



STORAGE NAME: h6505c.JDC

DATE: 2/19/2018

February 19, 2018

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 6505 - 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 NATURAL PARENT AND LEGAL GUARDIAN OF 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.

FINDINGS OF FACT:

On March 16, 2010, 23-year-old Vonshelle Brothers, who was nine weeks pregnant with Iyonna Hughey, her third child, visited the Brevard County Health Department (BCHD) for an initial pre-natal visit. Nurse Elena Cruz-Hunter conducted a Pap test¹ on Vonshelle and sent the test to Quest Diagnostics (Quest) for analysis.

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

- Negative for intraepithelial lesion or malignancy;
- Cellular changes consistent with Herpes simplex virus; and

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> (last visited Feb. 16, 2018).

- Shift in vaginal flora suggestive of bacterial vaginosis.

Additionally, the test result stated "Queued for Alerts call." BCHD had a policy on how to handle lab slips from entities like Quest. The policy provided that lab slips are reviewed by a nurse and initialed, and that negative lab slips should be filed in the client's medical records, while positive lab slips should be pulled and given greater scrutiny. BCHD's policy also required any abnormal results to be signed by a clinician.

BCHD received Vonshelle's test results and placed them in her file. There is proof that someone read the report as there is a checkmark adjacent to the interpretations. Nothing from the records shows that anyone from Quest called BCHD or vice versa. The test results were added to Vonshelle's file but no further action was taken. BCHD did not do any follow-up tests to confirm whether Vonshelle had herpes. BCHD never disclosed the test results to Vonshelle. In fact, Vonshelle returned 15 times during her pregnancy for follow-up appointments, prenatal visits, and ultrasounds. At none of these visits was she told about the herpes results.

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

On October 31, 2010, about two weeks after discharge, Vonshelle noticed Lyonna was running a fever. She took Lyonna to the Holmes Regional Medical Center in Melbourne but left after waiting for thirty minutes. She reported that a nurse instructed her to place a wet cloth on Lyonna. It is unclear what was said to her or why Vonshelle left without receiving further medical care for Lyonna.

The next day, November 1, 2010, Vonshelle returned to Wuesthoff Medical Center's Emergency Department with Lyonna, whose condition had gotten worse. Lyonna was lethargic, not eating, and was running a fever. A lumbar puncture was performed and cerebral spinal fluid was collected. Initial diagnosis of Lyonna was that she had meningitis, and she was transferred to Arnold Palmer Hospital in Orlando for further evaluation. On November 3, 2010, the final results of the cerebral spinal fluid indicated Lyonna had 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 Both of these viruses remain in the body throughout a person's life, even when they are not showing signs of infection.³ If a person with HSV-1 or HSV-2 is pregnant, her physician may consider a delivery by cesarean section.

Not only did the lumbar puncture show that Lyonna had HSV-2, but it was also 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 Acyclovir to help suppress the infection.

As a result of HSV-2, Lyonna has suffered significant and long-lasting developmental delays. Dr. Daniel Adler, M.D., who examined Lyonna, states she has a chronic and permanent neurological disability. Lyonna is now seven years old and attends Palm Bay Elementary School. She receives speech therapy and physical therapy at school.

LITIGATION HISTORY:

On October 9, 2012, Vonshelle Brothers, individually, and as natural parent of Lyonna Hughey, filed a complaint in the Brevard County Circuit Court alleging negligence against BCHD, which is a department of the Department of Health (DOH). On April 25, 2016, a week before the scheduled jury trial was to begin, the parties settled for \$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 an annuity which will begin to pay out when Lyonna turns 18.

Following the filing of the claim bill in January 2017, the parties reached another settlement, which provides that the amount requested in the claim bill will be \$1,000,000 and DOH will not contest the claim bill.

CLAIMANT'S POSITION:

Vonshelle, as parent and guardian of Lyonna Hughey, argues BCHD was negligent when it failed to conduct further testing and analysis when they received the Pap test results. The standard of care required BCHD to conduct more tests and take further precautions, such as starting anti-viral medication or delivering Lyonna by cesarean section. If these precautions had been taken, 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 to DOH to pay the claim.

² World Health Organization, "Herpes simplex virus," <http://www.who.int/mediacentre/factsheets/fs400/en/> (last visited Feb. 16, 2018).

³ Johns Hopkins Medicine, "Herpes Meningoencephalitis," http://www.hopkinsmedicine.org/healthlibrary/conditions/nervous_system_disorders/herpes_meningoencephalitis_134,27/ (last visited February 16, 2018).

