



THE FLORIDA SENATE
SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
12/1/01	SM	Favorable
1/30/02	FT	Favorable

December 1, 2001

The Honorable John M. McKay
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 44 (2002)** – Senator Ken Pruitt
HB 37 – Representative James (Hank) Harper, Jr.
Relief of James Torrence

SPECIAL MASTER'S FINAL REPORT

THIS IS AN EQUITABLE CLAIM FOR \$400,000 BASED ON A SETTLEMENT AGREEMENT BETWEEN THE PALM BEACH COUNTY HEALTH CARE DISTRICT AND JAMES TORRENCE, A PALM BEACH COUNTY SHERIFF'S DEPUTY, FOR INJURIES AND DAMAGES SUSTAINED BY DEPUTY TORRENCE AS A RESULT OF THE NEGLIGENT SURGERY AND POST-OPERATIVE CARE PROVIDED BY DR. JOSE THOMAS-RICHARDS, AN EMPLOYEE OF THE PALM BEACH COUNTY HEALTH CARE DISTRICT. CLAIMANT HAS ALREADY BEEN PAID THE UNDERLYING \$100,000.

FINDINGS OF FACT:

Background

In May 1998, James Torrence was a deputy sheriff with the Palm Beach County Sheriff's Office. Torrence, a physically fit 34-year-old, tripped and twisted his left knee while checking an inmate's cell at the Palm Beach County Sheriff's Department in West Palm Beach. His injury required medical attention and he went to the emergency department of Palms West Hospital. Later, the Sheriff's department workers' compensation carrier referred Deputy Torrence to Jose Thomas-Richards, D.O., an orthopedic surgeon employed by the Palm Beach County Health Care District.

The surgeon practiced at Glades General Hospital, an entity subject to Florida's sovereign immunity law, §768.28, F.S.

Dr. Thomas-Richards initially treated Deputy Torrence's injury conservatively, prescribing pain medication and requiring him to wear an elastic knee support. Deputy Torrence complained of continuing significant pain and an occasional "giving away and locking of his knee." Dr. Thomas-Richards responded by scheduling a magnetic resonance imaging scan (MRI).

From the MRI report, Dr. Thomas-Richards determined that Deputy Torrence had a torn medial meniscus and a complete tear of the anterior cruciate ligament (ACL) of the left knee. After an explanation by Dr. Thomas-Richards, Deputy Torrence consented to a "mini-arthrotomy with medial menisectomy and exploration of anterior cruciate ligament with repair, left knee."

Dr. Thomas-Richards told Deputy Torrence that the mini-arthrotomy incision would be between 1 and 1½ inches in length. When Deputy Torrence's surgical bandages were changed, he discovered that he had a 14-inch long scar extending from approximately 6 inches above his knee to 6 inches below it. Dr. Thomas-Richards' used non-arthroscopic instruments.

Furthermore, the procedure used by Dr. Thomas-Richards had long been out of common use because as Campbell's Operative Orthopaedics, Eight Edition, a notably authoritative source, stated: "... we no longer use the Jones procedure, believing it to be biomechanically flawed...."

Subsequent to the June 1998 surgery, Deputy Torrence developed arthritis and chondromalacia (degeneration of cartilage at a joint that can result in pain, a grating sensation, and a feeling of instability on movement). Dr. Thomas-Richards acknowledged in his deposition testimony taken on August 14, 2000, that Deputy Torrence did not have either condition when he first examined and treated Torrence in 1998. The doctor admitted, in response to questioning by Deputy Torrence's attorney, that chondromalacia occurs when the ligament attached to the quadriceps mechanism becomes permanently stretched. This attachment and stretching evidently occurred in Deputy Torrence's case

when Dr. Thomas-Richards performed the non-arthroscopic, modified Jones procedure and subsequently immobilized the deputy's knee in a brace for 4 weeks.

An orthopedic expert, Richard Laskin, M.D., hired to review Torrence's medical records concluded that the surgery performed by Dr. Thomas-Richards was below the standard of care in the United States and had been so for 20 years. Dr. Laskin further stated that most orthopedic surgeons would have performed this surgery arthroscopically. He concluded that the outdated surgery was improperly performed, and that it was improper to immobilize the knee following the surgery.

Additional Surgery and Care Required to Alleviate Symptoms Resulting from the Surgery by Dr. Thomas-Richards

Subsequent to his June 1998 surgery, Deputy Torrence was treated or evaluated by three additional orthopedic physicians, two of whom performed subsequent surgical procedures to repair the damage caused by Dr. Thomas-Richards. G. Scott Drumheller, M.D., performed arthroscopic surgery and a partial medial meniscectomy, chondroplasty, and synovectomy on Deputy Torrence's left knee in October 1998. In August 2000, Chaim Arlosoroff, M.D., again operated on the deputy's left knee to remove "painful retained hardware" placed in the knee by Dr. Thomas-Richards in 1998.

Deputy Torrence was also evaluated by Richard Weiner, M.D., first on May 5, 2000, and again on September 5, 2000. Drs. Drumheller, Arlosoroff, and Weiner agreed:

1. that the torn portion of the meniscus, which was supposedly removed by Dr. Thomas-Richards, had been left in the knee;
2. that the anterior cruciate ligament which Deputy Torrence consented to have repaired was completely missing; and
3. that Deputy Torrence will need a total knee replacement in the near future.

A total knee replacement will cost about \$50,000. Revision surgery may be necessary and currently costs about the same amount. Even with more surgery, it is unlikely that Deputy Torrence will ever be able to go back to full duty as a sheriff's deputy.

