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
12/04/09	SM	Unfavorable
3/9/10	HR	Fav/CS

December 4, 2009

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

Re: **CS/SB 34 (2010)** – Health Regulation Committee and Senator Dennis L. Jones
Relief of Daniel and Amara Estrada

SPECIAL MASTER'S FINAL REPORT

BASED ON A JURY AWARD OF MORE THAN $20 MILLION AGAINST THE UNIVERSITY OF SOUTH FLORIDA, THIS CONTESTED EXCESS JUDGMENT CLAIM ARISES FROM THE "WRONGFUL BIRTH" OF CALEB ESTRADA, A CHILD WHO, BECAUSE OF A GENETIC DISORDER, WILL REQUIRE A LIFETIME OF EXTRAORDINARY CARE.

FINDINGS OF FACT:

On June 28, 2002, Amara Estrada gave birth to a son, whom she and her husband Daniel named Aiden. Aiden was the couple's first child.

Aiden was delivered at Tampa General Hospital. He had a number of patent physical abnormalities. Consequently, a referral was made for Aiden to be seen by Dr. Boris Kousseff, who was, at the time, a professor of medicine at the University of South Florida (USF) College of Medicine and the Director of the Division of Medical Genetics in USF's Department of Pediatrics. Dr. Kousseff first examined Aiden on July 1, 2002. He saw the infant for a second time about two months later, on August 29, 2002. Arrangements were made for Dr. Kousseff to see Aiden again after 12 months. Dr. Kousseff did not, during either of the visits in 2002, diagnose Aiden as having any particular genetic disease or

syndrome. In fact, however, Aiden was suffering from a condition known as Smith-Lemli-Opitz Syndrome (SLO), a genetic disorder that produces a constellation of physical and cognitive impairments, many of which Aiden had been born with. Dr. Kousseff's failure to diagnose SLO in Aiden was a breach of the accepted standard of care for geneticists.

Not long after Aiden's birth, the Estradas moved from Tampa to Orlando. In Tampa, Aiden had been receiving early intervention services from the state. To continue receiving these services in Orlando, Aiden needed to be examined by the local provider; as a result, he was seen by Dr. Lynda Pollack on November 7, 2002. Dr. Pollack is a pediatrician. She happens also to be a geneticist.

Dr. Pollack performed a pediatric evaluation of Aiden. In her chart, however, she noted that blood for a cholesterol test should be obtained. The purpose for conducting a cholesterol test would have been to diagnose SLO, which Dr. Pollack suspected Aiden might have. Dr. Pollack did not herself order the test, however, nor did she recommend to the Estradas or any of Aiden's medical providers that the test be administered. It is reasonably likely that if Dr. Pollack had followed through to ensure that the cholesterol test was performed, Aiden's true condition, which remained undiagnosed, would have been discovered before Amara Estrada became pregnant again. Dr. Pollack's failure to act on her own suggestion to recommend a cholesterol test was a breach of the accepted standard of care for physicians.

Months passed, and the severity of Aiden's multiple impairments became increasingly manifest. He had profound developmental delays. Further, being unable to eat or drink by mouth, Aiden was forced to depend on a gastronomy tube (G-tube), which had been surgically placed through the wall of his stomach, for nutrition and hydration. The Estradas remained unaware that Aiden had a discrete genetic disorder; they were, however, understandably worried that their next child, were they to have one, would have the same birth defects as Aiden. They decided that unless they could be assured that the risk of recurrence were negligible, they would adopt rather than take a chance on having another special needs child.

The question that was foremost in the Estradas' minds when they brought Aiden to see Dr. Kousseff on September 15, 2003, was whether they could have another child without the recurrence of Aiden's birth defects. Dr. Kousseff told the couple that, because Aiden's condition did not fit a particular syndrome, they could expect to have normal children going forward. He advised them that Amara should, if pregnant, have fetal sonograms taken at 16 and 23 weeks into the pregnancy, to rule out the presence of birth defects. Dr. Kousseff put his mistaken judgment regarding the chance of recurrence in a letter to the Estradas, which was dated September 15, 2003. Dr. Kousseff's faulty risk assessment fell below the standard of care for geneticists faced with this situation, which calls for the doctor to advise parents whose first child has birth defects of unknown etiology that there is at least a 25 percent chance of those defects recurring in their next child.

