THE FLORIDA SENATE

The Special Master on Claim Bills

March 13, 1998

SPECIAL MASTER'S FINAL REPORT _____ COMM _____

The Honorable Toni Jennings
President, The Florida Senate
Suite 409, The Capitol

CF
WM

Re:
HB 3043 - Representative Sembler

THIS PARTIALLY CONTESTED CLAIM B
STATE GENERAL REVENUE, BASED ON A 1996 JURY VERDICT
FI JUDGMENT AGAINST THE FLORIDA DEPARTMENT O
CHILDREN AND FAMILY SERVICES DUE TO ITS PREDECESSO
AGEN FAILURE, AFTER BEING PUT ON NOTICE, T
INTER PROPERLY AND QUICKLY 12 YEARS AGO T
PROTECT N
THER T

FINDINGS OF FACT

The Abandonment Phase

infant born to Coreen and Michael Bellamy at Broward General

of the Department of Health and Rehabilitative Services (HRS), the

exactly 3 months later, before noon on Friday, August 16, 1985, when Joseph's parents had left Joseph with him about 2 weeks prior and caller said that he wanted to talk to an HRS counselor about getting Joseph's parents as "retarded." According to the HRS records, another intake worker; stated that he and his wife would continue to wife would call back to HRS the following week. Grandmother did activity on Thursday, August 22: one call with grandmother, one to grandparents. The records also indicate that HRS caseworkers made

August 22, during which call one or both of the parents are reported to have said that they did not wish to have their baby returned to them. There was another telephone contact with Joseph's parents on August 30, Friday of the following week, but the specific subject of that conversation was not noted in the records. There is an HRS log entry on Tuesday, September 3, 1985, noting a call from grandmother, relaying a message from Joseph's mother that she, Joseph's mother, was still trying to decide whether to keep Joseph. The HRS records indicate that this "abandonment" case was closed on September 4, 1985 as a "voluntary foster care" situation with "no further services needed" just one day after grandmother's call to say that she would keep the baby as long as she was able to and that she would contact HRS in the future, if necessary. Throughout this entire period, there was apparently no home visit although HRS had been given the child's correct address (properly noted in the agency record), and under the circumstances, based on standards and instructions in the HRS Manual, Rules and statute, a family visit was required.

Although the initial "abandonment" case apparently had been "closed" on Wednesday, September 4, 1985, somewhat conflicting HRS records show that the matter had actually been transferred to another caseworker who made several intermittent attempts, over the next several weeks, to reach Joseph's grandmother by phone. An HRS caseworker spoke to Joseph's maternal grandfather in mid-October; tried to reach Joseph's mother by phone on October 17 but spoke to an adult female housemate; and on October 31, finally spoke with Joseph's mother. On the phone, Coreen Bellamy gave a glowing report on her son Joseph's condition and on her family's general domestic tranquility.

The "Milk Allergy" Phase: In the early afternoon on Thursday, October 10, 1985, Joseph was picked up from the Bellamy residence at 1513 NW 12th Terrace in Ft. Lauderdale, and brought by ambulance to the Emergency Department at Broward General Medical Center. Joseph's mother told the staff that Joseph had vomited that day and his eyes had rolled back as though he were having a seizure. The ER physician spoke to Joseph's pediatrician's partner who suggested that Joseph be released with instructions to keep him off cows' milk and on clear liquids for 24 hours, and for Joseph's family to bring him to the pediatrician's office in 3 or 4 days. Joseph's mother signed the medical chart and left the ER with Joseph at 3:20 p.m. There is no record showing that she followed through with the prescribed visit to the doctor's office.

From "Abandonment" to Child Abuse Phase: The HRS records indicate that 12 days later, at 2:15 p.m. on Tuesday, October 22, 1985,

a physical abuse intake report was received from a neighbor, via the central 1(800) child abuse hotline, indicating that Joseph had been "slapped, hit, picked up by one arm, and thrown across the bed," and that Coreen Bellamy had abused Joseph by "throwing him to the floor." This hotline report was apparently funneled from Tallahassee to the local Broward HRS office. The intake counselor on duty apparently did not check the Central Information System to look for prior entries on the child, or if a check was made, no match was noted. At 8 a.m. the next day, Wednesday, October 23, 1985, the caseworker then on duty picked up the hotline report and physically went to 1530 NW 12th Terrace, which was in the same block, but not the correct house.

