



THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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November 16, 2000

SPECIAL MASTER'S FINAL REPORT	DATE	COMM	ACTION
President of the Senate Suite 409, The Capitol Tallahassee, Florida 32399-1100	11/16/00	SM HC FR	Fav/1 amend.

Re: SB 36 – Senator Walter "Skip" Campbell
Relief of Steven Mitchell

THIS IS A \$2.3 MILLION EQUITABLE CLAIM SUPPORTED BY A SETTLEMENT AGREEMENT IN WHICH THE HALIFAX HOSPITAL MEDICAL CENTER, A SPECIAL TAXING DISTRICT, D/B/A HALIFAX MEDICAL CENTER AGREED TO COMPENSATE THE CLAIMANT FOR SEVERE AND PERMANENT INJURIES SUSTAINED IN AN INCIDENT OF MEDICAL MALPRACTICE.

FINDINGS OF FACT:

Steven Mitchell traveled from his home in Nashville, Tennessee, to Daytona Beach to attend bike week. At about 6:35 p.m. on March 8, 1995, Mr. Mitchell was riding his motorcycle northbound on County Road 415 in west Volusia County when a motorist driving a pick-up truck pulled out of a side road immediately into Mr. Mitchell's path, causing an accident. The accident scene was near the "Cabbage Patch," a popular bar and campground frequented by motorcycle enthusiasts.

According to the accident report completed by the highway patrolman who investigated the accident, Mr. Mitchell was heading north on County Road 415. Steven Shekoski, the driver of the pickup truck failed to yield the right-of-way while making a left-hand turn from a dirt road to go south onto County Road 415. Mr. Mitchell struck the pickup truck from the left side toward the rear of the vehicle and upon impact was thrown some distance. The highway patrolman testified that Mr. Mitchell was lying down on the east shoulder of the roadway when he arrived at the accident scene. The accident report indicated that both Mr. Mitchell and the driver

of the pickup truck had not been drinking or using drugs. The highway patrolman did not find any probable cause to order blood alcohol tests of the drivers. Blood alcohol content tests were not taken of either driver. Mr. Shekoski was cited for failing to yield the right-of-way.

Firemen/paramedics were the first to arrive on the scene. The report completed by the firemen/paramedics notes that the patient states: "he had been drinking, a lot of beers." The emergency medical services (EMS) personnel arrived next at the accident site. The EMS personnel noted in their report that Mr. Mitchell had been wearing his helmet at the time of the accident which had been removed by the firemen/paramedics. The EMS report further notes that Mr. Mitchell admitted to having at least two beers and denied abusing any other substances. Based on their evaluation of Mr. Mitchell as recorded in their report, he had complete movement and sensation of his arms and legs. Mr. Mitchell apparently had no neurological deficits at the scene of the accident. Emergency medical personnel stabilized Mr. Mitchell's neck and transported him to the Halifax Medical Center emergency room at 7:40 p.m.

At the hospital emergency room, the emergency room staff assessed Mr. Mitchell's injuries and he was placed in the "fast track" designated for minor injuries. The emergency room physician, Dr. Hung Doan examined Mr. Mitchell and diagnosed him with a cervical strain, fracture of the right clavicle (located in the shoulder area), left wrist abrasion, and a left leg laceration. At about 8:06 p.m., Dr. Doan ordered portable x-rays of the cervical spine which were read and interpreted as normal by Dr. Doan. The plain cervical spine x-ray films ordered by Dr. Doan did not detect any of Mr. Mitchell's injuries other than the fractured clavicle.

Dr. Doan failed to appreciate and diagnose the extent of Mr. Mitchell's injuries from the vehicular accident. The following day in a subsequent examination, it was discovered that Mr. Mitchell had a fracture tear of one of the ligaments and small muscles that connect the fifth and sixth cervical vertebrae located in the neck, no dislocations of the cervical vertebrae were discernible on the x-rays ordered by Dr. Doan of Mr. Mitchell's neck. It was later discovered that Mr. Mitchell had a fragmented herniated disc at the fifth and sixth cervical vertebrae located in the neck.

