October 30, 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	11/03/97	HC WM	Fav/2 amendments

Re: SB 54 - Senator Dyer
HB 3047 - Representative Lynn
Relief of Michelle Jones

THIS IS A CONSENT VERDICT-BASED, EXCESS JUDGMENT CLAIM IN THE AMOUNT OF $1,972,540 FOR THE RELIEF OF MICHELLE JONES, A MINOR, BY AND THROUGH HER MOTHER AND NATURAL GUARDIAN, KATHY M. JONES, AGAINST THE WEST VOLUSIA HOSPITAL AUTHORITY FOR INJURIES SUSTAINED BY MICHELLE JONES, WHILE BEING TREATED AT WEST VOLUSIA MEMORIAL HOSPITAL, WHICH RESULTED IN HER PERMANENT MENTAL AND PHYSICAL TOTAL IMPAIRMENT.

STATEMENT OF CLAIM: This claim bill arises from a jury decision in July 1994, awarding Michelle Jones, Kathy M. Jones, and Thomas Jones $10,367,926.17 in damages for medical negligence against West Volusia Hospital Authority. Suit was filed in Volusia County against the hospital authority, d/b/a West Volusia Memorial Hospital (WVMH) and multiple other defendants. Claimants alleged that the health care providers involved in the management of Kathy Jones' labor and delivery of the infant claimant, Michelle Jones on January 5, 1987, caused hypoglycemia, or low blood sugar, and those responsible for Michelle's care in the hospital nursery during the 12 hours after birth failed to treat the low blood sugar, resulting in severe and permanent brain damage to Michelle. One pediatrician entered into a settlement with the claimants for $250,000 prior to trial, another was held by the court as not liable as a matter of law, and the trial proceeded against the obstetrician and the hospital authority on both liability and

damages. Trial began on June 20, 1994, before a jury in Deland, Florida, the site of WVMH. The jury was informed by WVMH that it was supported by taxes. West Volusia Memorial Hospital and the obstetrician claimed that something during gestation caused the damage, but they did not explain what caused injury. However, the treating doctors diagnosed hypoglycemia during the hospital stay; there was evidence that WVMH nurses failed to follow the hospital's written guidelines on how they should treat it, and caused the brain damage. After 2 weeks of trial and several days of deliberations, on July 6, 1994, the jury found that WVMH was negligent and responsible for 100 percent of the injuries suffered by Michelle Jones. The total economic damages awarded were $6,808,592.87. The remainder of the verdict was $1,000,000 each to the parents, and $1,559,333.30 to Michelle, for noneconomic damages.

West Volusia Memorial Hospital filed new trial motions and took an Appeal to the Fifth District Court of Appeal. The verdict was affirmed in February 1996, as to the jury's award to Kathy and Michelle Jones, although $1,000,000 of the jury's verdict to Thomas Jones, Michelle's father, was reversed. The net verdict which was the subject of the instant claim bill is therefore as follows:

Award to Kathy & Michelle Jones	$ 9,367,926.17
Interest accrued through 7/15/96	2,248,302.28
Costs stipulated to by WVMH	98,073.09
Amended Final Judgment, 1996	$11,714,310.54
Plus Simple Interest, 7/15/96-7/15/97	1,124,154.14

West Volusia Memorial Hospital paid $200,000 on the judgment after the entry of the Amended Final Judgment. Prior to August 1, 1997, a claim bill was presented to the Florida House and Senate. A hearing before the Special Masters of the House and Senate was set for August 29, 1997. The day before the hearing the parties reached a stipulation which was announced on the record at the Special Masters' Hearing on August 29, 1997, with all parties present, including Michelle and Kathy Jones.