Having received the "green light" from Dr. Kousseff, Daniel and Amara elected to have another child. Amara became pregnant in early 2004. Her pregnancy progressed normally. The ultrasound scans that Dr. Kousseff had recommended were conducted and gave no cause for concern. SLO is not detectable through sonography. It can be diagnosed by an amniotic fluid test, but, because Aiden had not been diagnosed with SLO, amniocentesis was not indicated for Amara, who—in light of Dr. Kousseff's report— was not believed to be at risk of carrying a child having hereditary abnormalities.

On November 18, 2004, Amara gave birth to Caleb Estrada, who was delivered at Shands Teaching Hospital in Gainesville. Caleb, unfortunately, had the same birth defects as his brother Aiden. In short order, the doctors at Shands determined that Caleb's congenital anomalies were the result of SLO. Having correctly diagnosed Caleb, the doctors next examined Aiden and concluded that he, too, had SLO.

Caleb Estrada has serious deformities and impairments. It is unlikely that he will ever walk normally, although he might someday be able to "functionally ambulate." He will not be able to talk or effectively communicate due to cognitive deficits. He cannot currently eat or drink and must be fed through a G-tube, a situation that is likely permanent, though

not necessarily so. In short, while some improvement in his situation is possible, Caleb will never be able to care for himself; rather, he will need continual care around the clock, seven days per week, for the rest of his life.

The Estradas have health insurance that has paid, and continues to pay, many of Caleb's medical expenses. Their insurer, Blue Cross/Blue Shield, has asserted a lien of approximately $25,500, which would be paid from the proceeds of the claim bill.

Caleb is currently receiving special education services in the public schools of Alachua County. He is not presently eligible for public assistance, such as Medicaid, because his parents' income is too high to qualify. (Amara, a veterinary cardiologist, is an assistant professor of veterinary medicine at the University of Florida. Daniel works as an administrator in UF's Department of Pediatrics; as of the final hearing, however, Daniel had been notified that he would be laid off at the end of the year.)

The parties sharply dispute the present value of the cost of Caleb's future extraordinary care. The Claimants' experts offered a detailed "continuum of care" plan, the present value of which, according to their economist, is about $25 million. In contrast, USF's experts placed the present value of Caleb's life care expenses at between, roughly, $2.5 million and $3.8 million. USF's proposed lifetime care plan affords fewer services than the Claimants' plan and assumes that Caleb will not live past the age of 40, whereas the Claimants assume that Caleb will have a normal lifespan. USF also has argued, in this proceeding, that Caleb's future financial needs can be adequately covered by purchasing an annuity, which, USF asserts, could be obtained for $1 million to $3 million from a reputable insurance company.

At the conclusion of the trial in the civil action that the Estradas brought against USF, which will be discussed below, the jury returned a verdict in favor of the Estradas, awarding them $18.5 million as the present value of the cost of providing Caleb's future extraordinary care. Having considered the evidence and arguments presented at the trial and in this proceeding, the undersigned finds no basis for disturbing the jury's assessment of this item of damages. The sum of $18.5 million is a reasonably accurate

determination of the present value of the future economic expenses associated with the lifetime of extraordinary care Caleb will need.

In addition to the award for future medical expenses, the jury found that Caleb's parents had incurred $53,000 in past extraordinary expenses in caring for him. USF has not challenged this item of damages. It is determined that the sum of $53,000 is, as the jury found, a reasonably accurate assessment of the Estradas' past economic losses.

Finally, the jury found that Daniel and Amara Estrada had endured "pain and suffering" for which each should be awarded $2.5 million. There is no formula, no scientific or mathematic method, for determining the appropriate amount of an award for pain and suffering. While the undersigned does not believe that the jury's determination in this regard was unreasonable under the circumstances, he nevertheless finds, for reasons that will be discussed below, that noneconomic damages should be limited to $500,000 per parent.

