



THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
02/05/08	SM	Fav/1 amendment

February 5, 2008

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

Re: **SB 26 (2008)** – Senator Gary Siplin
Relief of Stacie Wagner

SPECIAL MASTER'S FINAL REPORT

THIS IS A VIGOROUSLY CONTESTED CLAIM FOR \$800,880 ARISING OUT OF A 2001 ACCIDENT IN WHICH AN ORANGE COUNTY FIRE DEPARTMENT VAN STRUCK AND KILLED 11-YEAR-OLD ANGELICA HERNANDEZ AS SHE ATTEMPTED TO RUN ACROSS SEMORAN BOULEVARD/SR 436 IN ORLANDO.

FINDINGS OF FACT:

I held a hearing on this claim in connection with the bill filed in the 2007 Session. The parties submitted updated information in lieu of another hearing on this year's bill. The findings set forth below are based upon the record developed at last year's Special Master hearing and the updated information provided by the parties.

On June 4, 2001, Angelica Hernandez was struck and killed by a van owned and operated by the Orange County Fire Department as she attempted to run across Semoran Boulevard/SR 436 in Orlando. Angelica was 11 years old at the time of her death.

The accident occurred at dusk at or about 8:47 p.m. Angelica was wearing dark clothes. She may have also been listening to music over headphones.

SR 436 is a major, six-lane thoroughfare. The speed limit in the vicinity of the accident is 50 MPH. There is a raised concrete median in the center of the road.

Angelica was attempting to cross SR 436 in the middle of a block rather than at a cross-walk. The apartment complex where Angelica lived was on the west side of SR 436. Angelica sometimes crossed SR 436 at that location to visit friends who lived at an apartment complex on the other side of the road.

Angelica was running from the median towards her apartment complex when she was hit. She was hit by an Orange County Fire Department van driven by Marc Klein. The van was traveling in the lane closest to the median, and Mr. Klein testified that he never saw Angelica before he hit her. The van had its headlights on at the time of the accident.

There is conflicting evidence as to the speed at which Mr. Klein was traveling at the time of the accident. The claimant's experts opined that Mr. Klein was traveling between 60 and 63 MPH. The County's expert opined that Mr. Klein was traveling between 45 and 50 MPH, which is consistent with the eye-witness testimony of the driver and passenger of a vehicle that was traveling slightly behind and in the lane to the right of Mr. Klein's van. In my view, the more persuasive evidence establishes that Mr. Klein was not speeding at the time of the accident.

The driver and passenger of the car traveling behind and to the right of Mr. Klein's van testified that they saw Angelica running out in front of the van just before she was hit. The fact that they were able to see Angelica running in front of the van but Mr. Klein did not see her until after he hit her strongly suggests that he was distracted or not paying full attention to the road in front of him at the time of the accident.

On this issue, there is conflicting evidence as to whether Mr. Klein was distracted by a cellular phone call at or just before the time of the accident. Mr. Klein testified that he was not using his cellular phone while he was driving, but he testified that he received a call from his wife shortly after the accident.

Mr. Klein's cellular phone records show that he received calls at 8:47 p.m. and 9:02 p.m. on the night of the accident. He testified that the 8:47 p.m. phone call was from his wife. He was unable to account for the 9:02 p.m. call because he testified that after he received the call from his wife, he left the phone in the van and did not use it again that night.

There are a number of inconsistencies and incongruities in Mr. Klein's timeline of events on the night of the accident, which call into question his testimony. With respect to the cellular phone call, for example, Mr. Klein testified in his first deposition (less than 9 months after the accident) that his wife was calling him because he should have been off of work at that point, which is consistent with the call coming in after 9:00 p.m. It was not until his second deposition (3 years later and after copies of his cellular phone records were obtained) that Mr. Klein testified that he received the call from his wife at 8:47 p.m. as he was running back and forth across three lanes of traffic between his van and Angelica's body.

In my view, the testimony of Mr. Klein's wife (in conjunction with the emergency dispatch records) is the most reliable source regarding the timeline of events and, specifically, the timing of the cellular phone calls to Mr. Klein's phone on the night of the incident. Mrs. Klein testified that she called Mr. Klein around the time that he was scheduled to get off work, which was 9:00 p.m. She thought she called him prior to 9:00 p.m., but she acknowledged that it could have been a minute or two after 9:00 p.m. She further testified that immediately after she spoke to Mr. Klein and learned that he was in an accident, she left the house and drove to the scene. On the way, she attempted to call Mr. Klein's cellular phone but the calls just went to voicemail. Mrs. Klein's cellular phone records corroborate her testimony and are consistent with a timeline that starts with the cellular phone call being made at 9:02 p.m. rather than 8:47 p.m.

