature. Had this case involved a private hospital, the settlement amount would probably have been much larger. Therefore, I believe it would be fair and reasonable for the Senate to pay an award of \$550,000 (or 50 percent more than the agreed settlement amount).

ATTORNEY'S FEES AND LOBBYIST'S FEES:

In compliance with s. 768.28(8), F.S., the Claimants' attorneys will limit their fees to 25 percent of any amount awarded by the Legislature. However, Claimants' attorneys did not acknowledge their awareness of the provision of the bill that limits attorney's fees, lobbyist's fees, and costs to 25 percent of the award. They propose a lobbyist's fee that would be an additional 6 percent of any award.

OTHER ISSUES:

The bill should be amended to correct the name of the defendant to South Broward Hospital District. Of the two annuity options presented by the Claimants' attorney, I believe the option that guarantees payment for 40 years is the better option. In addition, because Shakima Brown received nothing in the settlement, I believe the bill should specify that, in the event that Janaria dies before the trust fund is exhausted, the balance in the trust fund should go to Ms. Brown.

The District stated that paying a claim in the amount of \$300,000 would not impair its ability to provide normal services.

RECOMMENDATIONS:

For the reasons set forth above, I recommend that Senate Bill 38 (2008) be reported FAVORABLY, as amended.

Respectfully submitted,

Bram D. E. Canter
Senate Special Master

cc: Senator Ted Deutch
Representative Kelly Skidmore
Faye Blanton, Secretary of the Senate
House Committee on Constitution and Civil Law
Tony DePalma, House Special Master
Counsel of Record