THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
02/05/08	SM	Fav/1 amendment
04/08/08	HR	Fav/CS

February 5, 2008

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

Re: **CS/SB 68 (2008)** – Health Regulation Committee and Senator Dean
HB 875 (2008) – Representative Marcelo Llorente
Relief of Tyler Giblin

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNOPPOSED EQUITABLE CLAIM FOR $700,000 AGAINST THE MARION COUNTY HOSPITAL DISTRICT FOR MEDICAL MALPRACTICE IN THE COURSE OF THE DIAGNOSIS AND TREATMENT OF TYLER GIBLIN AT MONROE REGIONAL MEDICAL CENTER IN 2004.

FINDINGS OF FACT:

Tyler Giblin was born on December 14, 2004, at Munroe Regional Medical Center in Ocala. The hospital is a "community hospital" operated by Monroe Regional Health System, Inc. (MRHS), pursuant to a lease from the Marion County Hospital District.

Tyler was born with a severely deformed heart. His condition is known as "hypoplastic left heart syndrome," which means that the left side of the heart did not develop as well as the right side. This condition is fatal unless the patient receives surgery to fix the heart or a transplant to replace the heart.

Tyler's condition was not known at the time of his birth. Had the condition been diagnosed prenatally, Tyler would have

been delivered at a tertiary facility such as Shands Hospital in Gainesville rather than at a community hospital. There is no evidence that the failure to diagnose the condition prenatally was a violation of the standard of care.

Dr. Yves Lande-Pierre, the physician who delivered Tyler, detected a heart murmur in Tyler within an hour of his birth. According to one of the claimants' experts, pediatric cardiologist Dr. William Hellenbrand, the heart murmur was a "red flag" that should have caused Dr. Pierre to request an immediate cardiac consultation for Tyler even though he did not exhibit any other symptoms indicative of a heart problem.

On the evening of December 14, Tyler's parents reported to the nurses that Tyler turned bluish or purplish when he was crying. This is referred to as a cyanotic episode and can be indicative of a heart problem. The nurses did not document this episode in Tyler's chart or report it to Dr. Pierre, even though Dr. Pierre's notes from her initial evaluation of Tyler requested "close observation" of Tyler because of the heart murmur. The nurses' failure to document and report this episode to Dr. Pierre was a violation of the standard of care.

Dr. Pierre examined Tyler on the morning of December 15. She noted an increase in the heart murmur and, therefore, ordered a chest x-ray and a four-extremity blood pressure test. This is the proper procedure when a heart problem is indicated.

The nurse who administered the four-extremity blood pressure test reported results that were generally within normal limits, but according to Dr. Hellenbrand, there were several anomalies in the results that should have indicated to Dr. Pierre that Tyler may have a heart condition that warranted a cardiac consultation. More significantly, according to another expert for the claimants, pediatric cardiologist Dr. Charles Kleinman, the test could not have been administered correctly because the reported results were not possible in a child that had hypoplastic left heart syndrome.

Tyler had another cyanotic episode where he turned bluish or purple when crying on the morning of December 15. Tyler's parents reported the episode to the nurses, but the nurses did not document the episode in Tyler's chart or

report it to Dr. Pierre. The nurses' failure to document and report this episode to Dr. Pierre was a violation of the standard of care.

Dr. Pierre scheduled a cardiac consultation for Tyler at Shands on December 16. She did not schedule it on a "stat" or emergency basis because she did not believe that Tyler's condition was serious based upon the information that she had at the time.

Tyler's condition worsened significantly between midnight and 5:00 a.m. on December 16. The nurses called Dr. Pierre at 5:15 a.m. that morning and told her that Tyler was "pale and dusky" and having difficulty breathing and that she needed to come in to the hospital. By the time that Dr. Pierre got to the hospital at 6:45 a.m., Tyler was cyanotic, his oxygen level was 70-80 percent, and his blood gas pH level was an alarmingly low 6.6. The experts referred to this event as a "crash."

After conferring with a pediatric cardiologist at Shands, Dr. Pierre administered medication to stabilize Tyler's heart condition and put Tyler on a ventilator. Thereafter, Tyler was transferred to Shands by helicopter for further treatment.