The HRS records indicate that 3 days later, on Friday, October 25, 1985, shortly after noontime, another telephonic report came into the local HRS office. The identity of the caller has been redacted from the records by the current records custodian, as is required by law; however, it was probably either a family member and/or the same neighbor. In any event, the caller again provided HRS with the Bellamy's correct address, stated that Joseph had a distended stomach and big bruise over his kidney, had passed out, and had been taken by his father to a hospital where he had been treated and released. The caller further related that Joseph's father and mother had had a violent disagreement and had thrown things back and forth. According to HRS records, two HRS intake workers arrived at the correct address for Joseph's residence at 4:50 p.m. that afternoon and reported that although all the lights were on, they got no response at the door. At 9:45 a.m., the next morning, Saturday, October 26, 1985, the HRS caseworker on duty followed up by getting a local police officer to accompany her to the Bellamy residence. Her report says that when they got there, Joseph's mother was there with Joseph, and the female adult family friend. Joseph's father was not there. The HRS worker's report contains Joseph's mother's account of the hospital visit 16 days earlier, the mother's admission that she and her husband argued a lot, and the mother's denial about throwing Joseph to the floor. The friend generally corroborated the mother's story. The HRS caseworker wrote in her report that she had examined Joseph. She also stated in her report that Joseph had "no marks or bruises" and appeared to her to be "very healthy." She apparently found nothing sufficiently unusual and she allowed Joseph to remain at home with his mother. She noted her follow-up plan that had two elements: 1) to try to locate and see the father; and 2) to try to obtain marriage counseling for Joseph's parents. At the Special Master's hearing, there was a suggestion by claimant's counsel that this HRS caseworker had not been entirely candid and that her physical examination of

Joseph was not as thorough as she had indicated in the written report

The record then shows that 4 days later, on Wednesday, October 30, 1985, the other caseworker who had gone to the wrong address on

and/or his mother. The caseworker found no one home. She left her card. The next day, Thursday, October 31, 1985, Coreen Bellamy

previous day. Coreen said that she was having financial problems and wanted to discuss "voluntary foster care" for Joseph. The evidence is

November 4, 1985. She never made it in.

The Final Assault Phase

Wednesday, November 6, 1985, at 1:29 p.m., he showed up in an ambulance, unconscious, at Broward General Medical Center. He

story that Joseph "went into a seizure" about 15 minutes before. The EMT who treated Joseph during the 9 minute ride, noted that Joseph

color and blue around his lips; and that his eyes had rolled back up into his head. The physician at the emergency department confirmed

Joseph as a "shaken baby." Joseph was admitted to the hospital one hour and 15 minutes after having arrived at the ER door.

_____: A preponderance of the evidence shows that sometime on November 6, 1985, Coreen Bellamy held Joseph under

Joseph, at 10 days short of his half birthday, became profoundly and permanently brain injured. Both parents were charged with child

another, to have shaken/beaten Joseph. Both were convicted.

Standards for Findings of Fact

a preponderance of evidence, although the Senate's Special Master is not bound by the formal rules of evidence or procedure applicable in

include in the record, any reasonably believable information that the Special Master finds to be relevant or persuasive in the matter under

element. In the final analysis, this is a legislative measure that, once the Master's report and recommendation are filed, can be treated and

Objections to the Special Master's findings, conclusions, and

recommendations can be addressed directly to the members of the Senate, either in committee, or individually, as the parties choose.

CURRENT MEDICAL SITUATION:

Joseph, now age 12, has a permanent, irreversible brain injury as a result of head trauma inflicted on him in November 1985. It is chronic (old), fixed (occurred at one moment), and non-progressive (not itself getting worse, but with ongoing complications that pose medical risks). In the shaking, he suffered bilateral subdural hematomas (accumulations of blood in the subdural space of his head), multiple brain hemorrhages, and hydroencephaly (cerebrospinal fluid leaking in his skull). He has a seizure disorder that is somewhat controlled with medication. He is profoundly retarded with cerebral palsy, spasticity (tightening) and contraction of many body joints. His IQ is estimated to be in the 25 range. These conditions manifest themselves in poor head control, the tendency toward maintaining a fetal position, tucked-in thumbs, and drooling with mouth open and tongue protruding. Joseph is sentient but cannot vocalize. He can laugh, make noises, respond to pain, and follow an object with his eyes. He can turn to voices. He is not toilet trained and never will be. He eats pureed food by mouth, but must be watched at meal time to avoid the risk of choking. He cannot feed or clothe himself. He weighs about 50+ pounds at his current age 12, and should grow to 100+ pounds at adult size. He will require yearly evaluation by an assorted group of physicians and will require anti-spasticity and anti-convulsant drugs for the foreseeable future. He will need physical, speech, aquatic, and related therapies. His expected life span, with optimum medical care, according to one set of experts, is into his 60's. There was conflicting yet credible evidence in the record that his remaining lifespan will be substantially reduced, based on the statistics of similarly injured persons.

