



THE FLORIDA SENATE
SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
2/12/09	SM	Fav/1 amendment
4/06/09	HR	Fav/CS

March 10, 2009

The Honorable Jeff Atwater
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **CS/SB 46 (2009)** – Health Regulation Committee and Senator Jeremy Ring

HB 647 (2009) – Representative Rick Kriseman
Relief of Raul Otero

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNOPPOSED EQUITABLE CLAIM FOR \$2 MILLION AGAINST THE SOUTH BROWARD HOSPITAL DISTRICT FOR MEDICAL MALPRACTICE IN THE COURSE OF TREATING RAUL OTERO AT MEMORIAL REGIONAL HOSPITAL IN 2003, WHICH CAUSED A CATASTROPHIC BRAIN INJURY RENDERING MR. OTERO A COGNITIVELY IMPAIRED QUADRIPLEGIC.

FINDINGS OF FACT:

On March 28, 2003, Raul Otero sustained serious bodily injuries in a motorcycle accident, during which he was run over by a tow truck. Mr. Otero was taken to Memorial Regional Hospital (MRH), a public facility located in Hollywood, Florida, which the South Broward Hospital District owns and operates. At the hospital, Mr. Otero's spleen was surgically removed and his left leg amputated above the knee.

One of the physicians who treated Mr. Otero at MRH was Michael Langone, M.D. Dr. Langone ordered a magnetic resonance imaging (MRI) scan for Mr. Otero, in hopes of determining the cause of a loss of function that the patient

was experiencing in his left arm. The MRI was medically necessary—but did not need to be done on an emergency basis. On April 16, 2003, at about 10:00 p.m., Mr. Otero was taken from the intensive care unit (ICU) to the MRI suite. Although he was intubated and breathing with the help of a ventilator, Mr. Otero was awake and alert that evening. A registered nurse and a respiratory therapist accompanied him to the MRI suite. While Mr. Otero was away from the ICU, the respiratory therapist used an ambu bag manually to pump oxygen into the patient's lungs.

From the MRI suite, the nurse, Eileen Humphreys, R.N., called Dr. Langone, to ask whether Mr. Otero, who had a metal pin in one of his fingers, should be placed in the MRI scanner. Dr. Langone informed the nurse that the metal would not interfere with the scan, and he directed that the MRI be completed as soon as possible.

Mr. Otero was placed into the MRI scanner at about 10:35 p.m. Although he had been sedated with 2 milligrams of Versed (midazolam), Mr. Otero immediately panicked and became frightened. The nurse gave him two boluses, amounting to 5 cubic centimeters apiece, of the sedative Diprivan (propofol), and Mr. Otero was again placed into the scanner. He became frantic and started thrashing about, pulling at his tubes. At 10:45 p.m., the nurse, Ms. Humphreys, placed a telephone call to Dr. Lawton W. Tang, a surgical resident at MRH, and informed him that the patient was in the scanner and highly agitated.

Dr. Tang was an employee of Mount Sinai Medical Center (Mount Sinai). At the time of the subject incident, Dr. Tang was in residency at MRH pursuant to an Affiliation Agreement between Mount Sinai and MRH, under which MRH operated a Surgical Residency Program. While working at MRH, Dr. Tang was under the direct supervision and control of the attending physicians at MRH. The Affiliation Agreement between Mount Sinai and MRH provided that while resident physicians such as Dr. Tang were on the premises of MRH, they would be agents of MRH, exclusively.

When Dr. Tang received Ms. Humphreys' telephone call, therefore, he did so within the scope and course of his agency relationship with MRH. Upon hearing the nurse's

summary of the situation, Dr. Tang concluded that the highest priority was to calm the patient down, to prevent him from hurting himself. Accordingly, Dr. Tang directed Ms. Humphreys to administer 3 milligrams of Versed and 100 milligrams of succinylcholine, which latter is a paralytic agent. The dosage of succinylcholine that Dr. Tang ordered for Mr. Otero was sufficient to paralyze the patient completely, making him unable to move or breathe on his own.