STIPULATION: West Volusia Memorial Hospital offered to pay $1,972,540 provided that the Legislature approved that amount; that WVMH, at its September 11, 1997, meeting would appropriate that sum from unallocated funds; and that WVMH would actively support the passage of a claim bill in that amount, and actively seek that the Legislature appropriate monies to pay an existing Florida Medicaid lien for $187,951.83 from the General Fund. The offer contemplated that most of the net, after attorney's fees and costs, would be placed in an annuity and a Special Needs Trust for the benefit of Michelle, which would enable her to continue receiving Medicaid in North Carolina, where she currently resides, with any monies going directly to Kathy Jones being placed only in assets that are intended to be exempt from North Carolina Medicaid consideration. After learning of the representations of WVMH as to its inability to pay any higher amount without either raising taxes or resorting to bankruptcy or other dire consequences to the citizens in the taxing district, the claimants accepted this offer, contingent upon the Legislature's passage of such a claim bill in the amount of $1,972,540, together with any such relief from the Medicaid lien as the Legislature may appropriate, no later than the end of the 1998 regularly scheduled session. Should the Legislature not pass this claim bill by the end of the 1998 regularly scheduled session for $1,972,540, the parties will be returned to the status quo as it existed before this Stipulation, with the claimants free to pursue the full amount of their claim bill filed prior to August 1, 1997.

FINDINGS OF FACT:

The Hospital Incident

On January 3, 1987, Kathy Jones went to West Volusia Memorial Hospital (WVMH) to deliver her baby, Michelle. Her obstetrician was Dr. Robert G. Ouellette. The pediatricians for the new baby were to be Drs. Wiggins and Barnard. Kathy's pregnancy had been uneventful. Although she had difficulty with repeated miscarriages in earlier years, because of what was eventually diagnosed as a "luteal phase defect" (a condition in which the walls of the uterus do not "ripen" sufficiently to hold the developing fetus in the uterus), once the problem was treated with progesterone suppositories, she had no difficulty with her pregnancies. She has two healthy older children.

> She arrived at the hospital in labor around 4:10 a.m., on January 3, 1987. She was placed on a monitor intended to measure the baby's heart rate and the strength of her contractions, and received the usual examinations and lab work. The obstetric nurses monitored her labor until 8:20 a.m., when Dr. Ouellette arrived and did his initial examination. After his examination, Dr. Ouellette prescribed Dramamine, a medication usually used for motion sickness, as treatment for a "swollen cervix."

After the Dramamine the intensity and frequency of Kathy's contractions increased, as shown on the uterine activity tracing on the monitor strips. Changes in the fetal heart rate began to appear. Cervical dilation progressed with no action taken to address these changes; the nurses did not contact Dr. Ouellette with any concerns.

Michelle was born at 10:20 a.m. Her "APGAR scores" were 9 at one minute and 10 at 5 minutes. APGARS are subjective and nonpredictive scores assessed by nurses, not doctors, per defense witnesses Cornblath and Ball, but indicate a likelihood that no damage had occurred before birth.

At about 11:30 a.m., Michelle began to appear to breathe very rapidly and became jittery. Marilyn Mahanor, the nurse who observed this, described it as light tremors all over the body. Because these were warning signs of low blood sugar, or hypoglycemia, under written WVMH policies and her own understanding, Ms. Mahanor did a Dextrostix (screening) blood sugar test which read out the result "Lo." This meant that the blood sugar was below the capability of the test machine to read the result, i.e., somewhere below 40 mg or 30 mg percent, depending on the machine (which could never be identified).

West Volusia Memorial Hospital had policies specifically directed toward the management of low blood sugar in newborns. Dr. Tilelli and nurse Howz both addressed in their testimony the specifics of the policies' requirements and how the WVMH staff deviated from the standard of care in not following the dictates of policy. West Volusia Memorial Hospital policy on "Monitoring Newborn Blood Glucose Levels" required that the following be accomplished in the circumstance of hypoglycemia in a newborn:

1. Obtain a chemstrip glucose level using the AccuCheck monitor Chemsticks (see procedures) one hour after delivery.

2. If glucose level is below 40 percent, obtain a STAT FBS from Lab and immediately feed baby 1-2 oz. of D10W (Do not wait for FBS results).