CURRENT LIVING SITUATION:

Joseph has been a ward of the State of Florida since late 1985. He was placed with Jeff and Helen Farver in November 1993 and legally adopted by them in April 1994. Jeff and Helen Farver are missionaries carrying out a ministry of Central Baptist Church in Panama City. Their mission is named in memory of Mephibosheth, the son of Jonathan and grandson of Saul, who King David treated as one of his own sons. II Samuel 9:5-13. Mephibosheth is significant to the Farvers because he was described in II Samuel 4:4 as being “lame of feet,” the only such physically afflicted individual specifically named in the scriptures.

Their family is supported by a modest monthly allowance from their church, plus $2,400 a month support for Joseph from his guardianship estate, plus $470 per month in SSI for each of the other 4 siblings, also adopted by the Farvers. All the children are in a similar medical state.

Joseph attends the Margaret K. Lewis Center, an educational facility of the Bay County School District. He gets picked up around 7 a.m., 4 to 5 days a week, depending on his daily physical condition. This gives Joseph's parents some respite. There has never been any professional nursing assistance in the Farver residence. Caring for these children is the full-time work, mission, ministry, and responsibility of Jeff and Helen Farver.

CLAIMANT'S ARGUMENTS: (Paraphrased for brevity)

1. Joseph comes to the Legislature with a jury verdict for $7 million. HRS could have, but did not, appeal it or ask for a new trial. His court-appointed guardian and lawyers have been through all the hoops. It has been 12 years since HRS employees abandoned Joseph, an infant unable to protect himself from his violent, retarded mother. HRS employees had over 20, perhaps up to 27 separate warnings/contacts from Joseph's relatives and neighbors. This is active, actionable negligence, and payment of this verdict will have the result of teaching the department about the results of sloppy, careless work.

2. HRS (now DCF) lawyers admitted HRS' liability at the Special Master's hearing. The issue for the Legislature is only the proper amount to pay Joseph's guardianship estate as damages.

3. One of Florida's most respected pediatric neurologists has prescribed a medically necessary "optimal" plan for Joseph's treatment. The plan has been quantified by a respected, experienced, credible Ph.D. economist who testified in court and before the Special Masters. The result of the plan (based on the pediatric neurologist's estimate of Joseph's remaining life expectancy of about 50 years) is about $17 million, comprised of about $14 million for round-the-clock LPN care to be supplied to Joseph by a private nursing agency, and about $3 million for other future medical needs.

4. State-provided Children's Medical Services are inadequate. Those providers are overworked, overbooked, underfunded, undependable, have a high turnover, and are getting worse, not better, as time goes on and government cutbacks in these programs continue. Furthermore, there may be no such thing as Medicaid and Children's Medical Services by the end of Joseph's life. This is Joseph's court-appointed guardian's only shot at providing a guaranteed fund to pay for all of Joseph's medical needs in perpetuity.

RESPONDENT'S ARGUMENTS: (Paraphrased for brevity)

Yes, we admit liability; BUT:

1. Joseph's guardian and lawyers have already exacted $1,644,000 from Broward General Medical Center, his pediatrician, and the ambulance company as a result of their combined failure to diagnose child abuse.[1] Even after paying his attorneys over a half million dollars, and paying $170,000 for the new house owned by the guardianship estate, plus $42,612 to renovate it for Joseph and his entire family, the guardian still has between $900,000 and $1 million in the bank that, at a conservative 5-6% per annum interest, practically guarantees to throw off about $4,000 per month in interest alone, which is more than Joseph will ever need for reasonable medical and home care "extras" and special needs expenses, even if he lives another 50 years.

