

STORAGE NAME: h0265.ju

DATE: March 4, 2004

SPECIAL MASTER'S FINAL REPORT

The Honorable Johnnie Byrd
Speaker, The Florida House of Representatives
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: HB 265 by Rep. Murman
Relief of Minouche Noel, a minor, and her parents Jean and Flora Noel

THIS IS AN \$8.5 MILLION EXCESS JUDGMENT CLAIM FOR AN INCIDENT OF MEDICAL MALPRACTICE BY THE FLORIDA DEPARTMENT OF HEALTH AS THE SUCCESSOR TO THE FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES D/B/A CHILDREN'S MEDICAL SERVICES, FOR SEVERE AND PERMANENT INJURIES SUSTAINED BY THE CLAIMANT AND HER FAMILY.

FINDING OF FACT:

On February 15, 1988, Minouche Noel was born with a small paraspinal lump (a sinus of connective and fatty tissue) at the tenth thoracic vertebra, on her back. Her physician obtained a neurological consultation from Dr. Richard McKenzie. Based on his review of x-rays of Minouche's spine and a physical examination, Dr. McKenzie diagnosed Minouche with spina bifida, a possible meningocele, and a questionable other lesion. Dr. McKenzie recommended a full evaluation, including a magnetic resonance imaging (MRI) scan, and a possible excision to be performed through the Children's Medical Services (CMS) neurosurgery clinic in one month. Jean and Flora Noel, Minouche's parents, followed Dr. McKenzie's orders and took Minouche to the CMS neurosurgery clinic for evaluation and follow-up.

In March 1988, Minouche was seen in the pediatric clinic at CMS. Dr. Sonia Hodges, a pediatrician, examined Minouche and found that she was very active, had regular motion in her extremities, no paralysis, and that she had a small raised round lesion on her back, soft and completely covered with skin. Dr. Hodge arranged for Minouche to be

seen in the neurology clinic for evaluation of the lesion. No neurological abnormalities were noted in Minouche's medical records for the treatment she received from birth until May 1988. On May 26, 1988, an MRI of the dorsal spine was performed on Minouche and revealed what appeared to be a myelomeningocele (hernial protrusion of the spinal cord and its membranes through a defect in the vertebral canal) and possible syrinx (an abnormal cavity in the spinal cord in which cavitation may slowly occur), tumor, cyst, or other abnormality." Dr. McKenzie examined Minouche in the CMS clinic following the MRI scan and planned to operate on Minouche: (1) to remove the sinus to prevent infection within the spinal cord; (2) to untether the spinal cord so that it could migrate in its usual developmental pattern; and (3) to explore the spinal cord to determine if what was seen was, in fact, a cystic tumor or other abnormality.

On July 14, 1988, Minouche was admitted to Broward General Medical Center for surgery. On admission to the hospital, Minouche was functioning well neurologically and had normal strength in all extremities. The following day, Dr. McKenzie performed a laminectomy from the ninth, tenth, and eleventh thoracic vertebrae, released a tethered spinal cord and removed a sinus tract. Immediately following the surgery, Minouche had no neurological deficits. Subsequent to the surgery, and during her hospital admission, Minouche was able to move her legs. Between October and December 1988, Minouche eventually walked. By mid-December, however, Minouche had stopped walking and had no bowel movements for a period of about 2 days.

On January 2, 1989, Jean Noel took Minouche to the Broward General Medical Center emergency room and Minouche was admitted to the hospital. A pediatrician examined Minouche and discovered weakness in the child's lower extremities. Minouche was unable to walk. She exhibited fine scratches across her abdomen which was slightly distended; had trouble moving her bowels; and had weakness in her lower extremities. Dr. McKenzie ordered an orthopedic consultation and physical therapy consultation to evaluate the weakness in Minouche's extremities. Minouche was examined by Dr. Leroy Smith, an orthopedic physician, who diagnosed her condition as a mild right hip subluxation (partial dislocation of a joint) and motor weakness of undetermined etiology. At trial, Dr. Smith testified that he told Dr. McKenzie that the mild condition of her hips could not account for the problems that Minouche was experiencing and that he believed that

it was neurological rather than an orthopedic problem. Minouche was discharged on January 9, 1989 without a diagnosis that explained the cause of the weakness in her lower extremities.

From January 2, 1989 until May 16, 1989, Minouche gradually lost function in her lower extremities and her physicians failed to definitively diagnose the cause for her condition.