The jury in the civil trial was asked to compare the negligence of Dr. Kousseff to that of Dr. Pollack and apportion the fault between them by percentages. The jury determined that Dr. Kousseff's negligence comprised 90 percent of the cause of Caleb's "wrongful birth," while finding Dr. Pollack 10 percent at fault.

While the undersigned might have placed less blame on Dr. Pollack, whose negligence did not change the status quo (in which Amara had no intention of becoming pregnant) and thus would not, without Dr. Kousseff's subsequent, faulty assessment of the risk of recurrence, have proximately led to Caleb's birth, he nonetheless considers the jury's apportionment of the fault to be consistent with the evidence and will defer to the jury's collective wisdom in the matter. It is found, therefore, that Dr. Kousseff was 90 percent responsible for the birth, Dr. Pollack 10 percent.

LEGAL PROCEEDINGS:

In January 2006, the Estradas individually, and as the parents and guardians of Caleb, brought a "wrongful birth" action against USF based on the negligence of Dr. Kousseff. The action was filed in the circuit court in Hillsborough County.

The case was tried before a jury in July 2007. The court directed a verdict in favor of the plaintiffs with regard to USF's liability, finding that Dr. Kousseff had been negligent as a matter of law, and that his negligence was a legal cause of Caleb's birth. The jury returned a verdict awarding the Estradas, as Caleb's guardians, a total of $18,553,000 in damages, broken down as follows: (a) $53,000 for economic losses; and (b) $18.5 million for future economic expenses. The jury further awarded Daniel and Amara Estrada, as individuals, $1.5 million apiece for past mental anguish resulting from Caleb's birth, and an additional $1 million each for future mental anguish, for a total of $2.5 million in pain and suffering damages per parent.

The jury apportioned the fault for Caleb's birth as follows: Dr. Kousseff, 90 percent; Dr. Pollack, 10 percent.

On August 17, 2007, in accordance with the jury's apportionment of fault, the trial court entered a judgment against USF and in favor of: (a) Daniel and Amara Estrada, as guardians, in the amount of $16,697,700; (b) Daniel Estrada, individually, in the amount of $2.25 million; and (c) Amara Estrada, individually, in the amount of $2.25 million. A cost judgment also was entered, awarding the Estradas $26,994.87.

USF appealed the judgment. On March 2, 2009, the Second District Court of Appeal affirmed, per curiam.

USF paid the Estradas $200,000 under the sovereign immunity cap.

CLAIMANTS' POSITION:

USF is vicariously liable for the negligence of its employee, Dr. Kousseff, whose negligent advice regarding the risk of Aiden's birth defects recurring in a second child deprived the Estradas of the opportunity to avoid conception or terminate a pregnancy. As a consequence of Dr. Kousseff's negligence, the Estradas have incurred, and will continue to incur, extraordinary expenses in caring for Caleb, whose significant impairments render him permanently incapable of caring for himself. The Claimants urge that a claim bill be enacted awarding them the entire excess judgment of $20,997,700, together with $26,994.87 in costs, and approximately $3.8 million in interest. (The claim for interest

is based on an argument concerning the availability of insurance coverage, which will be discussed below.)

As drafted, the bill provides for the payment of $21,197,700. This sum must be reduced by $200,000 to reflect the payment that USF has made to the Claimants.

USF's POSITION:

USF does not dispute that Dr. Kousseff was negligent in failing to diagnose Aiden with SLO and advising the Estradas that Aiden's birth defects did not signify an increased risk that a second child would be similarly impaired. Instead, USF makes a number of arguments, the goal of which is to urge defeat of the bill primarily on policy grounds. These arguments include:

(a) "Wrongful birth" is a rare and controversial cause of action. Dr. Kousseff's negligence did not cause Caleb's birth defects. Caleb's life is not "wrongful" and, though caring for him poses challenges, his parents love him and are enriched by his existence. Sovereign immunity should not be waived to provide compensation in a situation where, as here, a human being would not be in existence but for the negligence of the public employee.

