



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
2/1/11	SM	Favorable

February 1, 2011

The Honorable Mike Haridopolos
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 306 (2011)** – Senator Nan H. Rich
Relief of Denise Brown and David Brown, for the benefit of their son,
Darian Brown

SPECIAL MASTER'S FINAL REPORT

THIS UNOPPOSED EQUITABLE CLAIM AGAINST THE NORTH BROWARD HOSPITAL DISTRICT, WHICH IS FOR \$2 MILLION IN LOCAL FUNDS, ARISES FROM THE BIRTH OF DARIAN BROWN, A CHILD WHO SUFFERED A CATASTROPHIC BRAIN INJURY IN UTERO DUE TO THE HOSPITAL STAFF'S NEGLIGENT DELAY IN RECOGNIZING THE SIGNS OF FETAL DISTRESS, WHICH RESULTED IN AN UNTIMELY DELIVERY BY C-SECTION.

FINDINGS OF FACT:

On January 10, 2000, Denise Brown's obstetrician, Dr. Danoff, discovered that the fetal heart rate of the baby she was carrying was elevated. Because Mrs. Brown, who was then about 33 weeks pregnant, had delivered prematurely in the past, Dr. Danoff sent her to Broward General Hospital for observation and to rule out preterm labor. Mrs. Brown was admitted to the hospital at 11:30 a.m. Dr. Danoff directed that Mrs. Brown have continuous fetal heart monitoring and gave standing orders that the nurse on duty was to notify the obstetrician if the baby's heart rate ever exceeded 160 beats per minute.

From January 10 through January 14, 2000, Mrs. Brown remained stable, and her baby's heart rate stayed within normal limits. At about 5:00 p.m. on January 14, 2000, however, the fetal monitoring strips (printed graph paper showing displaying "tracings" of both the fetal heart rate and uterine contractions) began disclosing an accelerated heart rate (a condition known as tachycardia). The nursing staff did not notify the obstetrician of this development, despite the standing order to do so.

Over the next few hours, the fetal monitoring strips showed increasingly worrisome signs, namely consistent fetal tachycardia and loss of fetal heart rate variability. (A healthy fetal heart beats at varying rates, creating a tracing that looks like a jagged line. Loss of fetal heart rate variability produces a smooth line.) Variability indicates fetal wellbeing. The absence of variability may indicate fetal distress. At 11:00 p.m., the baby's heart rate started to slow periodically after uterine contractions. When this occurs, it is called a "late deceleration." Late decelerations are an ominous sign, especially in conjunction with tachycardia and loss of variability. The nursing staff, however, did not notify the obstetrician, or any other physician, that Mrs. Brown's baby might be in trouble.

The fetal tachycardia, loss of variability, and late decelerations continued throughout the night. At about 5:15 a.m., the attending nurse finally called an obstetrician, Dr. Vasanti Puranik, who was an employee of North Broward Hospital District. At Dr. Puranik's request, the fetal monitoring strips were faxed to her for review. Upon receipt, the doctor discovered that the graph paper had been fed into the electronic fetal monitor upside down. The strips, therefore, were not readily interpretable, although it could be seen that the baby's heart rate lacked variability.

Dr. Puranik consulted by telephone with another obstetrician, Laurie Scott, M.D., and they agreed that it was time to deliver Mrs. Brown's baby. Neither doctor rushed to the hospital, however. Dr. Puranik arrived on the obstetrical unit at 6:27 a.m., where she ordered a routine Caesarian section. Mrs. Brown was prepared for surgery. Dr. Puranik began the C-section at 7:24 a.m., and Darian was born at 7:27 a.m.

Darian had been oxygen-deprived in his mother's womb for hours before his birth. As a result, he was born with numerous complications, including respiratory distress syndrome, cystic kidney disease, neonatal jaundice, neonatal hypoglycemia, and newborn intraventricular hemorrhage. He required aggressive resuscitation. Eventually, Mrs. Brown and Darian were discharged from the hospital. The Browns were not told, however, that Darian might have suffered a serious brain injury.

In October 2000, Mrs. Brown became concerned that her son was not meeting developmental milestones. Her inquiries to the pediatrician resulted in a computed tomography (CT) scan of Darian's brain being ordered. The CT scan showed that Darian's brain had been seriously and irreversibly damaged by partial prolonged hypoxia (oxygen deprivation) in the hours before his birth.

The insult to Darian's brain has left him suffering from cerebral palsy, spastic quadriplegia, and developmental delay. He is unable to talk but smiles at family members and communicates basic needs by gesturing (e.g., pointing to his stomach when hungry or to his head when he has a headache). Darian has no bladder or bowel control, cannot feed himself, and is unable to perform any activities of daily living. He will be totally dependent on others for care and treatment for the rest of his life.

Paul M. Deutsch, Ph.D., performed a comprehensive evaluation of Darian and prepared Life Care Plan, which quantifies the future medical expenses that will be incurred over the course of Darian's lifetime. The report prepared by the plaintiffs' economist, Raffa Consulting Economists, Inc., which takes into account Dr. Deutsch's Life Care Plan, concludes that the present value of Darian's future medical needs is between \$11.5 and \$13.6 million, and that his estimated lost earning capacity, reduced to present value, is approximately \$0.68 million.