Following the January hospital admission, Dr. McKenzie, a neurosurgeon; Dr. Sonia Hodge, a pediatrician; Dr. Alan Watson, an orthopedist; and Dr. Ronald Sirois, an urologist, saw Minouche in the multidisciplinary myelodysplasia clinic at CMS on March 16, 1989 for follow-up. Although Minouche regained some capacity to walk again, she had a wobbly, unsteady gait as noted by Dr. Hodge. Although Dr. Watson concluded that Minouche did not need anything from an orthopedic perspective, he and the other physicians providing care to Minouche failed to adequately communicate with each other and to investigate the underlying cause of the child's symptoms in her lower extremities.

The Noels persistently sought treatment for their daughter's condition from doctors and staff at the CMS clinic but at this point were desperate and began to seek care in the emergency room of local hospitals. On April 11, 1989, Mr. and Mrs. Noel took Minouche to Broward General Medical Center emergency room because Minouche was unable to stand on her right leg and would not walk. The Noels were referred back to the CMS clinic for evaluation. Two days later, Mrs. Noel called CMS stating that Minouche had been taken to the emergency room of the hospital and complained that Minouche was unable to walk and appeared to be in pain. Despite the urgency of the call, Mrs. Noel was referred back to the CMS clinic for appointment for Minouche's annual pediatric evaluation on May 9, 1989. Minouche's parents took her to Humana Bennett Hospital emergency room on April 19, 1989, and the emergency room physician determined that Minouche was not bearing weight on either leg but could still move her legs. At this point, Minouche had not used her legs for 3 weeks.

Through the CMS clinic, Minouche was eventually seen on April 24, 1989, by Dr. Lucy Cohen, a pediatric physiatrist, who determined that there was no orthopedic problem and arranged for Minouche to meet Dr. McKenzie at the Broward General Medical Center emergency room

as soon as possible that day. On April 26, 1989, Minouche returned to the CMS clinic and was seen by Dr. Melvin Grossman, a neurologist. Dr. Grossman diagnosed Minouche with evidence of thoracic myopathy and ordered a stat MRI of the thoracic spine that was scheduled the next day. The April 27, 1989 MRI showed a cystic area which had been progressively widening the cord, which most likely represented a residual syrinx or post-operative arachnoid cyst secondary to adhesions.

Minouche at this point was crippled by the introduction of an infection into her spine by the initial surgery, which went undiagnosed. On May 6, 1989, Mr. and Mrs. Noel took her to Jackson Memorial Hospital emergency room, noting that she was unable to walk. A physical examination of Minouche showed that she had no movement of the lower extremities, decreased tone, and was unable to sit up.

On May 16, 1989, Drs. McKenzie and Stoll re-operated on Minouche's spine, performing a laminectomy from the seventh through the eighth thoracic vertebrae. The surgeons found a spinal cord abscess with purulent appearing fluid. Dr. McKenzie noted that the cyst was infected and had enlarged, and had to be completely removed from her spinal cord. Although Dr. McKenzie advised Mr. and Mrs. Noel that Minouche would eventually walk again, she never did.

Minouche is a paraplegic and no longer has use of her lower extremities. Minouche, now age 13, will require day-to-day attendant care and medical care, has no control of her bladder or bowel movement and other handicapping conditions secondary to the paraplegia, and is confined to a wheelchair. Minouche is susceptible to skin breakdowns, bladder infections, bowel obstructions and infections, scoliosis, muscle and tendon contractures and other related problems. Minouche will need multiple therapies during her lifetime. Mr. and Mrs. Noel currently rent a home that has not been modified for wheelchair accessibility. Her parents can no longer carry her around the house.

The claimants presented two scenarios showing the total economic loss of Minouche in a life care plan structured by an economist retained by the claimants. The first model provides for a live-in attendant and the second model provides for institutional care if Minouche's condition deteriorates. The present value of caring for Minouche is approximately \$6.373 million under the first

model and approximately \$9.146 million under the second model. Minouche has a life expectancy of about 70 years.

BATTLE OF THE EXPERTS:

The claimants presented deposition testimony as to whether the respondents fell below the standard of care by taking Minouche for surgery when she did not show any neurological deficits that would justify the initial surgery. A pediatric neurologist, and two neurosurgeons testified that Drs. McKenzie and Stoll should not have performed the initial laminectomy on Minouche because she did not show any symptoms, such as a loss in neurological function, to justify the potential risk of surgery which included the risk of infection. According to the experts, Minouche's MRI taken on May 26, 1988 showed that she had a neural tube defect, a benign condition in the absence of any neurological deficits.