(b) The verdict was excessive. The pain and suffering damages awarded to the parents individually far exceeded a rational assessment of their suffering. Moreover, the continuum of care plan for Caleb that the Claimants offered at trial was full of services that either Caleb does not need or will be paid for by insurance or through governmental programs such as the educational services available in the public schools. Not only that, the Claimants' continuum of care plan was based on a normal life expectancy, when a lifespan of 20 or 30 years is more likely. The damages should not have exceeded $3 million.

(c) Dr. Pollack's negligence was a supervening cause of the "wrongful birth." The jury should have found her 100 percent liable—or at least much more at fault than 10 percent.

Ultimately, it is USF's position that there is no compelling reason to enact the instant claim bill, which should be rejected in its entirety.

CONCLUSIONS OF LAW:

As provided in s. 768.28, F.S. (2009), sovereign immunity shields USF against tort liability in excess of $200,000 per occurrence. See Eldred v. North Broward Hospital District, 498 So. 2d 911, 914 (Fla. 1986); Paushter v. South Broward Hospital District, 664 So. 2d 1032, 1033 (Fla. 4th DCA 1995).

Under the doctrine of respondeat superior, USF 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). Dr. Kousseff was an employee of USF and was acting in the course and scope of his employment when treating Aiden Estrada. Accordingly, Dr. Kousseff's negligence in connection with his care of Aiden, including the bad advice given to the Estradas regarding the risk of recurrence, is attributable to USF.

The Florida Supreme Court, in Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992), recognized the existence of a cause of action for "wrongful birth," explaining that the claim is "a species of medical malpractice" arising from the birth of "an impaired or deformed child," where the parents allege that "negligent treatment or advice deprived them of the opportunity or knowledge to avoid conception or to terminate the pregnancy." Id. at 417 n.2. The purpose of such an action is to "recover damages for the extraordinary expense of caring for the impaired or deformed child, over and above routine rearing expenses." Id. Such damages, being for the benefit of the child, should be placed in trust. Id. at 424. In addition to economic damages, the parents in a "wrongful birth" action are entitled to recover individually for "mental anguish caused by the birth of a deformed child." Id. at 422-23.

The facts of this case are similar to those of Kush, where, as here, the doctor advised parents that their son's birth defects were an accident of nature and that they could have another child without incident. Id. at 417. The parents in Kush, as the Estradas did in this case, subsequently had another child, who had the same birth defects as their first child. Id.

It is concluded based on Kush that Dr. Kousseff's negligence proximately caused the "wrongful birth" of Caleb Estrada, for which USF is liable.

Generally speaking, each joint tortfeasor whose negligence was a proximate cause of the plaintiff's injury is liable for his or her share of the damages, under comparative fault principles. In this case, the jury apportioned the fault between Dr. Kousseff, whose employer the Estradas had sued, and Dr. Pollack, whom the defendant had named as a joint tortfeasor pursuant to a Fabre defense. See Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993). USF, recall, was found by the jury to have been 90 percent at fault, due to the actions of Dr. Kousseff, and Dr. Pollack 10 percent at fault.

A negligent party is *not* liable for someone else's injury, however, if a separate force or action was "the active and efficient intervening cause, the sole proximate cause or an independent cause." Department of Transp. v. Anglin, 502 So. 2d 896, 898 (Fla. 1987). Such a supervening act of negligence so completely disrupts the chain of events set in train by the original tortfeasor's conduct that any negligence which occurred before the supervening act is considered too remote to be the proximate cause of any injury resulting from the supervening act. On the other hand, if the intervening cause were foreseeable, which is a question of fact for the trier to decide, then the original negligent party may be held liable. Id. In circumstances involving a foreseeable intervening cause, the original tortfeasor sometimes is said to have "set in motion" the "chain of events" that resulted in the plaintiff's injury. See Gibson v. Avis Rent-a-Car System, Inc., 386 So. 2d 520, 522 (Fla. 1980).

