



THE FLORIDA SENATE
SPECIAL MASTER ON CLAIM BILLS

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November 25, 1998

<u>SPECIAL MASTER'S FINAL REPORT</u>	<u>DATE</u>	<u>COMM</u>	<u>ACTION</u>
The Honorable Toni Jennings President, The Florida Senate Suite 409, The Capitol Tallahassee, Florida 32399-1100	11/25/98	SM HC FR	Favorable Fav/1 amend Favorable

Re: SB 34 - Senator Dyer
Relief of Nelida Cruz and Jose Alberto Cruz, Sr. and
Jose Alberto Cruz, Jr., a minor

THIS \$1.8 MILLION CLAIM IS BASED ON A CONSENT FINAL JUDGMENT, SUPPORTED BY A SETTLEMENT AGREEMENT IN WHICH THE WEST VOLUSIA HOSPITAL DISTRICT AGREED TO COMPENSATE THE CLAIMANT AND HIS FAMILY FOR SEVERE AND PERMANENT INJURIES SUSTAINED IN AN INCIDENT OF HOSPITAL MALPRACTICE.

FINDINGS OF FACT:

Nelida Cruz was in early labor and entered the emergency room of West Volusia Hospital around 12:55 a.m. on September 16, 1992. Hospital nursing staff assessed Ms. Cruz's status and placed an external fetal monitor on her. Dr. Stanley Gelman, the physician-on-call that morning for obstetric patients, was notified at 5:20 a.m. and orders were given for Ms. Cruz's continued assessment by the nursing staff. Ms. Cruz was admitted to West Volusia Hospital around 6:30 a.m. Ms. Cruz's prenatal records did not indicate that she was a high-risk patient. Ms. Cruz's obstetrician, Dr. Gelman and his partner, Dr. Jeffrey Brooks, had staff privileges at the hospital, but were not hospital employees. The labor and delivery nurses were hospital employees.

Around 10:30 a.m., Dr. Brooks was notified about Nelida Cruz's status. Under Dr. Brook's standing orders the

hospital's nursing staff ruptured Ms. Cruz's membranes. The amniotic fluid leaked clear indicating no fetal distress. In addition to the external monitor to measure Ms. Cruz's uterine contractions, the nursing staff placed an internal fetal monitor on the scalp of the baby to assess the baby's condition in utero. At 10:50 a.m. Dr. Brooks performed a vaginal examination and reapplied the internal fetal monitor's scalp electrode which had previously come loose. From 11:00 a.m. until 11:40 am, the nursing staff observed that the fetal heart rate showed minimal to average variability with variable decelerations but did not call the physician because the nursing staff also saw reassuring signs that the fetal heart rate was stable. The nursing staff attributed the variable decelerations to head compression which occurs when the baby's head is pushing down to the cervix.

During the morning and early afternoon, Ms. Cruz's cervix dilated normally. A staff nurse administered a drug called pitocin. Pitocin stimulates dilation of the cervix and increases the frequency of uterine contractions.

West Volusia Memorial Hospital maintained a policy that authorized registered nurses to administer pitocin to patients in labor after assessment of the patient and fetal monitor, and under the direction of a physician. Under the hospital's policy staff nurses had some discretion to adjust the pitocin administered to an obstetric patient based on the nurse's independent assessment of the patient's condition. Dr. Brooks left standing orders to start administration of pitocin at a rate of 12cc per hour, and to increase the pitocin up to 6cc per hour every 15 minutes until a maximum of 120cc per hour of labor was established. Under Dr. Brooks's standing orders, at 3:15 p.m. the staff nurse administered pitocin to Ms. Cruz. The nurse increased the dosage of pitocin throughout the duration of her labor and continued to assess her condition and the baby by reviewing the internal fetal monitor.

Throughout the afternoon and early evening the nursing staff gave Dr. Brooks telephonic reports on the patient's status that were indicative of a typical labor. The nurse's interpretation of the fetal monitoring strips showed that

the baby was having some prolonged decelerations in its heart rate but was also showing reassuring signs of coping through the transient stresses of labor. Prolonged decelerations of the baby's heart rate on the monitoring strips started at about 5:50 p.m. The nurse's report to Dr. Brooks at about 6:30 p.m. indicated that Ms. Cruz's contractions were irregular and tripling. Since the nurse did not recognize the warning signs on the fetal monitoring strips, the nurse did not initiate any independent nursing actions to otherwise prevent the eventual outcome for this baby. At 7:20 p.m. the nurse informed Dr. Brooks that the fetal heart rate was stable and at about 7:30 p.m. the nurse continued to increase the dosage of pitocin.

The nurse called Dr. Brooks again at 8:50 p.m. to report that she increased the dosage of pitocin and that the fetal heart rate was stable. By about 9:20 p.m., the nurse failed to recognize the baby's continuing asphyxiant challenge evidenced on the fetal monitoring strips and failed to take any actions to counteract the passage of events that eventually led to Jose Cruz, Jr.'s neurological injuries. By 9:40 p.m., the baby was near crowning and Dr. Brooks was called for delivery. By 10:00 p.m. the pitocin was discontinued.