The EMS report of Mr. Mitchell's ingestion of alcohol conflicts with the findings of the accident report. Dr. Doan testified that during his evaluation of Mr. Mitchell's injuries, Mr. Mitchell initially did not complain about any pain in his right clavicle (shoulder) but he did complain of neck pain, wrist pain, and leg pain. Dr. Doan dictated a note on March 9, 1995 that: "The patient is pretty well under ETOH [alcohol] intoxication and is unable to provide much information except for some tenderness on palpation of the right clavicle area." Dr. Doan testified that he believed that Mr. Mitchell was not intoxicated but was insensitive to the pain in his fractured right clavicle, even though Dr. Doan noted that Mr. Mitchell complained of pain in other areas of his body. Dr. Doan testified that Mr. Mitchell's ingestion or drinking of alcohol did not affect his ability to care for the patient. As a treating physician, Dr. Doan had discretion as to whether to order a blood alcohol test. Although Dr. Doan suspected that Mr. Mitchell's pain in his clavicle was masked by alcohol, Dr. Doan did not order a blood alcohol content test to confirm his suspicion or modify his evaluation of Mr. Mitchell's injuries, including the complaint of neck pain.

Dr. Doan's evaluation of Mr. Mitchell showed no neurological deficits. Mr. Mitchell was discharged at about 9:11 p.m. on March 8, 1995. Mr. Mitchell had to rely on friends to pick him up since he was from out-of-town. The emergency room tried to call his friends, but was unable to reach them. He was placed on a gurney in the emergency room's hallway. Mr. Mitchell waited for almost 5 hours for friends to pick him up from the hospital. Dr. Doan's shift ended and Dr. Kevin MacMahon, another emergency room physician came on duty about 11:00 p.m. There is no documentation of a medical evaluation by Dr. MacMahon or any staff who saw Mr. Mitchell between 9:11 p.m. and Mr. Mitchell's departure at 2:20 a.m.

At 9:11 p.m., Mr. Mitchell was given discharge instructions, a prescription for pain medication, a figure eight splint and a soft cervical-collar neck brace. Apparently in response to Mr. Mitchell's complaints after 9:11 p.m., Dr. Doan ordered injections for Mr. Mitchell's pain. During the wait, the emergency room staff administered two injections to Mr. Mitchell for pain. Although the emergency room record lists the medications, there is not any documentation of any nursing or medical evaluation of the patient.

At about 2:20 a.m., Jerry Beliles, a friend of Mr. Mitchell, arrived with Vicki Beard, his wife, to pick up Mr. Mitchell. Mr. Mitchell complained of severe pain, numbness in his legs, and claimed he was unable to move his arms. Mr. Beliles was an emergency medical technician and Ms. Beard was a registered nurse with some emergency room experience. Mr. Beliles and his wife protested that Mr. Mitchell should not be discharged from the emergency room in his condition. Despite their protests, hospital personnel transferred Mr. Mitchell from a wheelchair onto the floorboard of their van. Mr. Mitchell was then placed into a captain's chair of Mr. Beliles' van.

Despite protests regarding the patient's condition by Mr. Beliles, there was no documentation of a medical evaluation of Mr. Mitchell by an emergency room physician or other hospital personnel as he left the emergency room. The emergency room staff did provide Mr. Mitchell with aftercare instructions upon his departure from the facility and Mr. Beliles acknowledged and signed the instructions on Mr. Mitchell's behalf. The instructions indicated that if there was any change in the patient's condition or symptoms that he should return to the hospital for further evaluation.

Conflicting testimony was presented regarding when Mr. Mitchell's initially complained of numbness. Hospital personnel testified that the patient never complained of numbness and that upon departure from the facility he stood as he was assisted off of a gurney into a wheelchair. Mr. Mitchell later acknowledged that he did not feel any numbness at the hospital during the night of March 8, 1995 and the early morning hours of March 9, 1995.