Financial Losses—Employment Compensation

Bernard F. Pettingill, Jr., Ph.D., an economist hired by Deputy Torrence's attorney, prepared a present value analysis of Deputy Torrence's financial losses resulting from the actions of Dr. Thomas-Richards. Prior to the surgery by Dr. Thomas-Richards, Deputy Torrence's annual base salary as a deputy sheriff was \$39,072. Had he been able to continue on his career track, Deputy Torrence potentially could have increased his base salary to \$44,592 annually. The highest pay grade for a career deputy sheriff in the Palm Beach County Sheriff's Office is a base annual salary of \$60,684.

Due to his physical limitations, Deputy Torrence has been reassigned to the position of control room operator. He earns \$34,344 annually. No promotion is possible for a control room operator. Deputy Torrence will be eligible only for cost of living adjustments, estimated at 2.4 percent annually.

The lifetime loss of earnings that Dr. Pettingill calculated is based on “. . . the differential between the grade and step increases which the deputy would have realized had the incident not occurred, versus his current position as a control room operator with 2.4 percent increases for cost of living adjustments only.” A second element of damages includes the monthly career salary incentive pay of \$120 per month for continuing education courses he would normally have been taking. Dr. Pettingill concluded that the present value of the funds needed, as of October 5, 2000, in order to compensate Deputy Torrence for his financial loss was \$858,720.

JUDICIAL HISTORY:

Deputy Torrence filed a lawsuit in February 2000, against the Palm Beach County Health Care District. In October 2000, Torrence and the Palm Beach County Health Care District agreed to settle all claims arising from the surgery performed by Dr. Thomas-Richards. On October 31, 2000,

a Palm Beach County circuit court judge entered an Order of Voluntary Dismissal with Prejudice.

The November 2000 settlement agreement states, in part that "...this settlement is a compromise of a doubtful and disputed claim, and that the payment or other consideration referenced above are not to be construed as an admission of liability or obligation by the Palm Beach County Health Care District, by whom liability or obligation is expressly denied." The Health Care District agreed to pay Deputy Torrence \$100,000 up front and not to oppose or contest a legislative claim bill seeking an additional \$400,000, in exchange for his release of the Health Care District from all future claims related to the allegations of negligence or medical malpractice.

CONCLUSIONS OF LAW:

Each claim bill must rest on facts sufficient to establish liability and damages, by a preponderance of the evidence. This is true even for a claim bill where the parties have entered a settlement agreement.

Duty Dr. Thomas-Richards had a duty to exercise reasonable care under all the surrounding circumstances in his care and treatment of Deputy Torrence's injuries, and a duty to provide care consistent with the prevailing professional standard of care recognized as acceptable and appropriate by reasonably prudent similar health care providers.

Breach Dr. Thomas-Richards failed to comply with his duty of care by performing a type of surgery to which Deputy Torrence had not consented, by using an outdated surgical technique that had been deemed to be substandard by the general surgical community for the past 20 years, by performing the surgery in a substandard way, and by prescribing the post-operative use of a knee-immobilizing brace for 4 weeks.

Causation Dr. Thomas-Richards' actions were the proximate cause of physical injury to Deputy Torrence's left knee, compounding and aggravating the work-site injuries.

Employer Liability As an employer, the Palm Beach County Health Care District is liable for Dr. Thomas-

Richards care and treatment of Deputy Torrence. As an employee of an entity that is shielded by sovereign immunity, Dr. Thomas-Richards could not have been held individually liable for ordinary negligence.

Damages Deputy Torrence has become incapable of performing the tasks and duties of a deputy sheriff. One doctor who evaluated Deputy Torrence has also stated that Torrence would not be able to perform the tasks and duties of a deputy sheriff even with a total knee replacement. Deputy Torrence has been reassigned as a control room operator, a position that pays less, offers only cost of living adjustments for salary enhancement, and currently offers no avenues for career advancement.

Deputy Torrence has been injured, and has suffered aggravation of pre-existing conditions, pain and suffering, disability, mental anguish, loss of enjoyment of life, disfigurement, and loss of earnings and earning capacity. He has incurred medical expenses in the care and treatment of the injuries, all caused by the actions of Dr. Thomas-Richards, an employee of the Palm Beach County Health Care District. All of these injuries are permanent.

LEGISLATIVE HISTORY:

This claim was filed last session by Senator Pruitt as SB 74 (2001). It received a favorable recommendation by a former Special Master, a favorable recommendation by the Senate Health, Aging and Long-term Care Committee, and a favorable recommendation by the Senate Finance and Taxation Committee. The bill died on the Senate Calendar. The House companion, HB 819, never made it out of any House committee.

ATTORNEY'S FEES:

Section 768.28(8), F.S., provides that no attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement of any case involving a waiver of sovereign immunity.

Although the claimant and his attorney have an agreement for a higher contingency fee, the attorney, according to a statement submitted in response to the Special Master's inquiry about attorney's fees, is charging 25 percent of the settlement amount, as limited by the statute.

RECOMMENDATIONS:

I recommend that the Legislature authorize and direct the Palm Beach County Health Care District to pay James Torrence \$400,000 as the balance due to him under his November 3, 2000, settlement agreement. The amount appears to be adequate to ensure that Deputy Torrence will have funds to pay for future surgery that he will need, and provide him with a portion of lost compensation due to his permanent medical disability resulting from substandard care by Dr. Thomas-Richards. Neither the settlement agreement nor the economist's analysis of lifetime loss provided for noneconomic damages such as mental pain and anguish, disfigurement, loss of enjoyment of life, or disability and inconvenience.

Accordingly, I recommend that Senate Bill 44 be reported FAVORABLY.

Respectfully submitted,

D. Stephen Kahn
Senate Special Master

cc: Senator Ken Pruitt
Representative James (Hank) Harper, Jr.
Faye Blanton, Secretary of the Senate
Stephanie Birtman, House Special Master