Jose Cruz was born at 10:04 p.m. with thick meconium stained amniotic fluid, a decreased heart rate, no respiration at the moment of birth, with Apgar scores of 2 at 1 minute and 4 at 5 minutes and apparently had suffered irreparable and permanent brain damage due to hypoxic ischemic encephalopathy. The hospital staff initiated cardiopulmonary resuscitation and intubated the infant. Around 2:15 a.m., Jose exhibited seizure activity and was given medication to control the seizures. Jose's pediatrician, Dr. Michael Bell, admitted Jose with a diagnosis of perinatal asphyxia into a nursery room for high risk infants. An ultrasound of Jose's brain showed signs of edema (swelling). Jose was discharged from West Volusia Memorial Hospital with a final diagnosis of asphyxia neonatorum and was transferred to Arnold Palmer Hospital/Orlando Regional Medical Center at 10 p.m. on September 17, 1992, where a CT scan of his head showed a subarachnoid hemorrhage and an

electroencephalogram was taken that is consistent with hypoxic encephalopathy.

Jose has spastic quadriplegia and has been diagnosed with cerebral palsy and developmental delay. Jose is unable to sit independently or to hold his head steady and erect even for brief moments. Jose has to be fed and can tolerate pureed foods. Jose, now age 6, is significantly mentally retarded. He requires ongoing day-to-day care and medical care, has no control over any of his normal bodily functions, and has severe handicapping conditions secondary to brain damage. Although his vision and hearing appear to be normal, and he will continue to grow to adult size, Jose will remain in his current developmentally delayed condition for the rest of his life.

BATTLE OF THE EXPERTS:

Deposition testimony was presented by the claimants as to whether the hospital's nurse's interpretation of the fetal monitoring strips, and clinical assessments and actions during Ms. Cruz's labor caused Jose's injuries. The claimants retained an obstetrician, neonatologist, and perinatal nurses who testified as experts that Jose's difficulties during labor and delivery and his subsequent brain damage were the result of the hospital's nursing staff's failure to identify and to appreciate the significance of a deteriorating fetal heart rate pattern during the latter part of Ms. Cruz's labor. The claimant's experts testified that the hospital's nursing staff failed to notify the physician, Dr. Brooks, regarding the non-reassuring fetal heart rate tracings and failed to institute independent nursing actions such as discontinuing pitocin, starting oxygen, and repositioning the mother to maximize oxygen and blood flow to the uterus during labor to counteract the effect of the non-reassuring fetal heart rate tracing. The claimant's experts testified that from around 7:15 p.m. until delivery the fetal monitoring strip for Jose's birth showed that the baby was not getting adequate oxygen, and the administration of pitocin was increased and caused excessive stimulation of Ms. Cruz's uterine contractions. To rebut the claimant's case, respondents retained an obstetrician who testified that the interpretation of fetal monitoring strips and the clinical observation of obstetric patients during active labor is

subjective and may differ among otherwise competent health care providers in a perinatal setting.

Deposition testimony was presented by the respondents on whether a preexisting prenatal infection rather than hypoxia (oxygen deficiency) during Ms. Cruz's labor caused Jose's injuries. The respondents retained a diagnostic radiologist and an obstetrician who testified that Jose's brain damage is the result of a unknown intrauterine amniotic infection which caused damage to the baby's brain approximately 3 to 10 days prior to the mother's labor and delivery. The respondent's experts who reviewed Jose's ultrasound and CT scans testified that the left side of Jose's brain demonstrated more damage consistent with an unknown intrauterine amniotic infection. The respondent's experts testified that it is likely that Jose's damage is the not the result of an hypoxic event during labor. The claimants retained a diagnostic radiologist. The claimant's expert testified that if Jose had suffered a brain injury from some virus in utero about 10 days before delivery, that the swelling evident on his brain would have leveled off. Based on a review of Jose's ultrasound and CT scans, the claimant's expert testified that Jose's injury was likely due to hypoxic ischemia.

Additional deposition testimony was presented on the respondent's causation theory that Jose's injuries were caused by a prenatal infection in Ms. Cruz. The respondents retained a perinatal pathologist who testified that she found evidence that Ms. Cruz had an acute intrauterine ascending infection. The respondent's expert also testified that Ms. Cruz had a heavy placenta which is consistent with the presence of inflammation in the placenta for at least 3 to 4 days prior to the pathological examination. The respondent's expert testified that the inflammatory process in Ms. Cruz's placenta when present for a long period of time can result in fetal injury and served as a host for infection and more likely than not was the cause of Jose's brain damage. The claimants retained a perinatal pathologist who testified that the placental mass was normal and found that some extra-placental elements were included in the total weight of the placenta. The claimant's perinatal pathologist

testified that inflammation of the placenta was limited to its edge where it attached to Ms. Cruz's uterine lining and that it was normal for the mother's uterine lining to become inflamed and to detach during the birth process. The pathologist who testified for the claimants believes that the acute intraamniotic infection was present in Ms. Cruz for only a 12 to 24-hour period, was very low grade, and that the infection did not significantly affect the fetus.