After leaving the hospital, Mr. Beliles and Ms. Beard transported Mr. Mitchell to their home. With the assistance of a friend, the couple transferred Mr. Mitchell from their van to a couch in their house using a lawn chair as a stretcher. Between 3 a.m. and 5 a.m., Ms. Beard called the hospital's emergency room and told a nurse, Debra Shoemaker, that Mr. Mitchell had numbness in his legs and that he continuously had these symptoms since the time of his discharge from the emergency room at 2:20 that morning. Nurse Shoemaker repeatedly instructed Ms. Beard to call 911 and to have Mr. Mitchell brought back to Halifax or an

emergency room located closer to home. Nurse Shoemaker indicated that the symptoms as described may be a sign of spinal cord injury.

Despite Nurse Shoemaker's urgency to call 911 to get Mr. Mitchell back to an emergency department, Ms. Beard and Mr. Beliles did not do so. Mr. Mitchell refused to go back. Mr. Beliles and Ms. Beard left Mr. Mitchell alone at their home with their sons.

By mid-morning on March 9th, Mr. Mitchell was experiencing respiratory difficulties, severe pain, and could not move his legs. After talking Mr. Mitchell into it, Ms. Beard called 911 around 11:00 a.m. At about 11:30 a.m., EMS personnel arrived and evaluated Mr. Mitchell. The patient told them that he had some movement in one of his feet and that he felt numb since the time he was discharged from the hospital. By noon, the patient had been transported to Halifax Medical Center emergency room.

A magnetic resonance imaging (MRI) scan of Mr. Mitchell's cervical spine was ordered since he was suspected to have a spinal cord injury. The patient went into a respiratory arrest just as he was about to enter the MRI machine. After the emergency room staff resuscitated him, they obtained an MRI that showed a massive disc herniation located at the fifth and sixth cervical vertebrae and a significant edema (swelling) on his spine. Mr. Mitchell's spinal injury was progressive and ultimately rendered him a quadriplegic.

Mr. Mitchell, at age 42, is a quadriplegic and is totally and permanently paralyzed. He requires total care since he has no fine motor movements and is unable to perform activities of daily living such as eating, bathing, and bowel and bladder functions. The claimant will require medical and attendant care for the remainder of his life.

Claimants have retained experts in the field of rehabilitative medicine and vocational rehabilitation who have developed two scenarios of a life care plan for Mr. Mitchell. Under the first, Mr. Mitchell will receive care at home with a licensed practical nurse and under the second, he will receive care in a facility. The claimant's experts have estimated that there is a 10-percent diminution in Mr. Mitchell's life expectancy of 34.1 years. Respondent's expert has estimated that Mr.

Mitchell has a life expectancy of 5 years. Claimants assert that Mr. Mitchell's life care needs have a present money value ranging between \$5 million, for facility-based care and \$10 million, for care at home. This range includes total economic damages including past and future wage loss.

BATTLE OF THE EXPERTS:

Claimants presented evidence on the causation of Mr. Mitchell's spinal cord injury which ultimately resulted in his quadriplegia. Claimant's experts testified that Mr. Mitchell sustained a spinal column, not a spinal cord injury during the vehicular accident. The experts note that Mr. Mitchell was neurologically intact, had movement in all extremities and was conscious. The experts opined that Mr. Mitchell developed a spinal cord injury at some point after the vehicular accident while being discharged from the hospital when he initially displayed symptoms of neurological deficits such as numbness. The experts testified that if Mr. Mitchell had been properly evaluated after 9:11 p.m. by the medical staff of the Halifax emergency room, they would have recognized his spinal cord injury so that they could have intervened earlier with the appropriate treatment. The claimant's experts testified that earlier treatment of Mr. Mitchell's injury would have prevented his quadriplegia.

Respondents presented evidence on the causation of Mr. Mitchell's spinal cord injury. Respondents presented deposition testimony of experts and Dr. Thomas Boulter, the neurosurgeon who ultimately performed surgery on Mr. Mitchell. Dr. Boulter testified that Mr. Mitchell sustained a traumatic injury during the vehicular accident that ultimately caused his spinal cord damage and quadriplegia. Dr. Boulter noted that the injury was both progressive and irreversible and that he would have expected neurological symptoms of the injury to start showing up as early as the time at which Mr. Mitchell was discharged from the Halifax emergency room at 2:20 a.m. on March 9, 1995. Dr. Bolter opined that Mr. Mitchell would have become a quadriplegic regardless of when surgical intervention took place.

