THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
2/1/07	SM	Fav/1 amendment
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February 1, 2007

The Honorable Ken Pruitt
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 38 (2007)** – Senator Dennis Jones
Relief of Adam Susser

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONSENT-BASED, EXCESS JUDGMENT CLAIM FOR $668,781.96 AGAINST THE NORTH BROWARD HOSPITAL DISTRICT FOR THE INJURIES SUFFERED BY ADAM SUSSER AT BIRTH AS A RESULT OF NEGLIGENT CARE PROVIDED BY DISTRICT EMPLOYEES AND OTHERS AT CORAL SPRINGS MEDICAL CENTER IN JULY 2000.

FINDINGS OF FACT:

Introduction

A hearing on this claim was held by a Senate Special Master in connection with the bills filed in prior years. The parties declined the opportunity to appear at another Special Master hearing, opting instead to rely on the record developed by the prior Special Master. As a result, my review of this claim is based upon the prior record, as supplemented by the parties pursuant to my requests for additional information.

The findings of fact set forth in the reports prepared by the prior Special Master are consistent with my de novo review of the record. Therefore, I adopt those findings as my own, with only minor modifications, as follows:

The Claimant and his Family

The claimant is Adam Susser, who is now 6½ years old. His parents are Gary and Judith Susser. The Sussers live in Boca Raton.

Mr. Susser is an attorney. Mrs. Susser was a paralegal prior to the pregnancy that gave rise to this claim. Mrs. Susser has not worked outside of the home since the birth of Adam and his twin brother, Brandon, in July 2000.

Events Giving Rise to the Claim

In late 1999, Mrs. Susser became pregnant with twins through in vitro fertilization. She was 47 years old at the time.

Mrs. Susser's pregnancy was a high-risk pregnancy because of her age, the presence of twins, and the gestational diabetes that she developed during pregnancy. All of the prenatal tests of the twins, including ultrasounds and genetic testing, were normal. Up to July 6, 2000, the pregnancy was relatively uneventful.

On July 6, 2000, Mrs. Susser was admitted to Coral Springs Medical Center in Broward County. The hospital is owned and operated by the North Broward Hospital District (District).

Mrs. Susser's amniotic sac for Adam had ruptured, putting him at an increased risk of developing an infection or being put under excessive stress. Mrs. Susser was only 33½ weeks pregnant at the time.

Mrs. Susser was attended to by several different physicians who were not employees of the District, but who had staff privileges at the hospital. She was also attended by nurses in the hospital's labor and delivery ward. The nurses were employees of the District.

The physicians decided not to immediately deliver the twins, but rather to slow down Mrs. Susser's labor in an effort to delay delivery until the 34th week of pregnancy. Among other things, the physicians ordered that Mrs. Susser be placed on a dual fetal monitor to keep track of the heart rates and other vital signs of both twins.

The monitoring of Adam's heart rate was consistently poor or non-existent throughout the course of Mrs. Susser's labor. There were extended periods of time when the monitor did not reflect a reading for Adam. The hospital's policies and procedures required the nurses to notify the physician when they are unable to maintain continuous fetal monitoring of both twins in a dual pregnancy. The physicians were not notified of the problems, and other available methods to obtain a better reading were not used.

In addition to problems with picking up Adam's heart rate when the fetal monitor was on, a nurse turned off the fetal monitor from 11:15 p.m. on July 7, 2000, until 9:00 a.m. the next morning. The nurse testified in deposition that a physician ordered her to turn off the monitor, but that she had not written the order down. The physician denied giving the order. Both the physician and the nurse agreed that it would be below the standard of care for the nurse to turn off the monitor without a doctor's order. When the monitor was turned back on at 9:00 a.m. on July 8, 2000, Adam's heart rate was not detected until shortly after noon.

Other problems with Adam were observed during the course of Mrs. Susser's labor, including low blood sugar levels and poor biophysical scores. Those problems were not promptly reported by the nurses to the physicians and/or not promptly acted on by the physicians. These additional "non-reassuring signs" suggested that an immediate delivery of the twins was warranted.

Despite these problems and other indications of fetal distress in Adam, Mrs. Susser's labor was allowed to continue over July 8 and 9, 2000. She was finally taken into the delivery room at approximately 1:30 a.m. on July 10, 2000.

No fetal monitoring was done for the first 35 minutes that Mrs. Susser was in the delivery room, apparently because of confusion as to whether the device that had been used to monitor the twins could be moved. Ultimately, a single fetal monitor was brought into the operating room, but it did not monitor Adam; it only monitored Brandon. The failure to monitor Adam during this critical period was below the accepted standard of care.