The experts noted that the MRI showed that Minouche did not have a meningocele (membranes that cover the spinal cord and protrude out through a defect), or a meningomyelocele (a hernial protrusion of the spinal cord and its membranes through a defect in the vertebral canal). The experts noted that a meningomyelocele invariably has severe neurological consequences.

The experts noted that the MRI showed that Minouche had three congenital spinal anomalies: (1) a dermal sinus tract of connective tissue and fat; (2) cavitation in the spinal cord; and (3) the cord is widened out by some fluid within its substances at a higher level in her spinal column. At the other end of the dermal sinus tract there was an epidermoid cyst that was within Minouche's spinal cord. At the initial surgery, Minouche did not have any neurological problems and claimant's experts testified that the lesion on Minouche's spine should have been left alone and monitored for any changes.

In the experts' opinion, the physicians deviated and departed from an acceptable standard of care in their care and treatment of Minouche and but for that deviation from the standard of care, within reasonable medical probability, Minouche would not be paralyzed, she would be ambulatory. In their opinion, the surgery allowed an 'indolent staph germ' to go down into the cyst in Minouche's spine which was subsequently discovered in May 1989. In the experts' opinion, Dr. McKenzie negligently performed the surgery by failing to remove the epidermoid cyst which later became infected. The experts testified that the infection introduced by the initial surgery

caused progressive pressure to increase on Minouche's spinal cord which ultimately caused her to lose all function in her legs, bladder and bowel. The claimant's experts noted that treatment or surgery of the infected epidermoid cyst would have in reasonable medical probability prevented Minouche's paralysis.

The experts retained by claimants and respondents both testified that the physicians who treated Minouche in the CMS multidisciplinary clinic deviated from the appropriate standard of care by negligently failing to communicate their findings with each other to provide a diagnosis, including a comprehensive neurological evaluation, that would explain Minouche's loss of function in her lower extremities.

The respondents presented deposition testimony by a neurologist that the causation of Minouche's paralysis stemmed from a congenital malformation of the spinal cord. Respondent's expert opined that Minouche's paralysis was the natural progression of a pre-existing spinal cord deformity. Respondents' expert opined that the existence and subsequent growth of the epidermoid cyst in Minouche's spine was wholly unrelated to the initial surgery performed by Drs. McKenzie and Stoll.

PROCEDURAL HISTORY:

The *Noel* case, *Stoll v. Noel*, 694 So.2d 701 (Fla. 1997) has a lengthy and well-known procedural history, and the Florida Supreme Court opinion is often cited regarding the status of sovereign immunity as it pertains to physician consultants.

In October of 1990, a complaint was filed against North Broward Hospital District, the Department of Health and Rehabilitative Services d/b/a Children's Medical Services (and now operating as the Department of Health); and six physicians, both independently and with their professional associations (PA's). The trial court granted summary judgment in favor of the physicians and PA's, which decision was appealed all the way to the Florida Supreme Court. In *Noel*, 694 So.2d 701 (Fla. 1997), the Florida Supreme Court held that the physicians were agents of the state and thus were entitled to sovereign immunity, and remanded the case for further proceedings consistent with the ruling.

As a result of being dismissed from the suit, the physicians were awarded final cost judgments, which order was also appealed. In *Noel v. Broward General*

Medical Center, 725 So.2d 438 (Fla. 4th DCA 1999), the Fourth District Court of Appeal affirmed the cost judgments in favor of the physician defendants.

The underlying case, upon remand, was heard in the Circuit Court in Broward County in March of 1999. The jury found no negligence on the part of the North Broward Hospital District, instead finding the Department of Health and Rehabilitative Services, d/b/a Children's Medical Services (now operating as the Department of Health) 100 percent liable, and awarding total damages to Minouche Noel and her parents of \$8,500,000. Nearly one year later, in April of 2000, the court granted the claimant's motion for enforcement of that portion of the final judgment not exceeding the \$200,000 statutory cap. The respondent department filed a Motion for Judgment notwithstanding the Verdict; Motion for New Trial on Liability and Damages; Motion for New Trial on Damages only; or in the alternative, Motion for Remittitur and Set Off. All motions were denied. The department chose not to appeal because the department determined that an appeal might not have been successful; further, the time for appeal has expired. Currently, there is no litigation pending on this matter.

