



STORAGE NAME: h6015c.JDC

DATE: 4/11/2023

April 11, 2023

SPECIAL MASTER'S FINAL REPORT

The Honorable Paul Renner
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: CS/HB 6015 - Representative Busatta Cabrera
Relief/Jamiyah Mitchell/South Broward Hospital District

THIS IS A SETTLED CLAIM FOR \$795,000 FOR MEDICAL INJURIES TO JAMIYAH MITCHELL BASED ON THE NEGLIGENCE OF THE SOUTH BROWARD HOSPITAL DISTRICT. RESPONDENT HAS PAID \$200,000 PURSUANT TO THE SOVEREIGN IMMUNITY CAP.

FINDINGS OF FACT:

This claim arises out of negligence in the context of the treatment of a pregnant woman and resulting damages to the then-unborn child.

On October 8, 2008, around 4:56 p.m., 31-year-old Latricia Mitchell, who was 41 weeks pregnant with Jamiyah Mitchell ("Claimant"), presented at the Pembroke Pines Memorial Hospital West emergency room, which is owned and operated by the South Broward Hospital District ("Respondent"), complaining of pain and vaginal bleeding.¹ Dr. Sheryl Facey, a private obstetrician and gynecologist who already had a physician-patient relationship with Ms. Mitchell and had seen and examined her a few days prior, was contacted.² Ms.

¹ Ms. Mitchell was known to be Group B streptococcus positive and positive for herpes simplex.

² Dr. Facey was a private physician with her own practice, with privileges at Respondent's hospital. Whether Dr. Facey was an "agent" of Respondent was a crucial matter throughout these proceedings, with the trial court, at one point, ruling as a matter of law that she was not an agent of Respondent.

Mitchell was admitted for an emergency Caesarean section ("C-section"). It appears from the record that Dr. Facey was present at Ms. Mitchell's bedside by 7:01 p.m., at the latest. A note from the record indicates that Dr. Facey ordered a C-section at 8:02 p.m.

The C-section was begun, and Claimant was delivered around 8:44 p.m. and immediately transported to the neonatal intensive care unit (NICU) for follow-up care. Claimant suffered a seizure and was later transferred to Joe DiMaggio Children's Hospital on October 10, 2008. Ms. Mitchell was discharged from the hospital on October 11, 2008.

On October 15, 2008, Claimant was discharged from the children's hospital with several diagnoses, including seizures, respiratory distress, and hypoxic ischemic encephalopathy (brain damage due to asphyxiation).³

In 2012, Claimant was diagnosed with mild receptive language and mild-to-moderate expressive language delays. By June 3, 2015, Claimant's mother reported that Claimant had behavioral issues and some problems focusing at home, and that Claimant had hearing problems.

LITIGATION HISTORY:

On October 8, 2013, Claimant's parents, Jerald and Latricia Mitchell, filed a medical malpractice complaint in circuit court against the South Broward Hospital District ("Respondent") for the actions of its labor and delivery nurses, Dr. Sheryl Facey, as the acting obstetrician, and Facey, P.A.

After the lawsuit was filed, Claimant's parents became aware that Dr. Facey did not have malpractice insurance. She declared bankruptcy, leaving her essentially judgment-proof. The case went to trial in the summer of 2018, but a mistrial was declared because two jurors accused Latricia Mitchell of misconduct. Accordingly, the case was reset for trial for late 2019.

Prior to trial, on July 3, 2019, Respondent settled its portion of the case with Claimant for \$995,000. The circuit court approved the settlement on behalf of Claimant as a minor on October 15, 2019.

In its order approving the settlement, the circuit court noted that Claimant's parents failed to appear at the hearing, despite the hearing's being rescheduled at their request. The court removed a portion of the proposed order that would have allowed any monies remaining in Claimant's special needs trust to be distributed to Claimant's parents in the event of Claimant's death.

³ Medscape, Hypoxic-Ischemic Encephalopathy, <https://emedicine.medscape.com/article/973501-overview> (last visited July 22, 2020).