3. Call pediatrician after receiving FBS results if below 40 MG percent.

4. Recheck glucose level ½ hour after D10W feeding using AccuCheck--notify physician if still low.

5. Feed 1-2 oz. of formula ½ hour after step #4.

6. Continue to feed formula every 2 hours, doing a Chemstrip or AccuCheck to check level before each feeding.

7. Call pediatrician immediately if any glucose levels are low or if there are any symptoms of hypoglycemia.

Ms. Mahanor, a part-time employee who had no nursery training regarding the policies, failed to follow these policies in significant respects: The timing shown on the chart indicated she did not obtain a fasting laboratory blood sugar test; she failed to feed the baby the mandated amount of sugar water (D10W) or formula at the prescribed intervals; and she failed to obtain repeat Dextrostix tests which the policies required. She did not clarify on the chart that the first blood sugar tested by the lab was drawn after she fed the baby, and in fact wrote conflicting notes such that the timing of the feeding, and indeed what was fed to the baby, were not ascertainable.

Dr. Wiggins, who visited Michelle after the first jittery episode, did not receive a report of what had occurred, or that the lab blood sugar reading, reported as normal, was a post feeding result.

As the day progressed, Michelle exhibited further symptoms of hypoglycemia. Virtually all her respiratory rates were high. At 4:00 p.m., she became dusky, blue, and cyanotic. A small feed was given: "sips" of Similac. At that time Dr. Wiggins ordered

hourly "chemstrips" (Dextrostix) but the nurses did not perform them. He gave orders at the same time for dextrose tube feedings (D10W) to start; these orders also were not carried out, with Michelle being given only formula, not sugar water, until 4½ hours later. At 8:30 p.m., she again had light tremors or jitteriness, with blood sugar of 38, and finally the tube feeding was begun. At about that time an order was made for a dextrose (sugar) IV. That order was not implemented for another 2 hours. By that time the blood sugar had dropped to 31.

After placement of the IV dextrose, some 12 hours after birth, Michelle's blood sugars stabilized. She continued manifesting a "poor suck," which was first noted by Ms. Mahanor after the dusky and blue episode and she appeared tremorous to her parents. However, she was discharged on January 5, 1987, with no particular precautions. Kathy and Tom Jones noticed that, at home, the "tremoring" continued, that she did not feed well, and she appeared to have "googly eyes."

Damages

On February 4, 1987, Michelle suffered her first seizure. From that time on, extensive testing and the passage of time revealed that Michelle was not a normal child. She was diagnosed as having a "static encephalopathy," i.e., a non-progressive neurologic impairment, and began missing developmental milestones such as crawling, walking, and talking. It initially appeared that she was cortically blind. She "failed to thrive" and was given a gastrostomy feeding tube. She was placed on long-term seizure medication. She suffered abnormal muscle tone and required therapies for that. She developed the gastroesophageal reflux disorder and constipation common in neurologically impaired children and was medicated for it. She often appeared to be suffering and would scream loudly for hours at a time, for days on end. She perceives pain.

Michelle was almost 2 years-of-age before she could sit up unaided. She still cannot speak at age 10. She could not feed herself, even with her hands, until after she began special education at age 3. She still cannot use a spoon or fork and is dependent upon supplemental tube feedings. She cannot be toilet trained. She has behavioral problems such as head-banging. She requires constant care. She cannot walk or stand

alone. She has a gastrostomy tube for feedings and she has a permanent colostomy. She is on constant seizure medications. Her care is involved. She requires medical monitoring by multiple specialists. Because she is often ill, she has frequent visits to doctors and hospitals, often hours away. She has needed frequent therapies from infancy.

The injuries suffered by Michelle Jones are severe and permanent. She will never care for herself, manage her own affairs, or work. She will require 24-hour-a-day care, regular therapies and rehabilitation, and medical monitoring and treatment for her lifetime. Her future care costs are currently estimated at $9,104,725 for Group Home care or $11,285,655 for home-based nursing care, according to the expert reports of Paul Deutsch, Ph.D., a vocational rehabilitation expert and Frederick Raffa, Ph.D., an economist. These reports were prepared in anticipation of the August 29, 1997, hearing. The increase in the costs were partly due to a permanent colostomy Michelle received after trial, the costs of maintenance of the colostomy, and partly due to the increasing costs of medical care. The seriousness of the damages was never disputed by WVMH. Michelle's primary treating physician testified that her life expectancy is solely dependent on the quality of care she is able to obtain. There was other evidence that her life expectancy is not likely to be significantly different than her actuarial life expectancy of age 72.