CLAIMANT'S ARGUMENTS:

- There is a well-supported jury verdict that was not appealed. The jury was given the opportunity to apportion liability to the North Broward Hospital District for the negligence of physicians employed by the District, but the jury found 100 percent liability on the part of the department.
- In this case, the Florida Supreme Court opined that the department was responsible for the negligence of the physicians that contracted with CMS.
- Motions for remittitur and new trial were denied.
- Claimant's expert, Dr. Sussman, testified that the first surgery was negligently performed, and that but for this deviation from the standard of care, Minouche Noel would not be paralyzed. Dr. Sussman further testified that lack of communication amongst other treating physicians, as well as multiple failures to perform a neurological examination allowed the infection in her spine to ultimately paralyze her.
- Claimant's rehabilitation expert, Lawrence Forman, testified that Minouche's future needs include: physical and occupational therapies; wheelchair modifications to the family home or a new home; a van; and extensive medical care. Dr. Bernard Pettingill, the claimant's expert economist, submitted a 1998 report stating that the

present value of Minouche Noel's lifetime loss, using a model that keeps Minouche in home care, is \$8,228,238. Dr. Pettingill's analysis was based on the following assumptions:

- Minouche's life expectancy of 70.1 years;
- Minouche's work life expectancy of 65 years;
- Capacity to earn \$630.75/week, with no benefits;
- Reduction in lifetime earned income of 25 percent, based on the assumption that she will not be able to work to age 65.

RESPONDENT'S ARGUMENTS:

The doctrine of sovereign immunity should protect the Department of Health from paying anything more than the \$200,000 statutory cap already paid.

Minouche Noel suffered from a pre-existing spina bifida, and was pre-disposed to paralysis due to no fault of the physicians as agents of the department.

There were numerous other physicians that treated Minouche Noel who were not under the control or supervision of CMS. The jury should have apportioned some liability to the North Broward Hospital District.

The Department of Health and CMS does not have the financial resources to pay a claim in excess of \$200,000, and such payment would put at risk the CMS program and services provided by it.

However, in the alternative, if the Legislature does consider a claim bill in this matter, Minouche Noel should receive no more than necessary to privately fund and sustain a healthy environment, secure the appropriate medical care, and provide for her limited vocational shortcomings. The department's General Counsel testified at the Special Master hearing that \$1.7 million would be sufficient to cover Minouche's needs. On questioning, counsel clarified that the \$1.7 million amount contemplates economic needs only, and does not compensate Minouche or her parents for any pain and suffering.

The respondent's rehabilitation/economist experts, Dr. Shanasarian and Dr. Clarkson, provided a 1998 report that valued Minouche Noel's net present value of lost earning capacity and future support at \$1,787,900. This analysis was based on the following assumptions:

- Claimant's pre-existing spina bifida would

significantly reduce the types of jobs that Minouche could realistically perform.

- Lawrence Forman, the rehabilitation expert hired by the claimant is unqualified to prepare a life care plan and has inflated the value of items in the claimant's life care plan.
- The claimant doesn't need a new home, but merely modifications to the existing family home.
- Claimant only needs a personal care attendant for 2-4 hours per day until she is 50, 4-6 hours per day from ages 51 to 60, and 6-8 hours per day from age 61 to death.
- Any money paid to the claimant should go into a Special Needs Trust to ensure proper expenditure, preserve Medicaid eligibility, and ensure reimbursement to the state upon the claimant's death.

CONCLUSION OF LAW:

In 1988, the respondent, State of Florida, Department of Health and Rehabilitative Services operated Children's Medical Services, 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 CMS owed a duty of care to Minouche Noel, that the duty was breached, and that the injuries suffered 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 Department of Health, the successor to the Department of Health and Rehabilitative Services, is supported by the evidence against it, in light of all the circumstances.

DAMAGES: Damages as found by the jury and in the Final Judgment were as follows:

Damages	Jury Award
Minouche Noel's future medical expenses and lost earning capacity	\$3.5 million
Minouche's past pain and suffering	\$1 million
Minouche's future pain and suffering	\$2 million
Total for Minouche Noel	\$6.5 million
Jean and Flora Noel's past medical expenses	\$200,000
Jean and Flora Noel's future medical expenses, until the age of Noel's majority	\$1.3 million
Jean and Flora Noel's past pain and suffering	\$300,000
Jean and Flora Noel's future pain and suffering	\$200,000
Total for Jean and Flora Noel	\$2 million
TOTAL OF ALL DAMAGES	\$ 8.5 million

The jury verdict is under attack by the respondent, Department of Health. How should the Legislature measure it? Rather than the subjective, time-worn "shock the conscience" standard used by the courts, for purposes of the claim bill process, a respondent who assails a jury verdict as being excessive should have the burden of showing the Legislature that the verdict was unsupported by any credible evidence; or that it was influenced by corruption, passion, prejudice, or other improper motives; or that it has no reasonable relation to the damages shown; or that it imposes a hardship on the defendant out of proportion to the injuries suffered; or that it obviously and grossly exceeds the maximum limit of a reasonable range within which a jury may properly operate; or that there are post-judgment considerations that were not known at the time of the jury verdict. Both the respondent, Department of Health and the law firm retained by the department failed to produce any credible evidence that would support a recommendation for an amount lower than the jury verdict.