At 10:58 p.m., Mr. Otero was given the medications that Dr. Tang had prescribed. Within minutes, Mr. Otero's heart went into ventricular fibrillation, meaning that the heart was essentially trembling, rather than beating properly. This in turn caused a cardiac arrest. A Code Blue was announced, and CPR started promptly. A defibrillator was used to administer an electric shock to Mr. Otero's heart. Dr. Tang and his team arrived and continued the efforts to resuscitate Mr. Otero. These efforts succeeded in saving Mr. Otero's life.

Unfortunately, however, during the period that Mr. Otero's heart was not beating, he suffered from anoxia, which means that too little oxygenated blood was being delivered to his brain and other vital organs. The result was severe—and permanent—brain damage.

This catastrophic injury has rendered Mr. Otero a quadriplegic who is unable to speak or understand even the simplest communications, in need of continuous, total care. He is incontinent and cannot feed himself. Mr. Otero will never be able to work or perform any activities of daily living on his own. His mother is currently Mr. Otero's fulltime caregiver. She is paid a salary of \$3,000 per month out of a special needs trust which was established for Mr. Otero.

Sharon Griffin & Associates, Inc., prepared a Life Care Plan for Mr. Otero, which quantifies the future medical expenses that will be incurred over the course of his lifetime. The report prepared by Mr. Otero's expert economist, Merle F. Dimbath, Ph.D., which takes into account the Life Care Plan, concludes that Mr. Otero's total economic loss, reduced to present value, falls within the range of approximately \$12 million to \$12.5 million, the lion's share of which is attributable to future medical expenses.

LEGAL PROCEEDINGS:

In 2005, Ana Delgado, the mother and legal guardian of Mr. Otero, brought suit on her son's behalf against the South Broward Hospital District, Mount Sinai, and several physicians, including Doctors Langone and Tang, who participated in the care and treatment of Mr. Otero. The action was filed in the Broward County Circuit Court.

Dr. Tang and Mount Sinai settled with the plaintiffs for \$2 million. The South Broward Hospital District entered into a mediated settlement agreement with the plaintiffs pursuant to which the district agreed, in exchange for a release of further liability, to the entry of a Consent Judgment in the plaintiffs' favor, and against the district, in the sum of \$2.2 million. The district agreed to pay (and has paid) the plaintiffs \$200,000 (\$100,000 to Mr. Otero and a like sum to his mother) under the sovereign immunity cap. (Each plaintiff's net recovery from this payment was slightly less than \$15,000.) The district agreed to support the passage of a claim bill for the remaining \$2 million.

The settlement funds that Mr. Otero has received to date have been placed in a special needs trust. In accordance with federal law, see 42 U.S.C. § 1396p(d)(4)(A), any money remaining in the trust at the time of Mr. Otero's death must first be used to reimburse the State for any benefits he has received under the Medicaid Program. As of the final hearing, Mr. Otero had discharged a Medicaid lien in the amount of approximately \$140,000, which the State had placed on the previously realized settlement proceeds that were attributable to medical expenses. See Arkansas Dep't of Health and Human Services v. Ahlborn, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006). There are currently no outstanding Medicaid liens relating to benefits provided to Mr. Otero.

The plaintiffs' lawsuit is still pending in the Broward County Circuit Court against Dr. Langone (in his individual capacity), whose medical malpractice insurance policy limit is \$200,000.

CLAIMANT'S POSITION:

The South Broward Hospital District is vicariously liable for the negligent acts of its employees and agents, including but not limited to:

- Taking Mr. Otero for a non-emergent MRI scan at night when he was not medically stable.
- Proceeding with the MRI scan after the initial attempt had failed due to the patient's agitation and panic, which persisted despite sedation.
- Ordering (and permitting) a registered nurse to administer succinylcholine, which is tantamount to a general anesthetic.
- Failing to have in place policies precluding the administration of succinylcholine by unqualified personnel.