The undersigned rejects USF's argument that Dr. Pollack's negligence constituted a supervening act that relieved USF of liability for Dr. Kousseff's negligence. Although Dr. Pollack's negligence occurred after Dr. Kousseff's initial failure to diagnose Aiden with SLO, it took place before Dr. Kousseff gave the Estradas the green light to have another child. Had Dr. Kousseff not given the Estradas the bad advice regarding the risk of recurrence, Dr. Pollack's negligence would have caused no harm, for the Estradas were not going to have another child absent assurance that they could do so without incident. At most, Dr. Pollack's negligence combined with that of Dr. Kousseff to cause a single injury, namely the "wrongful birth" of Caleb. This is how the case was presented—correctly, in the undersigned's view—to the jury, whose apportionment of the fault was

reasonable and has been accepted herein as a finding of fact.

The Estradas offered sufficient evidence to prove the elements of damages available under Kush, both economic and noneconomic. The trial court, in entering the final judgment, appropriately reduced the damages by 10 percent, according to comparative fault principles, to relieve USF of any liability for Dr. Pollack's negligence. The undersigned concludes that the damages awarded in the final judgment are supported both by the evidence presented and the governing law.

LEGISLATIVE HISTORY:

This is the first year that this claim has been presented to the Florida 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 Claimants' law firm, Searcy Denney Scarola Barnhart & Shipley, P.A., has agreed to limit its fees to 25 percent of the recovery. The Claimants' attorneys represent that they have incurred approximately $209,000 in litigation costs. They state that the net proceeds to be distributed to the Estradas would be reduced by these costs.

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." Unless amended, therefore, the bill would not allow the Claimants' attorneys to charge a fee of 25 percent of the gross recovery and, in addition to that, be reimbursed for costs out of the bill's proceeds; such would reduce the Claimants' recovery by more than 25 percent of the total amount awarded.

OTHER ISSUES:

One issue not discussed above concerns an evidentiary ruling of the trial court in the civil action with which USF vociferously disagreed. The trial judge did not permit USF to offer evidence or testimony on the Estradas' plans regarding a third child, which by 2007, when the trial took place, they had decided to have. The Senate Special Master heard that

evidence in this proceeding, and found it to be of limited probative value. The facts, in brief, are this. In 2007, the Estradas decided to have another child. By this time (unlike the situation in 2004 when Caleb was conceived), they had been fully and accurately apprised of the risks of having another child with SLO. They also knew in 2007 something else unknown to them in 2004, namely that SLO could be detected in utero using amniocentesis. Their plan, therefore, if Amara were to become pregnant again, was to have the unborn child tested for SLO and, if the test were positive, to abort the pregnancy. Amara did conceive, the tests showed the unborn child did not have SLO, and ultimately Amara delivered a healthy third child without incident.

The undersigned does not consider the Estradas' 2007 family planning decision to be inconsistent, as USF argues, with their testimony that, in 2003-04, before Caleb's birth and diagnosis with SLO, they would have adopted a child absent assurance that a second baby would not have the same birth defects as Aiden. The circumstances in 2007 were materially different from those in 2003-04. The facts concerning the Estradas' efforts to have a third child are irrelevant to the case at hand.

With regard to the noneconomic damages awarded to the Estradas individually for mental anguish, s. 766.118(2), F.S., should be considered. This statute places a limit of $500,000 per claimant on the noneconomic damages recoverable in a medical malpractice case. Section 766.118(7), F.S., however, provides that this cap is not applicable to actions governed by sovereign immunity law. Presumably the rationale for excluding actions governed by s. 768.28, F.S., from the limitation on noneconomic damages imposed under s. 766.118, F.S., is that the sovereign immunity cap of $100,000 per person is *lower* than the $500,000 cap prescribed in s. 766.118, F.S. In enacting a claim bill, the legislature, of course, can reduce an excess judgment in any way it sees fit. Because it would seemingly be anomalous for a claimant to be allowed to recover *more* in noneconomic damages from a governmental entity, via a claim bill, than otherwise would be allowable in a suit against a private defendant, the undersigned recommends that, if this claim bill is approved, the Estradas' respective individual recoveries be reduced, from $2.25 million apiece, to $500,000 per person. This would reduce the excess

judgment amount by $3.5 million.