In sum, I find that it is more likely than not that the 9:02 p.m. call reflected on Mr. Klein's cellular phone records is the call that he received from his wife. As a result, the 8:47 p.m. phone call is unaccounted for, which calls into question Mr. Klein's credibility and his version of the events leading up to the accident. The Kleins did not appear at the Special Master hearing to clarify the inconsistencies in their prior

testimony, and based upon the totality of the evidence of record and the reasonable inferences that can be drawn therefrom, I find that it is more likely than not that Mr. Klein received the 8:47 p.m. call from someone other than his wife at or just before the time of the accident, which may have distracted him and contributed to his failure to see Angelica.

In making the foregoing finding, I did not overlook the emergency dispatch records, which reflect that the accident was first reported by Mr. Klein at 8:46:46 p.m., which means that the accident occurred shortly before that time, perhaps as early as 8:45 p.m. However, the evidence establishes that the cellular phone times are calibrated with the atomic clock, whereas the times on the dispatch records are not similarly calibrated. This does not mean that one set of times is right and the other set is wrong, but it means that a comparison of the times shown on the cellular phone records and the times shown on the dispatch records are not “apples to apples.” Indeed, it can be inferred from the totality of the evidence of record that the times on the emergency dispatch records are several minutes behind the atomic clock time. For example, Mr. Klein testified that his wife arrived on the scene as the helicopter was leaving with Angelica’s body, which was 9:16:37 p.m. according to the dispatch records, but Mrs. Klein’s cellular phone records reflect that between 9:13 and 9:17 p.m. she was on her cellular phone with Lt. Agans and, according to her deposition testimony, she was still on the Greenway/SR 417 and several minutes from the scene at the time. As a result, it is more likely than not that Ms. Klein did not arrive on the scene until around 9:20 p.m. atomic clock time, which equates to the 9:16:37 p.m. time shown on the dispatch records. This means that the 8:46:46 p.m. time shown on the dispatch records is likely closer to 8:49 p.m. atomic clock time, which in turn means that the 8:47 p.m. phone call came in just prior to the accident, not after the accident as Mr. Klein contends.

Angelica was not being supervised by an adult at the time of the accident or for the several hours leading up to the accident. According to Angelica’s mother, Stacie Wagner (the claimant), Angelica had gone outside to play that afternoon and was not expected back until her “curfew” of 9:00 p.m. Ms. Wagner was recovering from the birth of a child at the time and she took pain medication and dozed off at approximately 8:00 p.m.

Ms. Wagner testified that Angelica was very mature and responsible for her age, and Angelica's school records reflect that she was a good student. Nevertheless, I find that Ms. Wagner acted irresponsibly and unreasonably by allowing an 11-year-old child to go unsupervised until 9:00 p.m., particularly since Ms. Wagner knew that despite her prior admonitions, Angelica often crossed SR 436 to visit friends. Indeed, Ms. Wagner testified that on several prior occasions, she had to call the police when she was unable to locate Angelica and/or she failed to return home by her curfew. Ms. Wagner's failure to supervise Angelica or arrange proper supervision on the day of the accident was, in my view, a material contributing cause to Angelica's death. As such, I do not share the view of Ms. Wagner (and the jury) that she bears no responsibility for her daughter's death.

At the time of Angelica's death, Ms. Wagner had four other children. (She has since had another child.) None of the other children lived with Ms. Wagner at the time of the accident. They lived with various family members in New York. Ms. Wagner and Angelica were living with Ms. Wagner's boyfriend, Richie Garcia, at the time.

Ms. Wagner's twin sister, Traci Santos, testified in deposition that Ms. Wagner and Mr. Garcia were drinking and doing drugs (marijuana) and neglecting Angelica. Ms. Wagner adamantly denies past or present alcohol abuse or drug use.

In the year leading up to Angelica's death, the Department of Children and Families (DCF) went to Ms. Wagner's home on several occasions to investigate claims that her children were being neglected and/or not being properly supervised. In an April 2001 report, DCF found "some indicators" of inadequate supervision by Ms. Wagner.

Ms. Wagner attributes her sister's deposition testimony to her anger about Angelica's death. She attributed Angelica's less than ideal living conditions at the time to her alcoholic ex-husband who took everything (including two of her children) when he left her in mid to late 2000. Ms. Wagner and her sister have reconciled, and they are living together in New York with four of Ms. Wagner's remaining five children.

Ms. Wagner was living in New York at the time of the Special Master hearing, but she testified at the hearing that she intends to return to Florida with her children in the near future. She further testified that Mr. Garcia has proposed to her and that they intend to marry when she returns to Florida.