THE DISTRICT'S POSITION:

The South Broward Hospital District supports the bill. The district is self-insured and has set aside funds to pay the bill should it be enacted. Payment of the bill will not impair the district's ability to provide normal services.

CONCLUSIONS OF LAW:

As provided in s. 768.28, F.S., (2008), sovereign immunity shields the South Broward Hospital District against tort liability in excess of \$200,000 per occurrence. See Eldred v. North Broward Hospital District, 498 So. 2d 911, 914 (Fla. 1986)(§ 768.28 applies to special hospital taxing districts); Paushter v. South Broward Hospital District, 664 So. 2d 1032, 1033 (Fla. 4th DCA 1995). Unless a claim bill is enacted, therefore, Mr. Otero will not realize the full benefit of the settlement agreement he has made with the district.

Under the doctrine of respondeat superior, the South Broward Hospital District is vicariously liable for the negligent acts of its agents and employees, when such acts are within the course and scope of the agency or employment. See Roessler v. Novak, 858 So. 2d 1158, 1161 (Fla. 2d DCA 2003).

The nurse and respiratory therapist who were involved in carrying out the order to have an MRI scan performed on Mr. Otero were employees of the district acting within the scope of their employment on the night of April 16, 2003. Though not an employee of the district, Dr. Tang, on the night in question, was an agent of MRH pursuant to an express

agreement. He, too, was acting in the course and scope of the agency when treating Mr. Otero. Accordingly, the negligence of these actors is attributable to the district.

Each of the referenced individuals had a duty to provide Mr. Otero with competent medical care. There is no genuine dispute in this case that such duty was breached, with tragic consequences. Had the MRI procedure been aborted after the initial, failed attempt, as it reasonably should have been, (or not carried out until after Mr. Otero's condition had stabilized), had Dr. Tang not directed Ms. Humphreys to administer succinylcholine, or had the nurse refused to give the succinylcholine, Mr. Otero would not have suffered a catastrophic brain injury on April 16, 2003. The negligence of the district's employees and agents was a direct and proximate cause of Mr. Otero's substantial damages.

The sum that the South Florida Hospital District has agreed to pay Mr. Otero (\$2.2 million) amounts to approximately 18 percent of Mr. Otero's total damages. Although there are other parties whose negligence contributed to the injury (some of whom already have settled with Mr. Otero), there is no persuasive basis in the record for finding that the district's share of the fault should be fixed at less than 18 percent; rather, the record supports the conclusion, which the undersigned reaches, that the district's fault is at least that much. The undersigned concludes that the settlement at hand is both reasonable and responsible.

LEGISLATIVE HISTORY:

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

ATTORNEYS' FEES AND LOBBYIST'S FEES:

Section 768.28(8), Florida Statutes, provides that "[n]o attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement." The law firm that the Otero family retained, Winston & Clark, P.A., has submitted a proposed closing statement showing that, if Mr. Otero were awarded \$2 million under the claim bill at issue, the attorneys' fees and lobbying fees would be limited to \$500,000, or 25 percent of the compensation being sought. The Claimant's attorneys urge, however, that \$5,974 in costs be reimbursed outside the 25 percent cap, which would leave the Claimant with a net recovery of \$1.49 million—about 74.7 percent of the total proposed award.

SPECIAL MASTER'S FINAL REPORT – CS by Health Regulation:

March 10, 2009

Page 7

In its current form, the instant claim bill provides that the "total amount paid for attorney's fees, lobbying fees, costs, and other similar expenses relating to the adoption of this act may not exceed 25 percent of the total amount awarded under this act." (Emphasis added). Unless the bill were amended to remove costs from the foregoing limitation, therefore, the costs (about \$6,000) would need to be paid out of the \$500,000 earmarked for attorneys' and lobbying fees.

OTHER ISSUES:

At the hearing, the parties acknowledged that certain language in the "whereas" clauses of the bill should be amended to conform to the parties' settlement agreement. The revisions discussed were not material to the substance of the bill.