Michelle resides with her mother, Kathy, and her older brother, Tommy, following the divorce of her parents. It is her mother's intent that she remain in her home unless Michelle's physical condition, or her mother's, makes that impossible. That arrangement appears to be in Michelle's best interest. At trial there was evidence that the 1994 home would require modifications and similar modifications are likely to be needed in the present home, which Kathy Jones bought in 1997. (Some modifications were made on the 1994 home from $25,000 distributed to the parents in 1996, but that home is now an asset of the father as a result of the parents' divorce.) It is estimated that Michelle could continue residing in her current home, with minimal modifications, for several years but that significant changes in this home, or purchase or construction of another home, would likely be desirable in the future to continue taking care of Michelle in the home. The family has a barely

functioning older model van but needs a reliable wheelchair-equipped van at an approximate cost of $35,000.

Michelle's mother, Kathy Jones, has been unemployed since Michelle's birth and it is unlikely that she will be able to sustain employment outside the home because of Michelle's care needs, including her frequent trips for hospitalization and medical care. Kathy Jones has proven to be an excellent caretaker of Michelle according to treating physicians. Although Michelle does attend school for some hours each day, those hours are needed by her mother to maintain the home, get groceries, and do the daily family chores. Once Michelle gets home from school, she cannot be out of her mother's sight for more than a few minutes. Although Michelle cannot walk, she can sit up, roll over, and pivot herself on her buttocks in such a way that she can change her position and present a danger to herself. She does recognize family members and responds with facial expressions, movement, or attempts at verbalization. She uses toys at about the level of a 1-year-old.

Ability to Pay

The hospital authority had no medical malpractice insurance and claimed it had no trust funds available to pay more than $200,000 on this claim without a claim bill. After these claimants' Judgment in 1994, the hospital authority leased out the operation of its hospital facility to a private, not-for-profit corporation to which it provides subsidies for indigent care. As a result, the authority itself is not paid for the medical services it provides. In 1997, the authority's tax millage was lowered by the Legislature and HB 1293 (1997) was an effort to permanently cap the millage rate at 1.54 mills. Governor Chiles vetoed the bill but the Legislature could still attempt to override the veto or reintroduce a similar bill. Based on the present millage, WVMH had reserves in the amount of $1,972,540 allocated in their 1998 budget for nonessential purposes, i.e., those which are not critical to the health and well being of the citizens of the authority. Based on the parties' Stipulation, the governing board has now appropriated those funds for the payment proposed to be made to the claimants.

Proposed Distribution

Because the available monies of $1,972,540 are significantly less than the estimated costs of Michelle's future needs and

significantly less than the amount of the Amended Judgment of 1996, and because Michelle's present financial circumstances include only a small amount of child support each month, SSI, AFDC, and food stamps, it is critical that Michelle remain eligible for Medicaid until she becomes eligible for Medicare, at age 18. The parties therefore have proposed that the net funds available from any award must be primarily placed in a Special Needs Trust which will protect that Medicaid eligibility. In order to fund the Trust, an annuity has been chosen which would provide approximately $4,463.43 monthly for 30 years certain, and life thereafter, with benefits increasing at 5 percent each year, based on a proposal from First Colony Life prepared in September 1997. That proposal assumes that there would be approximately $1,200,000 available to purchase the annuity plus $32,000 to pay off the current mortgage on the home in which Michelle resides, with any balance after attorneys' fees, costs, and lien being placed in cash into the Special Needs Trust. That assumption of $1,200,000 available includes the use of the net, after attorneys' fees, of the prior $250,000 settlement and WVMH's prior $200,000 payment. More will be said about that in the Conclusions of Law.

Based on this distribution, Kathy Jones would have to abandon her claim to all but $32,000 of the $1,000,000 the jury awarded her because receipt of any direct cash would defeat the purpose of the Special Needs Trust by disqualifying Michelle from Medicare eligibility. Mrs. Jones has agreed to do so to help protect Michelle. Although the $32,000 payoff of the current mortgage payment would be nominally in the name of Kathy Jones, it would not disqualify Michelle from Medicaid and seems beneficial to Michelle by assuring the entire household of a home not threatened by the possible financial inability to make payments.