Claimants also presented testimony as to whether the care given to Mr. Mitchell on March 8, 1995 deviated from the standard of care in emergency room medicine. Claimant's experts in emergency medicine, neurosurgery, neurology, and radiology testified that the care and treatment which Dr. Doan and the nursing staff of Halifax emergency room

provided to Mr. Mitchell fell below the standard of care. First, there was no medical record documentation as to any evaluation of Mr. Mitchell during the 5 hours that Mr. Mitchell waited in the emergency room and upon discharge from the facility. Second, claimant's experts opined that if Mr. Mitchell had been appropriately evaluated upon admission and received the appropriate radiological studies, he would have obtained a neurological consultation which may have resulted in spine stabilizing surgery and the prevention of his quadriplegia. The experts also testified that in their opinion Dr. Doan should have performed a more thorough neurological assessment of the patient's neck area if he suspected that the patient who had been in a vehicular accident had neck pain or was insensitive to pain due to distracting injuries or alcohol ingestion. The experts further testified that if Mr. Mitchell had been properly evaluated and treated even as late as 2:20 a.m. on March 9, 1995, his quadriplegia would have been avoided.

PROCEDURAL HISTORY:

In 1996, Steven Mitchell filed a complaint against the Halifax Hospital Medical Center d/b/a Halifax Medical Center, Halifax Emergency Physicians Meek & Associates, M.D., P.A., and Kevin MacMahon, M.D., alleging that the emergency room physicians that treated Steven Mitchell on March 8 and 9, 1995, were careless, negligent, and departed from the standards of care in the community; and that such negligence resulted in Steven Mitchell's quadriplegia and other damages and injuries. The trial court ruled that Mr. Shekoski, the driver of the truck that caused the initial accident, may have caused some of the claimant's injuries and that Mr. Shekoski was required to be placed on the verdict form allowing the jury the opportunity to find that he was at fault and caused all or some of the claimant's injuries.

The complaint also asserted a claim by Mr. Mitchell on behalf of his minor daughter, Sarah Mitchell, for damages for permanent loss of services, comfort, and society. The Halifax Hospital Medical Center settled its claim with Sarah Mitchell for \$100,000. As she is no longer contemplated in the remaining settlement, nor in the claim bill, the Special Master did not include Sarah as part of the investigation or recommendation.

Prior to trial, the parties entered into a settlement agreement, the final version of which was executed at the Special Master's hearing held in this case. There is no litigation pending in this case.

CLAIMANT'S ARGUMENTS:

- The hospital, through its agents, servants, and employees, breached the standard of care in treating Mr. Mitchell during his 7-hour stay in the hospital, and this deviation from the standard of care caused Mr. Mitchell's permanent quadriplegia.
- The damages sustained by Mr. Mitchell would be expected to generate a jury verdict much greater than the settlement amount.

RESPONDENT'S ARGUMENTS:

- The respondent hospital does not admit liability.
- A jury might find the driver of the vehicle that caused the accident, Mr. Shekoski, a joint tortfeasor responsible for Mr. Mitchell's injuries. In this case, non-economic damages could be apportioned amongst the tortfeasors according to percentages of fault.
- A jury might find the driver of the vehicle that caused the accident, Mr. Shekoski, a separate and independent tortfeasor who is responsible for all of Mr. Mitchell's injuries.
- A jury might find that Mr. Mitchell, or his friends that picked him up from the hospital (Vicki Beard and Jerry Beliles) contributed to Mr. Mitchell's injuries.

STIPULATED AGREEMENTS:

The parties stipulated to the following facts:

- The initial accident was the fault of Mr. Shekoski.
- Mr. Mitchell was wearing a helmet at the time of the accident.
- Mr. Mitchell's quadriplegia is a permanent injury.
- All of Dr. Doan's neurological tests performed on Mr. Mitchell were within normal limits until 9:11 p.m.