On December 22, Tyler was transferred from Shands to Miami Children's Hospital for open heart surgery. He successfully underwent the first stage of the Norwood procedure, but he was unable to undergo the second and third stages of the surgery because of the damage to the right side of his heart that was caused by the "crash" on December 16. As a result, Tyler was transferred back to Shands to await a heart transplant.

Tyler received a heart transplant on June 3, 2005. He is now almost 3 years old, and he is doing well physically. His treating physician, Dr. Jay Frickler, a pediatric cardiologist at Shands, characterized Tyler as a "medical miracle."

The claimants experts' testified in deposition that the "crash" could have been avoided if Tyler had been properly diagnosed on December 14 or 15. They further testified that but for the "crash" on December 16 and the damage that it did to the right side of Tyler's heart, it is more likely than not that Tyler would have been able to undergo all three stages

of the Norwood procedure. Stated another way, but for the "crash," Tyler likely would not have required a heart transplant.

There are concerns about Tyler's developmental delay, which the claimants' experts attribute to brain damage caused by oxygen deprivation associated with the "crash" on December 16. Dr. Robert Baumann, a pediatric neurologist, reported that "Tyler shows major delays in important cognitive functions evidenced by deficits in speech and in imaginative plan" and that Tyler's motor skills "are probably mildly impaired." Tyler is currently in speech therapy twice a week.

It is likely that Tyler will require additional heart transplants as he gets older because the average life span of a transplanted heart is 12-13 years. Tyler may have required a heart transplant even if he was able to undergo all three stages of the Norwood procedure, but the life span of that procedure is longer -- 20+ years -- and that procedure generally has fewer long-term side effects than a heart transplant.

It is expected that Tyler will have the cognitive capacity to live independently as an adult and, with therapy, he will reach or come close to reaching normal developmental levels. One of the claimants' experts, certified rehabilitation counselor Dr. Paul Deutsch, opined that Tyler's chronic medical condition will not be conducive to his participation in gainful employment. However, as noted by Tyler's treating cardiologist, Dr. Frickler, Tyler is too young make such a determination at this time.

The report prepared by the claimants' expert economist, Dr. F.A. Raffa, estimated that Tyler's economic damages were between $22.3 million and $22.6 million. Those figures were based upon a comparison between a healthy child and a child with Tyler's medical conditions. The claimants' attorney acknowledged at the Special Master hearing that those figures would not have been presented at trial and that a more accurate comparison would be between a child with hypoplastic left heart syndrome who was able to undergo the Norwood procedure and a child, like Tyler, who had that condition but had to undergo a heart transplant.

MRHS is self-insured up to $2 million. It has an excess insurance policy over that amount, but that policy is not implicated because this claim was settled against MRHS for $900,000. MRHS reports that the claim will be paid from the general revenues of the hospital, and that "the hospital has the ability to pay the claims bill without detrimental impact to hospital operations or provision of any service at the hospital."

Dr. Pierre is not an employee of the hospital. She had staff privileges at Monroe Regional Medical Center at the time of Tyler's delivery. She no longer has staff privileges because she is not board certified, which the hospital now requires.

A special needs trust has been established for Tyler. The trust provides that, consistent with federal law (e.g., 42 USC § 1396p(d)(4)(A)), any funds remaining in the trust at Tyler's death must first be used to reimburse the State for benefits provided to Tyler under the Medicaid program. Then, if any funds are remaining, they will go to Tyler's parents. Tyler's grandmother is the trustee of the trust.

Tyler's father is employed by the State as a forest ranger at the Tomoka State Park in Ormond Beach. Tyler is covered by the Blue Cross and Blue Shield (BC/BS) insurance that his father has through his employment with the State.

Tyler's mother is not been able to work full-time outside of the home because Tyler cannot to go to daycare as a result of his medical conditions. She works about one day a week at Disney as a server and she also works as a bartender during Bike Week. Tyler's grandmother watches Tyler when his mother is at work.