The bill as drafted does not specify that the funds awarded for the care of Caleb Estrada be placed in trust for that purpose. The undersigned recommends that the bill be amended before approval to require that such funds be held in trust.

The bill as drafted provides for the payment of the sum of $21,197,700 to the Claimants. This amount does not take into account the $200,000 payment that USF already has made. The undersigned recommends that the bill be amended before approval to reduce the amount claimed by $200,000.

The last issue that warrants mention involves insurance. USF has a self-insurance program that might provide coverage for this loss. The underlying coverage of up to $3 million per incident was provided by University of South Florida Health Sciences Center Insurance Company (HSCIC) pursuant to a policy that was not provided to the Senate Special Master. In addition to the HSCIC policy, there are two stand-alone excess polices, which are reinsured through Lloyd's, providing additional layers of coverage above $3 million, with limits of $5 million and $10 million, respectively. The excess policies, which were admitted into evidence in this proceeding, are "follow form" policies, meaning that their terms and conditions mirror those of the underlying policy. Thus, although USF did not produce a copy of the primary policy, it is possible to deduce, from the excess policies, the outlines of the underlying coverage, if not all the details thereof.

The HSCIC coverage is limited to $200,000 per incident when sovereign immunity applies, as here. If a claim bill were enacted and signed by the governor, however, then the $3 million limit would be activated. (The Claimants' attorneys argue that this insurance also would cover prejudgment interest, which is why they urge that nearly $4 million in interest be added to the amount of the claim. The bill in its present form, however, does not include prejudgment interest. Given that s. 768.28(5), F.S., excludes punitive damages and prejudgment interest from the liability that can attach to the state and its agencies for tort claims, an award for prejudgment interest is probably inappropriate, if not

prohibited.) In theory, then, there is potentially available $18 million in liability insurance for this loss, excluding prejudgment interest, assuming a claim bill is passed. The Claimants' attorneys argue, moreover, that the entire judgment ultimately would be covered because the insurers acted in bad faith.

The Senate Special Master was not provided sufficient information to make detailed findings or conclusions regarding insurance coverage, and in any event such determinations are beyond the scope of the Master's delegated authority. The possibility that insurance companies might be at risk for this loss should be noted, however. If this claim bill is approved, the undersigned recommends that it be amended to maximize the chances of an insurance recovery for the benefit of the state. Based on the information at hand, the undersigned is unable, at this time, to propose an amendment that might accomplish such a purpose.

In conclusion, the undersigned must recommend against the enactment of this bill, not because the claim lacks merit, but for reasons of policy. To be clear, the facts that were proved at trial and reestablished at final hearing in this proceeding make out a textbook case of wrongful birth under Florida law. Indeed, USF's liability is so clear that the trial court directed a verdict in the plaintiffs' favor on the issue. The undersigned's primary concern about this bill, as drafted, is that, were it to pass, a large sum of public money would be appropriated—at a time when the state's budget is tight—to pay a claim that might be covered by insurance.

In light of this concern, the undersigned believes that the bill should not advance. The undersigned would be able to recommend enactment of this bill, however, if it were amended to require that the claim be paid exclusively, or at least to the maximum extent possible, out of insurance proceeds. (No opinion is expressed herein concerning the constitutionality of such legislation.)

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 34 (2010) be reported UNFAVORABLY.

Respectfully submitted,

John G. Van Laningham
Senate Special Master

cc: Senator Dennis L. Jones
R. Philip Twogood, Secretary of the Senate
Counsel of Record

CS by Health Regulation:
Increases the sum to be paid under the claim bill from $21,197,700 to $24,823,212.92 and requires the claim to be paid, to the maximum extent possible, out of insurance proceeds. The amendment removes references to the General Revenue Fund as the funding source.