As mentioned above, the bill would need to be amended if costs were to be excluded from the 25 percent cap on fees. Although s.768.28(8), F.S., does not require that fees and costs be capped at 25 percent, the legislature is free to place conditions on the amount of costs payable from the appropriation, should the bill be approved. The undersigned expresses no opinion on whether the Claimant's attorneys and lobbyist, rather than the Claimant himself, should absorb the litigation expenses incurred in prosecuting the Claimant's case.

RECOMMENDATIONS:

For the reasons set forth above, I recommend that Senate Bill 46 (2009) be reported FAVORABLY, with a technical amendment to conform the "whereas" clauses to the parties' agreement.

Respectfully submitted,

John G. Van Laningham, Esq.
Senate Special Master

cc: Senator Jeremy Ring
Philip Twogood, Secretary of the Senate
Counsel of Record

SPECIAL MASTER'S FINAL REPORT – CS by Health Regulation:

March 10, 2009

Page 8

CS by Health Regulation:

The committee substitute conforms the “whereas” clauses in the bill to the parties’ agreement as recommended by the Special Master.

Attachment



813810

LEGISLATIVE ACTION

Senate

.
. .
. .
. .
. .

House

The Special Master on Claim Bills recommended the following:

1 **Senate Amendment**

2

3 In title, delete lines 17 - 81
4 and insert:

5 WHEREAS, on April 16, 2003, while in the trauma intensive
6 care unit at Memorial Regional Hospital, Mr. Otero was taken
7 during the night shift to the MRI laboratory for a scan to rule
8 out a nonemergency shoulder injury. Mr. Otero was accompanied by
9 a nurse and a respiratory therapist to the MRI laboratory, but
10 was removed from his ventilator at the time he was transported
11 to the MRI during the night shift when the hospital operates
12 using significantly fewer staff. He was alert and oriented. Mr.



813810

13 Otero became panicky during the scan and was given several doses
14 of a narcotic sedative, Versed, in addition to the narcotic
15 medication he was already receiving intravenously. Because of
16 his panicked thrashing, an order for a paralytic drug was also
17 given. Lawton Tang, M.D., a surgical resident employed by Mt.
18 Sinai Medical Center and working under the supervision of
19 attending physicians of the South Broward Hospital District on a
20 rotation through Memorial Regional Hospital, was not present and
21 gave the medication orders by telephone, and

22 WHEREAS, the nurse administered the paralytic drug, which
23 was inappropriate under the circumstances. When the drug was
24 given to Mr. Otero, it caused his heart to stop beating
25 properly, and

26 WHEREAS, shortly thereafter Raul Otero went into cardiac
27 arrest, a code was called, and, after a relatively extended
28 process, Mr. Otero was successfully resuscitated. However, he
29 was found to be suffering from anoxic encephalopathy, and

30 WHEREAS, several physicians, including the trauma resident
31 on duty at the time, testified that Mr. Otero was not stable
32 enough to be taken from intensive care during the midnight shift
33 for an elective MRI. In fact, the very next day this practice
34 was expressly forbidden by then Chief of Trauma, Lawrence
35 Lottenberg, M.D., and

36 WHEREAS, Raul Otero is completely incontinent, is
37 quadriplegic, and cannot speak, and is unable to consistently
38 follow simple one-step commands. Mr. Otero's life-care plan was
39 drafted by Sharon Griffin, Ph.D., and was originally valued in
40 excess of \$20 million. Now that his feeding tube and ventilator
41 have been removed, the cost of his future care has been revised



813810

42 to approximately \$12 million, and

43 WHEREAS, the surgical resident, Lawton Tang, M.D., the
44 resident who gave the telephonic medication orders, and Mt.
45 Sinai Medical Center, his employer, have settled for \$2 million,
46 and

47 WHEREAS, the South Broward Hospital District has agreed to
48 pay \$100,000 to Raul Otero and \$100,000 to his mother and
49 primary caregiver, Ana Otero, pursuant to s. 728.28, Florida
50 Statutes. In addition, the district has agreed to the passage of
51 a claim bill in the amount of \$2 million, NOW, THEREFORE,
52