CONCLUSIONS OF LAW:

In 1992, West Volusia Memorial Hospital was licensed to and operated by the Respondent, West Volusia Hospital Authority. Since 1994, the Authority has leased out the operation of its hospital facility to a private, not-for-profit corporation to which it provides subsidies for indigent care. The claimant has established to my satisfaction, by a preponderance of evidence, that the hospital staff owed Jose and his mother a duty of care, that their applicable duty to Jose and his mother was breached by the hospital's medical and nursing staff, that claimant's damages were a proximate and foreseeable result of that breach, and that Jose's damages are catastrophic and permanent in nature.

As in many cases of this nature, the various named defendants shared the responsibility for the result, and although reasonable people might disagree with the allocation of the responsibility among the defendants, I find that the sum to be paid by the West Volusia Hospital Authority is supported by the evidence against it, in light of all the circumstances.

THE SETTLEMENT:

The claimants presented two scenarios showing the total economic loss of Jose A. Cruz, Jr., in a life care plan structured by an economist retained by the claimants. Jose's life care plan outlines both a home care program and a facility-based program. The present value of alternative one which involves home care is \$22,169,354 and the present value of alternative two which involves residential care is \$11,177,251. Long-term care options will include a facility-based program as Jose ages. Jose's parents are currently handling all of his care and they currently do not have anyone outside the home coming in to help with attendant care of Jose. Special needs up to age 21 include costs for maintenance of

equipment supplied through outside sources such as Medicaid and the Children's Medical Services program and additional equipment.

Before trial, Dr. Brooks, and his professional association, Brooks and Gelman, M.D., P.A., and Dr. Brook's insurance company, the Physicians Protective Trust Fund entered into a settlement with the claimants for \$425,000 on August 26, 1996.¹ Under that settlement, the claimants dismissed their claims against Dr. Brooks and his professional association.

The trial proceeded against the West Volusia Hospital Authority. On the second day of a jury trial which began on August 30, 1997, the West Volusia Hospital Authority and Jose's parents on Jose's behalf agreed to settle for a gross amount of \$2 million. The West Volusia Hospital Authority has already paid \$200,000 to Jose's parents on Jose's behalf. Payment of the \$1.8 million balance of the Authority's portion of the settlement is contingent on the passage into law of this claim bill. The settlement allows the Authority to prepay the \$1.8 million balance of the claim at an annual 8 percent discount rate. On November 13, 1998, the court entered a final judgment approving the settlement between Jose's parents, on behalf of Jose and the Authority.

RESPONDENT'S POSITION : The Authority did not admit liability. As part of the settlement, the Authority has agreed to support the passage of Senate Bill 34 (1999) in the current amount of \$1.8 million to be paid out in equal installments over a five-year period beginning in the year 1999, those payments to be in equal amounts of \$360,000 per year out of funds of a reserve account of the West Volusia Hospital Authority Special Taxing District which has been budgeted for such a purpose. The settlement's payment structure will not involve any tax increase in the West Volusia Hospital Authority Special Taxing District. The Authority had no medical malpractice insurance to pay

¹The closed claim filed with the Florida Department of Insurance for the September 16, 1992 incident by the Physician Protective Trust Fund for Jeffrey B. Brooks, M.D. and Brooks & Gelman, M.D., P.A., notes that the nurse employed by the hospital misread the fetal monitor and failed to notify Dr. Brooks during a 12-hour labor of the infant's status prior to delivery.

the claim. In 1994, the Authority leased out the operation of its hospital facility to a private, not-for-profit corporation to which it provides subsidies for indigent care.

SPECIAL NEEDS TRUST:

To protect the funds paid or to be paid by all defendants, to ensure their proper expenditure, and to preserve Jose's Medicaid eligibility, Nelida Cruz, Jose's mother has been appointed as co-trustee of a Special Needs Trust. First Union National Bank of Florida has been appointed the other co-trustee. The Trust is irrevocable during Jose's lifetime, and at his death will reimburse the Florida Department of Children and Families, or any other appropriate agency of the State of Florida or of the United States Government for all funds expended by or through that agency for Jose's lifetime care. The net balance will be distributed to Jose's estate. The Circuit Court in Orange County has retained jurisdiction to oversee expenditures from the trust fund. On October 24, 1997, the claimants paid \$26,098 to the Florida Agency for Health Care Administration to discharge a Medicaid lien for care and treatment rendered to Jose up through March 24, 1997.

ATTORNEYS FEES:

Attorneys for the claimant have provided the Senate with an affidavit to the effect that the fees of each of the three firms representing the claimants when totaled together will be limited to 25 percent of all gross amounts paid or to be paid by the West Volusia Hospital District, either before or after the claim bill is enacted into law.

RECOMMENDATIONS:

Accordingly, I recommend SB 34 (1999) be AMENDED to specify that after payment of statutory attorney fees, and costs, the balance shall be paid into the existing Special Needs Trust Fund established for Jose A. Cruz, Jr., and be reported FAVORABLY AS AMENDED. An amendment is attached.

Respectfully submitted,

Barry J. Munroe
Senate Special Master

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cc: Senator Dyer
Faye Blanton, Secretary of the Senate
Thomas R. Cooper, House Special Master