2. Joseph does not need an "optimal" plan when a normal plan will suffice. In fact, Joseph has done adequately, under the circumstances, for over 4 years. Mrs. Farver says she is generally satisfied with Joseph's current medical treatments. Joseph does not need round-the-clock LPN care. First of all, Joseph attends public school for 8 hours a day about 4 days a week. Next, he sleeps for another 8 hours out of every 24. Finally, he does not need an LPN when a home health care worker can do whatever his mother and father have been doing themselves, without an LPN, or anyone else for that matter, since they brought him to Panama City and adopted him.

3. The "optimal" plan his lawyer wants the Legislature to fund, up to the amount of the court's Final Judgment, ignores the fact that the State of Florida, using Medicaid, Children's Medical Services, and Developmentally Disabled program funds, has paid, and will continue to pay virtually 100% of Joseph's medical and associated pharmaceutical, therapy and assistive devices bills, until the day he dies. If fact, the state has already paid about $34,400 in Medicaid funds on behalf of Joseph, and substantial benefits under Children's Medical Services programs.

4. The department was prohibited from raising the issue of comparative fault at the two court trials in this case, but the department can still raise it in the Legislature. Joseph's mother was the direct cause of their own son's catastrophic injuries. If their names had been allowed on the verdict forms, along with the HRS, the jury would have been able to assess the active,

[1] As a result of a failure by the emergency room physician, Joseph's pediatricians, the hospital staff, and the ambulance company on October 10, 1985 to diagnose and report suspected child abuse based on the presence of several of its classic symptoms: an extraordinarily elevated level of the enzyme CPK, scratches and bruises, and deviated and staring eyes, Joseph's guardian sued and obtained a settlement recovery of $1.64 million, the bulk of which remains in Joseph's guardianship account, subject to court control, after deduction of contingency fees of about $588,000 and costs of about $143,000.

direct negligence of Coreen and Michael Bellamy and balance that with the passive, failure to act negligence of the department. Damages against the HRS would have been much lower.

CONCLUSIONS OF LAW: Some see the Legislature's role in claim bills against the State of Florida as merely rubber stamping and "passing through" for payment those jury verdicts that have been reduced to judgment and survived appeal, if any. Others see the Legislature's role as a *de novo* responsibility to review, evaluate, and weigh the total circumstances and type of the state's liability in the case, and to consider those factors that might not have been perceived by or introduced to the jury or court.

Whichever of these two views each lawmaker holds, at the Special Master's level every claim bill, whether based on a jury verdict or not, must be measured anew against the four standard elements of negligence.

Element l) DUTY--In the fall of 1985, the department and its employees had a clear statutory duty to receive reports of suspected child abuse, neglect and abandonment; to commence an investigation "immediately, regardless of the time of day or night"; and to act on the investigation and protect the child if it was determined that the situation warranted it. Section 415.505, F.S.(1985). In addition, the department itself promulgated Section 10M-2.03, F.A.C., calling for an immediate child protective investigation in 11 specified factual instances, at least 4 of which pertained to Joseph at one time or another between August 16 and November 6, 1985. Furthermore, the department had a newly revised, extensive and detailed Manual, HRSM 210-l 1983, revised July 1, 1985, that outlined and explained the department's official Intake Program and set out in very great detail, the responsibilities, required steps, time lines, and reporting requirements that applied to intake workers dealing with possible child abuse, neglect or abandonment cases. Finally, a majority of the justices of the Florida Supreme Court, in HRS vs. Yamuni, 529 So.2d 258 (Fla. 1988), rejected HRS' arguments to the contrary, and at page 261, stated that HRS had a common law duty of care, in addition to its statutory duty, to prevent further harm to children when reports of child abuse are received. In short, duty was clear.

Element 2) BREACH--Was there one and was it serious enough to be actionable? In my view, this determination must be based on a 1998 perception of whether the actions of the department's employees in 1985 fell below what was expected by the Secretary and required by law. I think that the evidence of breach was preponderant. Furthermore, any doubt as to sufficiency has been wiped away by the

department's attorney's recent admission that HRS employees breached the department's duty to protect Joseph. In short, he conceded liability.