There are no collateral sources of payment. The claimant is still eligible for and receiving Medicaid services. Medicaid has a lien against Minouche Noel in the amount of \$107,762.92.

PROTECTION OF MINOR'S FUNDS:

The appointed Guardian ad Litem in this case has reported that the funds would be best protected in a guardianship account with Jean and Flora Noel as appointed guardians of the guardianship account with Sun Trust Bank for the benefit of Minouche Noel. The Circuit Court in Broward County has retained jurisdiction over the expenditures from the account, and has entered an order that no withdrawals may be made without a court order. Because the Legislature generally favors structured

payments, guaranteed-term annuities, or special needs trusts in large claims and in claims on behalf of those who have suffered serious or permanent injuries that are likely to require substantial or long-term medical care, I recommend that after the payment of attorney's fees and costs, medical bills and other immediate needs, that the remaining proceeds be required, by law, to be placed in a special needs trust created exclusively for the benefit of the claimant. To do so, would preserve Medicaid eligibility for the claimant.

Claimants argue that a special needs trust would force Minouche to accept medical care from the physicians that caused her injury. However, at the hearing the claimants indicated that Minouche is treated by and will continue to be treated by Dr. Lucy Cohen, who accepts Medicaid and has been paid by Medicaid for treating Minouche up to this point.

INTEREST:

The final judgment provides for interest on the award, which the claimant has represented has accrued interest at the rate of 12 percent per annum. However, since the award could not be paid without further act of the Legislature, as required by s. 768.28, F.S., the respondent should not have to pay interest on a judgment that they could not satisfy but for the passage of a claim bill.

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 §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 dismissed defendants have a cost judgment against the claimant for \$39,718.09. There is a Medicaid lien outstanding in the amount of \$107,762.92. The claimant's attorney has a cost judgment of \$84,000. Again, as the respondent is prohibited by law from paying the portion of the judgment exceeding the statutory cap of \$200,000 absent passage of a claim bill, respondent should not have to pay interest on the cost judgment.

LEGISLATIVE HISTORY:

HB 241 (2001) was filed by Rep. Cantens. The undersigned Special Master recommended that the bill be amended to delete reference to any payment of interest and to specify that after payment of statutory fees, court-ordered costs, and outstanding medical bills

and liens, the balance of the \$6.5 million awarded to Minouche Noel be paid into a Special Needs Trust Fund. Any funds remaining in the Special Needs Trust at Minouche Noel's death after payment of any outstanding Medicaid liens were to revert to the General Revenue Fund of the State of Florida. HB 241 (2001) died in the Committee on Claims. SB 6 (2001) was amended to reflect the Special Master's recommendations and passed all committees of reference. SB 6 died on the Senate calendar.

HB 529 (2002) died in the Committee on Claims. CS/SB 4 (2002) passed all committees of reference in the Senate, passed the full Senate, and died in House messages. No further Special Masters' hearings have been held.

In 2003, HB 183 was introduced by Representative Murman. The claim was referred to the Sub-Committee on Claims, the Judiciary Committee, Health Appropriations Committee, and the Appropriations Committee. The claim passed favorably through both the Committee on Claims and the Judiciary Committee but died in Health Appropriations on May 2, 2003.

The Senate companion, SB 22, was introduced by Senator Campbell. The claim was referred to and withdrawn from the Special Master on Claim Bills; Health, Aging and Long-Term Care; and Taxation and Finance. The claim was referred to and died in the Committee on Rules and Calendar on May 2, 2003.

In preparation for the 2004 session, both parties have been given the opportunity to supplement the record for this claim; neither party submitted any supplemental information. However, claimant responded that she is still paralyzed and in a wheelchair. She catheterizes herself daily and has uncontrolled spasms in her legs for which she receives Myobloc injections in all of her lower extremities muscles.

RECOMMENDATIONS:

As filed, HB 265 (2004) incorporates the Special Master's recommendations from 2001, 2002, and 2003. Thus, I again recommend that House Bill be reported FAVORABLY.

Respectfully submitted,

Stephanie Birtman
House Special Master

cc: Rep. Murman, House Sponsor
Sen. Campbell, Senate Sponsor
Barry Munroe, Senate special master