LEGAL PROCEEDINGS:

In 2003, Mr. and Mrs. Brown brought suit on their son's behalf, and in their respective individual capacities, against the North Broward Hospital District and others. The action was filed in the Circuit Court in and for Broward County, Florida.

While the lawsuit was pending, the Browns settled with Dr. Scott and Parinatal Associates, P. A. for a confidential amount. The case proceeded to trial in 2008 against the North Broward Hospital District as the sole remaining defendant. On June 13, 2008, after four weeks of trial, the jury rendered a verdict in favor of the plaintiffs and against the district, awarding a total of \$35.2 million in damages. The resulting judgment was appealed. In June 2010, the Florida Fourth District Court of Appeal affirmed.

The hospital district sued its insurers seeking a declaration of coverage for the damages awarded to the Browns. The coverage lawsuit led to a global settlement under which the district's insurers paid the Browns \$10.35 million, the district paid its sovereign immunity limit of \$200,000, and the parties agreed that the plaintiffs could seek an additional \$2 million through an uncontested claim bill in that amount.

Under the settlement agreements, the plaintiffs' net recovery to date (after satisfying medical and legal expenses and attorneys' fees) is approximately \$8.5 million. They have paid roughly \$3.3 million to their attorneys.

CLAIMANTS' ARGUMENTS:

The North Broward Hospital District is vicariously liable for the negligent acts of its employees and agents, including but not limited to:

- Failing timely to alert Mrs. Brown's obstetrician, or any medical doctor, of the onset of fetal tachycardia, despite a standing order to do just that.
- Failing timely to notify a physician of the loss of fetal heart rate variability and subsequent onset of late decelerations, which (the nurses should have known) indicated that the baby was likely in distress.
- Failing to notice, for hours, that the graph paper in the electronic fetal monitor had been inserted upside down, producing tracings that were not readily interpretable.
- Failing to order an emergency C-section immediately upon discovery that the baby's fetal heart signals were non-reassuring.

RESPONDENT'S POSITION:

The North Broward Hospital District does not oppose the bill. The Chief Executive Officer of the district has attested that if the claim bill were enacted, the \$2 million award would be paid out of the district's general operating account, and that the payment of this sum would not in any way detrimentally impact the district's ability to provide medical services to the people of Broward County.

CONCLUSIONS OF LAW:

As provided in section 768.28, Florida Statutes (2010), sovereign immunity shields the North Broward Hospital District against tort liability in excess of \$200,000 per occurrence. See Eldred v. North Broward Hospital District, 498 So. 2d 911, 914 (Fla. 1986)(§ 768.28 applies to special hospital taxing districts); Paushter v. South Broward Hospital District, 664 So. 2d 1032, 1033 (Fla. 4th DCA 1995). Unless a claim bill is enacted, therefore, Darian and his parents will not realize the full benefit of the settlement agreement they have made with the district.

Under the doctrine of respondeat superior, the North Broward Hospital District is vicariously liable for the negligent acts of its agents and employees, when such acts are within the course and scope of the agency or employment. See Roessler v. Novak, 858 So. 2d 1158, 1161 (Fla. 2d DCA 2003).

The nurses and obstetrician who were involved in Mrs. Brown's treatment were employees of the district acting within the scope of their employment. Accordingly, the negligence of these actors is attributable to the district.

The district's employee's each had a duty to provide Mrs. Brown and Darian with competent medical care. Such duty was breached, with tragic consequences: Had Darian been delivered shortly after his fetal heart signals became ominous late in the evening on January 14, 2000, as he reasonably should have been, rather than 8 or 9 hours later, as in fact he was, Darian likely would not have suffered a catastrophic brain injury before birth. The negligence of the district's employees and agents was a direct and proximate cause of Darian's substantial damages.

The sum that the North Florida Hospital District has agreed to pay Darian (\$2.2 million in the aggregate) is a relatively

small percentage of Darian's total economic losses. If this claim bill is enacted, the Brown family's recovery, including the funds previously received from other sources, should be adequate to cover Darian's future medical needs. The undersigned concludes that the settlement at hand is both reasonable and responsible.

ATTORNEYS FEES:

Section 768.28(8), Florida Statutes, provides that "[n]o attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement." The law firm that the Harris family retained, Clark, Fountain, La Vista, Prather, Keen & Littky-Rubin, LLP, has submitted the affidavit of Nancy La Vista, Esquire, attesting that, if the claimants were awarded \$2 million under the claim bill at issue, the attorneys' fees would be limited to \$500,000, or 25 percent of the compensation being sought.

RECOMMENDATIONS:

For the reasons set forth above, I recommend that Senate Bill 306 (2011) be reported FAVORABLY.

Respectfully submitted,

John G. Van Laningham
Senate Special Master

cc: Senator Nan H. Rich
R. Philip Twogood, Secretary of the Senate
Counsel of Record