Costs

The claimants' attorneys have incurred costs of $277,508.80 through September 25, 1997, and will incur additional costs in the presentation of this claim bill to the various committees and through final passage. Those costs will have to be paid from the total funds derived from this claim bill and from the prior recoveries of $450,000. None of the costs have been paid to date. The costs have been incurred over the 9-10 years claimants have been represented and include the minor costs of

two attorneys hired to assist the claimants solely in the pursuit of this claim bill. The costs appear justified in light of the result achieved and the length of litigation, which was filed in 1989, and which resulted in trial in 1994, and appeal and post-judgment matters thereafter.

Medicaid Lien

Florida Medicaid has asserted a lien for $187,951.83, which the claimants ask that the Legislature pay from the General Fund or by any other means available, due to the limited funds available from WVMH and the magnitude of the needs.

There are no other collateral sources other than Medicaid in North Carolina, which has asserted only a $1200 lien at this time, and the prior settlement of $250,000, which is maintained in trust in an interest bearing account, per prior Court Order, until the complete resolution of all claims. At the time of that prior settlement, the costs of litigation and the Florida Medicaid lien alone would have diminished the funds and there would have been none available for the claimants.

The claimants request that the Medicaid lien be paid from the General Fund is reasonable given the discrepancy between the available funds and the evidence of the minor's needs. For instance, even at the current level of costs and the annuity proposal of September 1997, the maximum available per month from the purchase of a $1,200,000 annuity with 30 years certain, life thereafter, and increases of 5 percent per year is $4,463.43. Yet, the evidence of needs is in the range of $11,000 per month, present value, to fund the future lifetime care.

CONCLUSIONS OF LAW: This claim bill is ripe for determination by the Legislature. There is evidence in the record to support the liability of the hospital in this case, including the 100 percent apportionment of liability. The hospital itself argued that neither it nor the obstetrician were negligent or caused the damages, so it cannot complain of the lack of apportionment to that doctor. Both the labor nurses and the nursery nurses may have played a role in the jury's decision that only the hospital was responsible for causing the damage. Additionally, the hospital itself claimed that Michelle was a perfectly healthy baby when the obstetrician delivered her.

Under the case of *Fabre v. Martin*, 623 So.2d 1181 (Fla. 1993), the hospital's liability for the economic damages of $6,808,592.87 would not be reduced even if the jury had found either the obstetrician or the pediatrician partly responsible.

Dr. Wiggins' prior settlement of $250,000 ordinarily would be a set-off against the total damages, but the damages so far exceed the stipulated recovery that the issue is deemed moot. Indeed, the hospital never requested, after the verdict, that the Court set-off that amount.

The claimants' attorneys have stipulated to a cap of 25 percent fees which is in accordance with s. 768.28, F.S., and the fees will be split among the five firms providing representation to the claimants.

There is evidence in the record to support the amount of the Amended Final Judgment and both the trial court and the appellate courts declined to reduce the awards to the claimants.

The stipulated award is payable without jeopardizing the health, well-being, and taxation rate of the authority's supporters and is equitable by providing the best immediate and long-term relief to the claimants that can be afforded given the financial limitations that the authority claims.

The guaranteed-term annuity is a vehicle favored by the Legislature in past claims on behalf of those who have suffered serious or permanent injuries that are likely to require substantial or long-term medical care.

Despite the intended use of a Special Needs Trust and the proposed distribution contemplated here, funds which are appropriated in this claim bill for the benefit of a minor should be approved by a Petition for Approval of Settlement to obtain court approval in the Circuit Court.

As the minor and her natural guardian now reside in North Carolina, the Special Master does not see the need for a Florida guardianship, provided that the Special Needs Trust is devised consistent with North Carolina law and provided the Trust assets are not physically located in Florida. As there will be multiple members of an advisory committee directing the

actions of a Trustee, who is not the mother, and who has fiduciary duties to the Trust, the potential for abuse of the minor's funds is low. However, if the Trust assets are located primarily in Florida, there should be a Florida guardianship established to supervise disbursements on a yearly basis, but without prior approval. And if North Carolina law requires a guardianship for a minor under these circumstances, and there is no Florida guardianship, then a North Carolina guardianship should be established to supervise disbursements on a yearly basis, but not requiring prior approval of the many disbursements that will likely be needed.