CONCLUSIONS OF LAW:

In 1995, the Halifax Hospital Medical Center entered into an agreement with the named physicians, acknowledging that the physicians were employees acting on behalf of the Special Taxing District, which is liable for the negligent acts of its employees and agents. I find that the claimant has established, to my satisfaction and by a preponderance of the evidence, that the physicians and employees of the

Halifax Hospital Medical Center owed a duty of care to Mr. Mitchell, that the duty was breached, and the injuries were a proximate and foreseeable result of that breach.

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

SETTLEMENT AGREEMENT:

The parties entered into a settlement agreement with a present money value of \$2,300,000, with terms as follows:

- Respondent will pay Mr. Mitchell \$15,000 per month guaranteed for the rest of his life. The payment shall be made to a special needs trust created for the use and benefit of Mr. Mitchell. This component has a present money value estimated at \$1.425 million.
- Immediately upon passage of the claim bill, the respondent will pay \$50,000 to Mr. Mitchell's special needs trust.
- Immediately upon passage of the claim bill, the respondent will pay \$625,000 to the claimant's attorneys for professional fees. Attorney's fees will not exceed the 25 percent cap specified in s. 768.28(8), F.S.
- Respondent will pay claimant's attorneys \$200,000 to reimburse costs incurred by the attorneys.
- Respondent does not admit liability.
- Respondent will not oppose the claim bill.
- Respondent has already paid the \$200,000 statutory cap.

Because settlement agreements are sometimes entered into for reasons that may have very little to do with the merits of a claim or the validity of a defense, settlement agreements between the parties to a claim bill are not necessarily binding on the Legislature or its committees, or on the Special Master. However, all such agreements must be evaluated. If found to be reasonable and based on equity, then they can be given effect, at least at the Special Master's level of consideration.

Such is the situation in this claim bill.

I find that the settlement agreement is reasonable, is not inequitable to either side, and should be given effect.

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 s. 768.28, F.S. Claimants' attorneys have acknowledged this limitation and verified in writing that nothing in excess of 25 percent of the gross recovery will be withheld or paid as attorneys' fees. The settlement agreement requires that the respondent pay claimant's attorneys \$200,000 in costs.

COLLATERAL SOURCES:

Mr. Mitchell received \$15,000 from Universal Underwriters Insurance Company as uninsured motorist coverage; and \$10,000 from Mr. Shekoski's insurance, Delta Insurance Company.

MEDICAID/MEDICARE LIENS:

Mr. Mitchell has a Florida Medicaid subrogation lien in the amount of \$1,024.16, which he intends to pay with the proceeds of the settlement agreement.

Tennessee Medicare has a subrogation lien in the amount of \$10,321.48 that they have agreed to waive until the final outcome of the Florida legislative process.

Halifax Hospital Medical Center had a lien in the amount of \$310,984.25, which has been waived.

TennCare had a lien in the amount of \$556,495.43. However, pursuant to Order of the Circuit Court of the Seventh Judicial Circuit in Volusia County based on Tennessee case law (*Blankenship v. Bain*, 5 SW.3d 647 (Tenn. 1999)), the claimant has not been made whole and thus the State of Tennessee has been found by that court to have no right of recovery.

RECOMMENDATIONS:

Accordingly, I recommend SB 36 (2001) be amended to authorize and direct the Halifax Hospital Medical Center to draw a warrant in the amount of \$50,000 payable to the trustee for the special needs trust established for Steven Mitchell; to pay the trustee for the special need trust established for Steven Mitchell a sum of \$15,000 per month for the rest of his life; to draw a warrant in amount of

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\$200,000 to the claimant's attorney to reimburse costs incurred by the attorneys; and to draw a warrant in the amount of \$625,000 to compensate the claimant's attorneys for professional fees incurred by the claimant in the litigation.

For the foregoing reasons, I recommend that Senate Bill 36 be reported FAVORABLY AS AMENDED.

Respectfully submitted,

Barry J. Munroe
Senate Special Master

cc: Senator Walter "Skip" Campbell
Faye Blanton, Secretary of the Senate
House Claims Committee