Respondent subsequently paid Claimant the statutory limit of \$200,000, leaving \$795,000 to be recovered in this claim bill.

Claimant filed a claim bill in the Florida Senate for the 2020 legislative session. In anticipation of the 2020 session, a special master hearing was held on the claim bill on November 8, 2019. Claimant's attorney and Claimant's guardian ad litem appeared on behalf of Claimant, but neither Claimant nor either of her parents appeared in person or via electronic means.⁴

On December 12, 2022, Claimant requested a second special master hearing, asserting that Claimant's parents would now be able to attend the hearing. Special masters for the House and Senate subsequently granted the new hearing, which was held on February 28, 2023, for the purpose of hearing testimony from Claimant or her parents.

CLAIMANT'S POSITION:

Claimant argues that Respondent's nursing staff was negligent in its failure to advocate for a speedy C-section upon Claimant's mother, causing Claimant to suffer a birth asphyxia and resulting brain injury around the time of delivery. This brain injury substantially contributed to Claimant's loss of hearing, abnormally low IQ, cognitive deficits, learning disability, seizure disorder, speech delay, and ADHD. Claimant argues that her brain injury is both significant and permanent, and that she will have future needs and medical expenses.

Claimant states that another potential defendant, the acting obstetrician, Dr. Facey, was judgment-proof; accordingly, this claim bill does not seek compensation for any damages against Dr. Facey. Claimant states that she would have argued to a jury that compensatory damages alone should be \$15 million.

RESPONDENT'S POSITION:

Respondent does not contest the claim bill but makes no concession as to liability or any other matter. The report of Claimant's guardian ad litem ("GAL") indicates that during the litigation, Respondent's position had been that Claimant did not suffer a birth injury and that any injuries sustained were minor and not permanent.

CONCLUSIONS OF LAW:

Regardless of whether there is a jury verdict or settlement, each claim bill is reviewed *de novo* in light of the elements of negligence.

Duty

In Florida, to prevail on a medical malpractice claim, a plaintiff

⁴ See Legislative Claim Bill Manual at 8 (2019 ed.), <https://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?PublicationType=Committees&CommitteeId=3022&Session=2020&DocumentType=General+Publications&FileName=Legislative+Claim+Bill+Manual+August+2019.pdf> (last visited July 22, 2020) ("The claimant must attend the final hearing, preferably in person, though the special masters may permit appearance by webcam or other means in certain situations").

must show what standard of care was owed by the defendant, how the defendant breached that standard of care, and that the breach was the proximate cause of damages.⁵ The professional standard of care is the level of care, skill, and treatment which, in light of all surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.⁶ Generally, expert testimony is required to establish the standard of care prevalent in a particular medical field. The services rendered by a physician are scrutinized by other physicians in the same field to determine whether there was a failure to adhere to the standard of care.⁷ Florida law provides guidance with respect to who may testify as an expert with respect to the relevant standard of care applicable to a nurse or other medical support staff.⁸

Breach & Causation

Claimant's attorney was asked at the first special master hearing whether any party other than Respondent contributed to Claimant's injury. Claimant's attorney admitted that the acting obstetrician, Dr. Facey, did not have malpractice insurance and had filed for bankruptcy, making her judgment-proof. In turn, Claimant sought damages against the nursing staff directly employed by Respondent.

Claimant argues that Respondent's nursing staff was negligent in not summoning Dr. Facey urgently enough after Ms. Mitchell presented on October 8, 2008; and in not strenuously advocating to Dr. Facey that a C-section should be performed quickly. Claimant provided testimony from several experts in support of her argument that Respondent's nursing staff failed to meet the relevant standard of care, as follows:

- Dr. Carolyn Crawford, a neonatologist, testified that based on Claimant's position as a fetus, Respondent's nurses should have "fast-tracked" Claimant's mother and "advocated" for a C-section. According to Dr. Crawford, had a C-section been performed upon Claimant twenty minutes before delivery, Claimant would have, more likely than not, been born neurologically intact.
- Dr. Robert Cullen, a pediatric neurologist, stated that Claimant suffered an injury just prior to being delivered.
- Dr. Laura Mahlmeister, who has a doctorate in nursing, and Dr. Martin Gubernick, an obstetrician, stated that Respondent's nursing staff failed to understand the need for an emergency C-section and the need to summon Dr. Facey.