Although the parties have proposed a distribution that includes the $250,000 of the prior settlement, and have included those funds in calculating what likely would be available to buy an annuity and fund the Special Needs Trust, that settlement was under jurisdiction of the Circuit Court and is already governed by the terms of a prior Court Order. Therefore, the distribution of those funds is governed by that Circuit Court, and not the Legislature. Also, that settlement was reached when the father of the minor was still a party, and he may assert claims to those funds. Likewise, the $200,000 paid earlier by WVMH is not contingent upon the passage of this claim bill, and the distribution of it will require Court approval as a minor is involved. Thus the proposed distribution of $1,200,000 to an annuity is hopeful that the Court approves the prior receipts being used in the manner proposed. However, the Legislature cannot guarantee the Court action and must rely on the claimants' attorneys' attempts to secure the Court approval. Otherwise, if only the $1,972,540 is available, there would be $981,948.27 available after attorneys' fees, present costs, payment of the Medicaid lien (assuming the Legislature does not appropriate that from the General Fund) and paying the $32,000 mortgage on the home. This would significantly reduce the monthly annuity benefits from the $4,463,43 shown in the parties' proposal, but an annuity should still be purchased with those funds and would be in the minor's best interests.

ATTORNEYS FEES: Limited to 25 percent of recovery under the provisions of s. 768.28, F.S.

RECOMMENDATIONS: I recommend that SB 54 be amended to provide for the following:

1. That the Stipulation between the parties be approved and that the $1,972,540 already allocated for this claim be used to purchase an annuity in an amount to be determined by the Circuit Court, pay off the mortgage on the home, and that the attorneys' fees of $493,135 and all accrued costs be paid to a designated firm which will be responsible for distributing the fees and costs among all the claimants' attorneys. The funds for the Medicaid lien ($187,951.83) should be paid to that same firm and should be held in trust pending the Legislature's decision on payment of the lien from the General Fund. Any net remaining after fees, costs, annuity, all lien payments, and mortgage payoff should be paid directly to the Special Needs Trust. These payments should be made as soon as those funds are received by the hospital authority from property taxes collected between now and March 1998. The monies other than the annuity purchase should be deposited in the claimants' attorneys' trust account pending Circuit Court approval of the proposed distribution.

2. That the payment of the $1,972,540 be made with the expectation that the claimants will petition the Circuit Court for approximately the same distribution the parties have described as their intent; that all funds in excess of 25 percent attorney fees, liens, costs, and $32,000 mortgage payoff, be the basis of a Special Needs Trust, and that the great majority of those assets be used to fund an annuity, with any remainder used as an initial cash funding of the Trust. Because costs continue to accrue and cannot be fixed at this moment, the costs of an annuity proposal in September 1997, may differ slightly by the time funds are available to fund the purchase. There may be some costs associated with the creation of the Trust and the creation of a guardianship, and we cannot guarantee the availability of the net monies from the prior settlement and the initial payment by WVMH being used for annuity. For these reasons, I am not fixing the exact amount available to become the property of the Special Needs Trust, but am recommending that the Legislature approve the Stipulation's principles and intention and that the

claimants' attorneys receive their actual costs accrued by the time of Court approval.

3. That any interest earned on the deposit of the claim bill funds into the attorneys' trust account be payable to the Special Needs Trust for the benefit of the minor.

4. Given the evidence of good faith by the hospital authority in their offer, and the good faith of the claimants in accepting a severe reduction in the claim bill amount in order to secure more certain benefits for the minor, I recommend that the Legislature appropriate $187,951.83 from the General Revenue Fund to pay the Medicaid lien. Although the settlement reached between the parties is not contingent upon this appropriation, this will be of special importance if for any reason Court approval of the planned distribution of the prior payments of $400,000 has a different outcome than projected. Appropriation of the lien amount would provide almost the same net amount available for an annuity as if the prior recoveries, less attorneys fees, were assured of being used for the annuity, rather than subject to further Court action.

I therefore recommend that Senate Bill 54, as amended, be reported FAVORABLY.

Respectfully submitted,

William R. Pfeiffer
Senate Special Master

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