Element 3) PROBABLE CAUSE--The evidence points to the conclusion that Joseph's mother shook the living daylights out of Joseph on November 6, 1985. Whether it was due to her rage because he would not stop crying, or her retardation and failure to appreciate the effect of what she was doing, does not make much difference at this point. She severely and practically fatally injured her own child. She was, and continues to be, the direct cause of Joseph's profoundly disabled condition. Nevertheless, the department's employees had a clear chance to break the chain of events that resulted in Joseph's injuries, but did not do so. In hindsight, the department would have prevented the November 6, 1985 violence if its agents had intervened and removed Joseph from his parents' custody prior to that date.

Element 4) DAMAGES--There were two jury verdicts in Joseph's cases against the department.

1. The first jury heard extensive and conflicting testimony from experts in both the medical and economic loss areas. Jury #1 set Joseph's monetary damages at:

Past pain, suffering, disability, impairment, disfigurement, mental anguish, inconvenience, and lost capacity to enjoy life	$ 100,000
Future pain, suffering, etc.	$ 550,000
Present value of loss of future earning capacity	$1,050,000
Present value of future medical care and rehabilitation	$12,800,000
	$14,500,000

The Final Judgment based on this verdict was overturned on appeal based on a judicial error in improperly allowing certain evidence at trial.

2. Another jury, 3 years later, heard much of the same conflicting testimony and set Joseph's monetary damages at:

Past pain, suffering, disability, impairment, disfigurement, mental anguish, inconvenience,

and lost capacity to enjoy life	$ 1,000,000
Future pain, suffering, etc.	$ 1,500,000
Present value of loss of future earning capacity	$ 500,000
Present value of future medical care and rehabilitation	$ 4,000,000
	$ 7,000,000

The second Final Judgment, in which $6,900,000 remains unpaid, was not appealed by the department, and is the basis of this claim bill. Obviously, Joseph's damages are extensive.

ATTORNEYS FEES: Section 768.28(8), F.S., limits claimant's attorneys' fees to 25 percent of claimant's total recovery by way of any judgment or settlement obtained pursuant to §768.28, F.S. Claimant's attorney has acknowledged this limitation.

LEGAL POLICY ISSUES: This claim again raises the applicability and retroactivity in the legislative forum of the concepts underlying §768.81, F.S., the statute that applies "comparative fault" in certain "negligence" cases insofar as noneconomic damages are awarded. It also raises the applicability in the legislative claim bill forum of the concepts underlying Fabre v. Marin, 623 So.2d 1182 (Fla. 1993), that judgment should be entered against each "party" on the basis of that party's percentage of fault, regardless of whether they could have been joined as a defendant. It also raises the question of whether, in the legislative claim bill forum, the Legislature should try to apply the concepts where, as here, the other "parties" [Joseph's natural parents] committed intentional criminal actions, not "negligence." Finally, it raises the question of whether, in the legislative claim bill forum, these principles should be made to apply to all damages awarded on the verdict, including economic damages.

These issues are ones of policy, to be argued by the parties to the respective legislative committees that consider this claim bill.

GENERAL CONCLUSIONS: I find that the claimant has proven that the department had a duty to him at all times between August 16 and November 6, 1985; that the employees of the department made efforts to comply with that duty, but, as their lawyer has candidly admitted, fell short of hitting the mark; that such failure was one of several causes of the injuries

sustained by Joseph Farver at the hands of his mother and/or father; and that Joseph's injuries were and continue to be catastrophic.

The "teach 'em a lesson" effect of this claim bill on a state agency will be minimal because the Legislature is now dealing with a successor department, and activities that occurred 12 years ago.

Joseph's mother and father, as the primary actors, should bear the lion's share of responsibility for inflicting Joseph's injuries. I myself would assess their responsibility at greater than half, but because the jury was given no opportunity to assess damages against anyone other than HRS, and because I have no objective way of allocating them, I have resorted to assessing Joseph's parents' blame and their responsibility at half.

Furthermore, it is my view that the department is entitled to a set-off for $1,644,000 which, for legislative claim bill purposes, is a proper deduction.

Finally, the department is entitled to credit for the $100,000 it has already paid to the guardian of Joseph's property.

RECOMMENDATIONS: ACCORDINGLY, I recommend that Senate Bill 62 be amended to pay Joseph's guardianship account the sum of $1,756,000, and be reported FAVORABLY AS AMENDED.

Respectfully submitted,

D. Stephen Kahn
Senate Special Master

cc: Senator Diaz-Balart
Representative Sembler
Faye Blanton, Secretary of the Senate
Richard Hixson, House Special Master