CONCLUSIONS OF LAW:

Regardless of whether there is a jury verdict or a settlement, each claim bill is reviewed *de novo* in light of the elements of negligence.

Duty

In Florida, to prevail on a medical malpractice claim, a plaintiff 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. The services rendered by a physician are scrutinized by other physicians in the same field to determine whether there was a failure to adhere to the standard of care.⁶

From the expert testimony provided by Claimant, I find BCHD had a duty to review the lab results and follow up with further diagnostic testing. Sharon Hall, a registered nurse and expert on labor and delivery, stated the standard of care required the nurses at BCHD to report any abnormal results in the Pap test and that 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, stated the standard of care for ordering tests on patient samples requires the physician to follow up on and be responsible for knowing the test results. In Dr. Lopez's view, the nurse reviewing the test results and the treating physician fell below the standard of care.

Breach

BCHD breached its duty to follow up on the abnormal report. There is evidence that BCHD even failed to follow its own policy with respect to Vonshelle's test results.

Causation

For a defendant to be liable to a plaintiff, the plaintiff must show the defendant's actions were the proximate cause of the plaintiff's injuries. In this case, causation was the most contentious issue prior to settlement. 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 stated that Vonshelle's Pap test showed "cellular change consistent with Herpes simplex virus."

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).

She was not given a more extensive test while pregnant with Lyonna. During litigation, Vonshelle was tested three times for HSV-2. In two blood tests, Vonshelle tested negative for HSV-2. In a more thorough DNA test, 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 these boils were lesions consistent with HSV-2.

Claimant's attorney argues that despite Vonshelle's inconclusive test results, 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 appear 12 to 14 days after exposure. Dr. Carl Barr, DOH's medical expert, testified that the most common cause of exposure for infants with HSV-2 is through vertical transmission from mother to child during birth. Dr. Catherine Lamprecht, a pediatric infectious disease specialist, stated the timing of Lyonna's symptoms in late October is consistent with exposure to HSV-2 during labor and delivery. She stated that exposure in labor and delivery accounts for 98 percent of all cases of neonatal herpes. Dr. Daniel Adler, an expert on neonatal herpes simplex encephalitis and how newborns contract HSV, stated it was more likely than not that Lyonna contracted HSV-2 during delivery via the birth canal.

One of the questions that would have been presented to a jury is whether anyone other than BCHD was responsible for Lyonna's injuries. Quest knew of an abnormal test result, and there is no evidence anyone from Quest called BCHD. Claimant's attorneys stated at the special master hearing that they evaluated whether a claim of liability existed against Quest but it was without merit. Claimant's 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, as to whether they should have thoroughly reviewed Vonshelle's medical history and charts before delivery. Again, Claimant's experts stated that the hospital did not deviate from the standard of care.

Another question is whether Vonshelle bears liability for Lyonna's injuries. 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 returned the next day. It is unclear whether those

hours altered Lyonna's condition in any way.

Based on the timing of the onset of symptoms and the expert testimony, I find Lyonna contracted HSV-2 through vaginal delivery. Dr. Lopez testified that if Vonshelle had had further testing after the Pap test, Lyonna may have never contracted HSV-2. 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 had a cesarean section to prevent the transmission of herpes to her child. I find Claimant has met her burden to show that BCHD's breach caused Lyonna's injuries.

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, bathe, and walk. Dr. Paul Deutsch, a certified life care planner, opined that Lyonna will remain dependent for the rest of her life. She currently receives speech therapy and physical therapy. Claimant's attorneys submitted a life care plan estimating 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 of \$1,000,000, in addition to the \$50,000 annuity that has already been purchased, is a reasonable amount to compensate Lyonna for her injuries.

ATTORNEY'S/
LOBBYING FEES:

Claimant's attorneys and lobbyist have agreed their fees will be 15 percent of any amount awarded, with the lobbyist taking 5 percent and the attorneys taking 10 percent. Outstanding costs total \$2,214.

LEGISLATIVE HISTORY:

This is the second session this claim has been presented to the Legislature. It was initially filed in 2017 as House Bill 6535 by Representative Jenne. CS/HB 6535 passed the House by a vote of 114-4. CS/HB 6535 died in Senate Appropriations.

RECOMMENDATION:

I recommend that House Bill 6505 be reported **FAVORABLY**.

Respectfully submitted,

JORDAN JONES

House Special Master

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