LEGAL PROCEEDINGS:

In March 2006, the claimants filed a medical malpractice suit against MRHS, the hospital district, and several of the physicians involved in the diagnosis and treatment of Tyler, including Dr. Pierre. The suit was filed in circuit court in Marion County.

In July 2007, the claimants entered into a mediated settlement agreement with MRHS pursuant to which MRHS agreed to the entry of a Consent Final Judgment against it in

the amount of $900,000 and the claimants agreed to voluntarily dismiss with prejudice their claims against the hospital district. MRHS agreed to pay the claimants $200,000 under the sovereign immunity cap and further agreed to support a claim bill for the remaining $700,000.

On July 25, 2007, the circuit court entered an Order approving the settlement between MRHS and the claimants. An amended Order was entered on November 7, 2007, approving the allocation of the net settlement proceeds between Tyler's special needs trust (75%) and his parents (25%). The Orders authorized the reservation of $1,838.09 for an outstanding Medicaid lien and the reservation of $645,401.76 for an outstanding BC/BS lien. (The claimants' attorney reported at the Special Master hearing that he is working to get the BC/BS lien discharged in full.)

MRHS paid the claimants $200,000 under the sovereign immunity cap. The claimants received $100,000 of that amount, with $75,000 going into Tyler's special needs trust and $25,000 going to his parents. The other $100,000 went to the claimants' attorney, with $50,000 going to attorney's fees and $50,000 being applied to costs. There are still outstanding costs of approximately $135,000, which will be paid from the proceeds of the claim bill.

The claimants voluntarily dismissed their claims against Dr. Pierre and the other physicians. As to Dr. Pierre, the claimants were concerned that if they had gone to trial and lost, then they would have been required to pay Dr. Pierre's costs and the costs of their attorneys, which would have reduced the amount of the money from the settlement with MRHS that would have gone to Tyler. As explained by Tyler's father at the hearing, they dismissed the suit against Dr. Pierre because they "were not willing to gamble with Tyler's money."

CLAIMANT'S POSITION:

- The nurses were negligent in their care of Tyler because, among other things, they failed to report the cyanotic episodes to Dr. Pierre and they failed to correctly perform the four-extremity blood pressure test.

- The nurses' negligence contributed to the delayed diagnosis of Tyler's heart condition, and if the condition had

been timely diagnosed, Tyler would have not have suffered the "crash" on December 16 which damaged the right side of his heart and caused brain damage and required him to undergo a heart transplant rather than open heart surgery.

- The amount of the mediated settlement in this case is reasonable in light of the significant life-long medical care that Tyler will need.

HOSPITAL'S POSITION:

- MRHS supports the bill.

CONCLUSIONS OF LAW:

Sovereign immunity extends to "corporations primarily acting as instrumentalities . . . of the state, county, or municipalities." See s. 68.28(2), F.S.; Pagan v. Sarasota County Public Hospital Board, 884 So.2d 257 (Fla. 2d DCA 2004). MRHS was deemed to be an instrumentality of the hospital district by the Attorney General in an opinion dated December 8, 2006 and the circuit court in Marion County has reached the same conclusion in several cases. As a result, MRHS is entitled to sovereign immunity under s. 768.28, F.S.

The public policy basis for extending sovereign immunity to private entities such as MRHS has recently been questioned by two appellate courts. See University of Florida Board of Trustees v. Morris, 32 Fla. L. Weekly D1803 (Fla 2d DCA July 27, 2007) (Altenbernd, J., concurring), rev. denied, 2008 Fla LEXIS (Fla. Jan. 7, 2008); Andrews v. Shands at Lakeshore, Inc., 33 Fla. L. Weekly D30 (Fla 1st DCA Dec. 20, 2007).

The nurses are employees of MRHS and they were acting within the scope of their employment when providing services to Tyler. As a result, the nurses' negligence is attributable to MRHS.

The nurses had a duty to provide competent medical care to Tyler. They breached this duty and violated the standards of care for nursing personnel by failing to report the cyanotic episodes to Dr. Pierre and by failing to properly perform the four-extremity blood pressure test.

The nurses' actions and inactions contributed to the delayed diagnosis of Tyler's heart condition. However, Dr. Pierre's

failure to order an immediate cardiology consultation when she detected a heart murmur shortly after Tyler's birth also contributed to the delayed diagnosis of Tyler's heart condition.