Despite indications from the time that Mrs. Susser first presented to the hospital on July 7, 2000, that Adam's situation required an emergency Caesarean delivery, he was not delivered until 2:28 a.m. on July 10, 2000. His umbilical cord was wrapped around his neck and he was blue, limp, unmoving, and not crying. He had to be intubated and have compressions to get his heart beating.

Adam was also hypoglycemic and had metabolic acidosis. Neither of these conditions was tested and treated promptly after his birth, possibly contributing to the severity of Adam's injuries.

Brandon was born 23 minutes after Adam. Brandon was much healthier at birth, but he still had problems. At 18 months he had surgery to drain fluid from his brain, but his subsequent development has been normal for the most part.

Adam's Condition and Prognosis

Adam is severely disabled. He is cortically blind, and he cannot walk, talk, or drink or feed himself. It is unlikely that he will ever be self-sufficient.

Adam's condition was diagnosed as "estatic encephalopathy with spastic paraplegia secondary to perinatal hypoxic eschemic encephalopathy." That condition and Adam's myriad of medical problems are attributable to the problems that occurred at and around his delivery, and not to any genetic or congenital issues.

Adam is expected to have a normal life span despite his disabilities. A life care plan was developed for Adam to detail the anticipated medical, rehabilitative, and therapeutic services and equipment that he will need throughout his life. The life care plan includes, among other things, a live-in nanny and full-time attendants for Adam's lifetime; an intensive therapeutic program for Adam in Poland and/or France; quarterly Botox injections; adult day care services 5 days per week after he turns 21; modifications to the Sussers' home and vehicles to accommodate Adam's wheelchair; payment of the Sussers' major medical insurance premiums because they lost coverage when Mrs. Susser stopped working; and a special education program for Adam at a private school for children with disabilities.

The present value of the cost of the life care plan was estimated to be $15.4 million. That figure is reasonable under the circumstances, even though there appear to be some questionable items included in the life care plan (e.g., the therapeutic program in Poland or France, full-time nanny and attendants and adult day care services over the course of Adam's life even though Mrs. Susser is no longer working). Additionally, the life care plan does not appear to take into account any services that might be available to Adam through state agencies or the public school system, as contemplated by Adam's Special Needs Trust.

Adam is not expected to have any future earning capacity because of his severe disabilities. The present value of Adam's lost earning capacity was projected to be between $900,000 and $1.8 million, depending upon the level of post-high school education that he obtained. That range is reasonable, particularly since at least Mr. Susser obtained a professional degree.

In sum, the estimated economic damages to Adam alone are between $16.3 million and $17.2 million. As a result, I find that the $9.8 million settlement, which resolved all of the Sussers' claims (not just those involving Adam) is reasonable.

District Funds Available to Pay the Claim

The District is self-insured up to $1 million. Above that amount, it has $15 million of excess insurance coverage through Zurich American Insurance Company (Zurich).

Normally, Zurich will not pay a claim until the District had paid the first $1 million, which would require the approval of a claim bill for the amounts between $200,000 and $1 million. In this case, however, Zurich agreed to fund the majority of the settlement up front because of the significant exposure for damages due to the severity of Adam's injuries and the extent of the negligence. Payment of the claim bill, combined with the District's previous payment of the statutory limit under s. 768.28, F.S., will satisfy the District's obligation under the settlement agreement and its obligation to Zurich to exhaust its $1 million self-insurance coverage before the excess insurance coverage is triggered.

The District set aside the funds necessary to pay the claim bill several years ago in an interest-bearing account for Adam's benefit. Upon approval of the claim bill, those funds (less attorney's fees and costs) will be paid to the Special Needs Trust established for Adam.

Because the funds have already been set aside, payment of the claim bill will have no financial impact on the District and it will not affect the District's provision of health care services to the general public. The District provided an affidavit from its Chief Financial Officer confirming that information.

Adam's Special Needs Trust
An irrevocable Special Needs Trust has been established for Adam's future medical needs. The trust was funded with the initial settlement proceeds and, as noted above, the proceeds of the claim bill will be paid into the trust.

The trust is structured in a way that it is not considered to be an asset or resource of Adam so as to disqualify him from receiving federal or state assistance. Indeed, the trust states that it is not a "basic support trust" and that its funds are to be used to supplement the benefits Adam may receive from governmental agencies or other sources as a result of his disabilities. Any assets remaining in the trust after Adam's death go to Mr. and Mrs. Susser or, if they fail to survive Adam, then to Brandon.

Mr. and Mrs. Susser are the trustees of Adam's Special Needs Trust. They receive no compensation for their service.

