

November 28, 1997

SPECIAL MASTER'S FINAL REPORT

DATE

COMM.

ACTION

The Honorable Toni Jennings
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

HC
WM

Re: SB 42 - Senator Silver
HB 3011 - Representative Rojas
Relief of Vernelle Lowder

THIS IS AN EXCESS JUDGMENT CLAIM BASED ON A JURY VERDICT AGAINST THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES IN THE AMOUNT OF \$250,000, FOR MISDIAGNOSING MS. VERNELLE LOWDER WITH HIV.

FINDINGS OF FACT:

In November 1990, Ms. Vernelle Lowder, a long-time patient of the state subsidized Economic Opportunity Family Health Center (Health Center) consented to and had her blood drawn by the Health Center to be tested for the HIV virus by the State of Florida, Department of Health and Rehabilitative Services (HRS) lab.

Although Ms. Lowder exhibited no signs for the AIDS virus, she had been considered high risk for the HIV infection in late 1990 because of a blood transfusion she had received during the course of a hysterectomy in 1980.

Upon receiving the blood marked "Vernelle Lowder," Pia Kaban, at the HRS laboratory, performed the HIV test on Ms. Lowder's blood. She had performed 4,000 HIV tests up to that date in 1990, and over 10,000 to date.

Immediately after conducting the first test, (ELIZA test) the results indicated positive. Ms. Kaban next performed the confirmatory Western Blot Test, which is generally considered to be the "gold standard" test for HIV infection

and is universally accepted by health care providers in diagnosing the infection. The result of that test also indicated positive.

Within days after the blood testing, HRS returned a lab result indicating that Ms. Lowder was HIV positive. The Health Center immediately notified Ms. Lowder of the result.

The record reflects that HRS never had any personal, telephonic, or written contact with Ms. Lowder. Although she exhibited no physical signs of the virus, Ms. Lowder did not choose to be retested until late 1992 while she was visiting her birth place, Waycross, Georgia. The HIV test result was confirmed negative.

As a result of her HIV misdiagnosis, Ms. Lowder suffered extensively for nearly 2 years. Her relationship with her family was diminished. Ms. Lowder would not let her own children hug her or touch her for fear of transmitting the disease to them. Her youngest son took a CPR class so that he could save her when and if she started to die. Ultimately, Ms. Lowder gave her mother custody of her boys because she believed her death was imminent.

Ms. Lowder's suffering expanded beyond her own home. She was abandoned by friends, neighbors, and her community. In 1990, Ms. Lowder's mother would not allow her to cook for her own family and insisted on washing her dishes and toilet seat with bleach and ammonia after each use.

During the period Ms. Lowder lived with the false diagnosis, fear controlled her life. Ms. Lowder was afraid to go to sleep. She constantly tried to gain weight. Ms. Lowder was afraid of catching a cold.

In addition, Ms. Lowder followed her doctors' recommendations for treating the physical and psychological effects of HIV and AIDS. She took an experimental toxic AIDS medication called DDI which left her nauseated,

vomiting, weak, and debilitated. She attended twice weekly group therapy for AIDS patients.

The Respondent's expert psychiatrist, Sandford Jacobson, who regularly testifies on behalf of the State of Florida, conceded that during her 2 years of living as an AIDS patient, Ms. Lowder suffered severe psychological distress. According to Dr. Jacobson, Ms. Lowder's suffering included depression, ostracization, rejection from family, fear of dying, and other symptoms typically associated with the diagnosis. He also concluded that she will continue to suffer into the future.

Additionally, it appears that Ms. Lowder suffers from physical injuries caused by the needless HIV treatment and care. The DDI which she took has caused permanent problems with her heart and pancreas. She takes regular medication for these conditions and requires ongoing medical care, treatment, and monitoring for the remainder of her life.

In September 1993, Ms. Lowder filed suit against the State of Florida, Department of Health and Rehabilitative Services, Family Health Center, Inc., and Homer Kirkpatrick, M.D. The case was settled as between Ms. Lowder and Dr. Kirkpatrick and proceeded to trial by jury with the remaining two defendants in September 1994. At the conclusion of the case, the jury returned a verdict in the amount of \$600,000 of which HRS was found to be 65 percent liable. The remaining 35 percent of liability was attributed to Dr. Kirkpatrick. Ms. Lowder and Family Health Center, Inc., were found not to be liable.

After set-offs, judgment in the amount of \$350,000 was entered against HRS. Although HRS initially appealed the verdict, the appeal was withdrawn. HRS paid the statutorily required amount of \$100,000, pursuant to §768.28, F.S.

Ms. Lowder is extremely distrustful of Florida health care providers and travels to Georgia for medical treatment. She appears to suffer severe psychological problems. A few

months ago, learning that she needed another blood test, Ms. Lowder attempted suicide in order to avoid having blood drawn in fear of a re-enactment of her prior incident. As a result of this suicide attempt, Ms. Lowder remains in psychological treatment 4 days per week. Moreover, she is on prescription medication, including Prozac, to treat her lingering depression. She described relationships with her children, mother, and community as remaining strained. She describes herself as remaining isolated, without friends or an understanding support system and in regular fear of death.

CONCLUSIONS OF LAW:

1. In September 1994, pursuant to a jury verdict, Ms. Lowder obtained a judgment against HRS in the amount of \$350,000.
2. Pursuant to §768.28, F.S., the Respondent HRS paid the Claimant \$100,000 in 1995.
3. The claim is for the excess judgment in the amount of \$250,000.
4. HRS is not obligated to satisfy the excess judgment unless and until the Florida Legislature passes a claim bill.

ATTORNEYS FEES:

Limited to 25 percent of recovery under the provisions of §768.28, F.S.

RECOMMENDATIONS:

It is the opinion of the undersigned that the claimant has suffered and continues to suffer severely as a direct result of the HRS misdiagnosis. The undersigned can find no compelling reason to modify the jury award; however, it is the opinion of the undersigned and Ms. Lowder that any amounts awarded pursuant to this claim bill be placed in a structured payment annuity to help defray the costs of her future medical needs.

Therefore, due to the foregoing reasons, I recommend that Senate Bill 42, with proper amendment, be reported FAVORABLY.

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Respectfully submitted,

William R. Pfeiffer
Senate Special Master

cc: Senator Silver
Representative Rojas
Faye Blanton, Secretary of the Senate
Richard Hixson, House Special Master