⁵ *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984).

⁶ S. 766.102(1), F.S.

⁷ *Moisan v. Frank K. Kriz, J.K., M.D., P.A.*, 531 So. 2d 398, 399 (Fla. 2d DCA 1988).

⁸ See s. 766.102(6), F.S.

According to the medical records, Dr. Facey was present at Ms. Mitchell's bedside by 7:01 p.m., at the latest. Claimant was delivered by C-section around 8:44 p.m. Two of Claimant's experts indicated that simply performing the C-section just a few minutes earlier, would have led to a better, or even excellent, outcome.

This is a difficult case involving speculative medical causes and effects. Further complicating this case is the fact that Respondent is required, pursuant to the settlement agreement, to "not oppose" the claim bill. Even though Respondent did not concede any of the elements of negligence, Respondent did not actively contest Claimant's arguments and submissions of evidence at the final hearing. Therefore, I find that Claimant has carried her burden to demonstrate that Respondent's nursing staff breached the duty of care and is at least partly to blame for this incident.

Damages

Claimant's expert, Dr. Nancy Parsons, a licensed psychologist, opined that Claimant suffered a brain injury that will likely cause her to have poor adaptive functioning, difficult social functioning, difficulty living independently, and difficulty solving problems. Dr. Parsons opined that Claimant will likely require special educational accommodations, language therapy, and speech therapy.

Moreover, Claimant's guardian ad litem ("GAL") attended the first special master hearing and was helpful to the special masters in assessing the claim bill. The GAL concluded that he believed the settlement and allocation of recovery are "fair, reasonable[,] and in the best interest of [Claimant]."

Claimant's GAL also testified that Claimant does not have any trouble moving around, although she does use hearing aids and lags behind other children her age developmentally. Claimant has attention deficit hyperactivity disorder (ADHD) but is otherwise able to function in most aspects of everyday life.

Claimant is now 14 years old. At the second special master hearing, Claimant's father, Jerald Mitchell, provided helpful and credible testimony as to Claimant's current condition. Mr. Mitchell stated that Claimant's IQ is below 60, and she is in special needs classes. Further, according to Mr. Mitchell, Claimant has ADHD, speech impairment, hearing loss, bipolar disorder, and a seizure disorder. Mr. Mitchell believes that Claimant is not likely to be able to ever live independently, even when she becomes an adult.

The claim bill includes a provision requiring that the funds from the bill must be paid to a special needs trust for the benefit of Jamiyah Mitchell.

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ATTORNEY/
LOBBYING FEES:

If the claim bill passes, the attorney fee will not exceed \$143,100, and the lobbying fee will not exceed \$55,650. Outstanding costs total \$35,240.66.

COLLATERAL SOURCES:

At the original claim bill hearing, it appeared that Claimant had private insurance. At the time, she was not receiving Medicaid, but it appeared likely she would be eligible for Medicaid in the future.

RESPONDENT'S ABILITY
TO PAY:

Respondent states that it has claim bill insurance, but the deductible is \$2 million, which is more than the amount sought in this claim bill. Accordingly, if this claim bill is passed, Respondent is prepared to pay the amount directly out of its own funds.

LEGISLATIVE HISTORY:

This is the third session this claim bill has been presented to the Legislature. Last session, 2022 HB 6519 was not agendaed in any committee of reference.

RECOMMENDATION:

Based on the foregoing, I respectfully recommend that this claim bill be reported **FAVORABLY**.

Respectfully submitted,

JORDAN JONES

House Special Master

cc: Representative Busatta Cabrera, House Sponsor
Senator Joe Gruters, Senate Sponsor
Nathan Bond, Senate Special Master