LITIGATION HISTORY:

In 2002, the Sussers filed suit against the District and the physicians who were involved in the delivery of Adam and Brandon at the hospital. The suit was filed in circuit court in Broward County. With respect to the District, the suit alleged, among other things, that the hospital's nurses were negligent in their failure to properly evaluate and monitor the condition of Adam and Brandon through continuous electronic fetal monitoring each twin; their failure to properly follow the physician's orders; and their failure to promptly communicate with the physicians regarding problems that were observed with Mrs. Susser's pregnancy.

The Sussers did not bring a NICA claim against any of the defendants for the twins' birth-related injuries. See ss. 766.301-.316, F.S. (an administrative NICA claim is the exclusive remedy for statutorily-defined "birth-related neurological injuries" caused by participating physicians). Apparently, Adam and Brandon did not meet the statutory criteria for compensation under the NICA program and/or the hospital and treating physicians did not participate in NICA.

The case was mediated and settled prior to trial. The parties entered into a "global settlement" that resolved all of the Sussers' claims against the District and the other defendants, including claims related to Brandon. The settlement was approved by the court in July 2003.

The total amount of the settlement was $9.8 million. Of that amount, $5.3 million (54.1% of the total) was to settle the claims against the District and $4.5 million (45.9%) was to settle the claims against the other defendants.

Approximately $7.75 million was available for distribution to the Sussers after payment of attorney's fees and costs and subrogation liens. Adam's portion of the settlement was $6 million; Brandon's portion was $650,000; and Mr. and Mrs. Susser's portion was approximately $1.1 million.

A portion of Adam's share of the settlement ($600,000) was used to purchase an annuity to provide monthly payments to his Special Needs Trust. The remainder of Adam's share of the settlement was placed into the trust.

A Consent Judgment for $868,781.96 was entered against the District on July 30, 2003. The balance of the District's share of the settlement (approximately $4.4 million) was paid by the District's excess insurer, Zurich.

The District has paid $200,000 in partial satisfaction of the Consent Judgment pursuant to s. 768.28, F.S. The amount sought in the claim bill ($688,781.96) is the balance of the Consent Judgment and the final portion of Adam's settlement. Any amount granted through this claim bill, less attorney's fees and costs, will be placed in the Special Needs Trust established for Adam.

CLAIMANTS' POSITION:

- The settlement agreed to by the District in this case is part of the court-approved "global settlement" of the Sussers' claims against the District and others for Adam's birth-related injuries, and it should be given effect.

- The total settlement amount and the District's share of the settlement are reasonable in light of the severity of Adam's disabilities and the gross negligence of the District employees and others involved in Adam's delivery at the District's hospital.

DISTRICT'S POSITION: The District supports the bill, and it has set aside the funds necessary to pay the claim.

CONCLUSIONS OF LAW: I agree with the prior Special Master that the nurses employed by the District owed Adam a duty of care, that this duty of care was breached in a number of respects, and that the injuries and damages suffered by Adam were a proximate and foreseeable result of the breach. The District is responsible for the negligence of its employees pursuant to the doctrine of respondent superior.

I also agree with the prior Special Master that a number of individuals and entities, including non-District employees, share responsibility for Adam's condition; that there is no exact method for allocating percentages of fault between the District and the others responsible for Adam's condition; and that the total amount to be paid under the "global settlement" ($9.8 million) is reasonable under the circumstances and supported by the evidence as is the portion of the settlement (54.1%) to be paid by the District.

ATTORNEY'S FEES AND LOBBYIST'S FEES: The claimants' attorney submitted an affidavit certifying that attorney's fees related to the amount sought in this claim bill are 15 percent. Lobbyist's fees are an additional 5 percent. Together, the attorney's fees and lobbyist's fees are less than the 25 percent cap in s. 768.28(8), F.S.

LEGISLATIVE HISTORY: This is the third year that this claim has been presented to the Senate. It was recommended favorably by the Special Master in 2005 (SB 20) and 2006 (SB 58), but no action was taken on those bills.

OTHER ISSUES: The prior Special Master recommended four amendments to the bill, which were agreed to by the parties. The amendments make minor factual corrections to the "whereas" clauses and remove redundant and unnecessary language, but do not change the substance of the bill. The bill should be amended to incorporate those amendments.

The bill directs the District to pay only $668,781.96, even though that amount was placed in an interest-bearing account by the District for Adam's benefit several years ago as directed by the court. The bill should be amended to clarify that the payment to Adam should include any interest that has accrued in the account since the funds were set aside by the District.

RECOMMENDATIONS: For the reasons set forth above, I recommend that SB 38 be reported FAVORABLY, as amended.

Respectfully submitted,

T. Kent Wetherell, II
Senate Special Master

cc: Senator Dennis Jones
Faye Blanton, Secretary of the Senate
House Committee on Constitution and Civil Law
Counsel of record