The delayed diagnosis of Tyler's heart condition led to his "crash" on December 16 because it is more likely than not that Tyler would have been transferred to Shands or another tertiary facility had his condition been diagnosed sooner. Tyler was not a candidate for the second and third stages of the Norwood procedure because of the damage caused by the "crash," and he also suffered brain damage during the "crash" that caused his developmental delay.

The amount of damages agreed to by MRHS is reasonable, even though Dr. Pierre likely shares some of the responsibility for Tyler's condition. Indeed, the life care plan prepared for Tyler reflects that the cost of a transplant is between $650,000 and $700,000 and Tyler is expected to require multiple transplants over the course of his life. Moreover, the non-economic damages (e.g., pain and suffering) of Tyler and his parents could very well have exceeded the settlement amount had the case gone to jury trial.

LEGISLATIVE HISTORY:

This is the first year that this claim has been presented to the Legislature.

ATTORNEYS' FEES AND LOBBYIST'S FEES:

The claimants' attorney provided an affidavit stating that that attorney's fees will be capped at 25 percent of the amount awarded by the claim bill in accordance with s. 768.28(8), F.S.

Lobbyist's fees are not included in the 25 percent attorney's fees. Lobbyist's fees will be an additional 4 percent of the amount awarded by the claim bill, which would be $28,000 based upon the $700,000 claim.

The Legislature is free to limit the fees and costs paid in connection with a claim bill as it sees fit. See Gamble v. Wells, 450 So.2d 850 (Fla. 1984). The bill does so by stating that "[t]he total amount paid for attorney's fees, lobbying fees, costs and other similar expenses relating to

this claim may not exceed 25 percent of the amount awarded [by the bill]."

If this language remains in the bill (and the bill is amended as recommended below to reflect the allocation approved by the circuit court), the claimants will receive a total of $525,000, with $393,750 going into Tyler's special needs trust and $131,250 going to his parents. The remaining $175,000 will go to attorney's fees, costs, and lobbyist's fees.

If this language was not in the bill (and the bill is amended as recommended below to reflect the allocation approved by the circuit court), the claimants would receive approximately $362,000, with approximately $271,500 going into Tyler's special needs trust and approximately $90,500 going to his parents. The claimants' attorney would receive a total of approximately $310,000 ($175,000 for attorney's fees and approximately $135,000 for costs), and the lobbyist would receive $28,000.

OTHER ISSUES:

The bill identifies the Marion County Hospital District as the entity responsible for payment of the claim. The parties agree, and I recommend that the bill be amended to reflect MRHS as the entity responsible for payment because it is responsible for operating the hospital pursuant to a lease from the hospital district.

The bill requires the entire claim to be paid into Tyler's special needs trust. The parties agree, and I recommend that the bill be amended to require payment of the claim in accordance with the allocation approved by the circuit court, i.e., 75 percent into Tyler's special needs trust and 25 percent to his parents.

The bill requires any funds remaining in Tyler's special needs trust upon his death to revert to the General Revenue Fund. The parties agree, and I recommend that the bill be amended to remove this language because the bill is being paid from the hospital's funds, not State funds.

The bill should be also amended to include the standard language requiring payment of Medicaid liens prior to disbursing any funds to the claimants. See s. 409.910, F.S.

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 68 (2008) be reported FAVORABLY, as amended.

Respectfully submitted,

T. Kent Wetherell
Senate Special Master

cc: Senator Charlie Dean
Representative Marcelo Llorente
Faye Blanton, Secretary of the Senate
House Committee on Constitution and Civil Law
Tony DePalma, House Special Master
Counsel of Record

CS by Health Regulation on April 8, 2008:
As recommended by the Special Master, the committee substitute corrects the name of the entity responsible for payment of the claim, requires 75 percent of the claim to be paid into Tyler's special needs trust, removes a provision that any funds remaining in the special needs trust upon Tyler's death revert to the General Revenue Fund, and requires payment of Medicaid liens prior to disbursing any funds to the claimants.