Angelica is buried in New York. Her funeral expenses, \$8,000, were paid by Angelica's uncle. Ms. Wagner has no legal obligation to repay those expenses, but she feels a moral obligation to do so.

Ms. Wagner received only \$10,000 of the \$100,000 paid by the County under the sovereign immunity cap. The balance of the funds went to attorney's fees and costs.

Ms. Wagner testified at last year's Special Master hearing that if the claim bill is approved, she intends to use the proceeds to purchase a house. Of the remaining proceeds, she testified that she intends to donate 10 percent to the church that helped her get through Angelica's death and the remainder to a charity that helps children in need.

The County is self-insured up to \$1 million. It has already incurred fees and costs related to this claim of approximately \$267,000, which means that if the claim bill is approved, the County will have to pay approximately \$733,000 before its excess insurer's obligation is triggered. The excess insurer is in receivership, which means that there is no guarantee that it will be able to pay any excess claim (approximately \$70,000 under the bill, as filed) and the County would look to a state guarantee fund for payment if its excess insurer is unable to pay.

Any payments by the County would be made from a risk management trust fund. The County's contingent liability related to this claim has been "budgeted for" in the trust fund already. Payment of the claim will not have a direct operational impact on the County Fire Department or the County as a whole.

Since the time of the accident, an elevated bike path/walkway has been constructed over SR 436 just to the south of the area where Angelica was killed.

No disciplinary action was taken against Mr. Klein related to the accident. He retired from the County Fire Department in October 2006 because of a lingering back condition unrelated to the accident that killed Angelica.

LITIGATION HISTORY:

In June 2002, Ms. Wagner (then known as Stacie Reyes), as personal representative of Angelica's estate, filed suit against Orange County. After extensive discovery and unsuccessful mediation, a 4-day jury trial was held in March 2005.

The jury found the County negligent and awarded \$8,000 in economic damages (funeral expenses) and \$1.4 million non-economic damages. The jury allocated 61 percent of the negligence to the County, 39 percent to Angelica, and 0 percent to Ms. Wagner. The jury specifically found that Ms. Wagner was not negligent.

In June 2005, the court entered a final judgment in favor of Ms. Wagner for \$858,880, which reflects the County's 61 percent share of the jury verdict, plus costs of \$42,000. Thus, the total judgment entered against the County was \$900,880. The County did not appeal the judgment.

In July 2005, the County paid \$100,000 in partial satisfaction of the judgment in accordance with s. 768.28, F.S. The Satisfaction of Judgment includes a reservation of the claimant's right to seek a claim bill for the remaining \$800,880 of the judgment.

The claimant unsuccessfully attempted to obtain copies of the County's litigation records pursuant to the Public Records Act. An appellate court recently held that such records remain exempt from disclosure while a claim bill is pending. See Wagner v. Orange County, 960 So.2d 785 (Fla. 5th DCA 2007).

CLAIMANT'S POSITION:

- The jury verdict is entitled to deference and should be given full effect.
- Mr. Klein was negligent in his operation of the van in that he was speeding, distracted, and/or otherwise not exercising reasonable care under the circumstances.

- Angelica was admittedly negligent in that she was attempting to cross SR 436 in the middle of a block rather than in a cross-walk, but she was only 11 years old at the time and the primary cause of the accident was Mr. Klein's careless driving.
- Ms. Wagner was not negligent in her failure to supervise Angelica on the day of the accident because she was on bed rest at the time and she had no reason to believe that Angelica was going to leave the apartment complex and go across SR 436.

COUNTY'S POSITION:

- The County bears no responsibility for Angelica's death because Mr. Klein was not speeding, distracted, or otherwise negligent in his operation of the van, and Angelica darted out in front of him.
- Angelica and Ms. Wagner are solely responsible for Angelica's death in that Angelica was attempting to cross SR 436 outside of a cross-walk in violation of Florida law and Ms. Wagner acted irresponsibly by allowing her 11-year-old daughter to go unsupervised until 9:00 p.m. even though she knew that Angelica often crossed SR 436 to visit friends.

CONCLUSIONS OF LAW:

Mr. Klein had a duty to operate the van he was driving on the day of the accident with reasonable care. See ss. 316.183(1), 316.1925(1), F.S. Mr. Klein breached that duty when he was distracted by a cellular phone call at or around the time of the accident or otherwise not paying full attention to the road at the time of the accident. Mr. Klein's negligent operation of the van was a proximate cause of the accident that resulted in Angelica's death.

Mr. Klein was acting within the course and scope of his employment at the time of the accident. Therefore, the County is responsible for Mr. Klein's negligence.

Angelica violated s. 316.130(10) and/or (11), F.S., when she attempted to run across SR 436 in the middle of the block rather than at a cross-walk and, as a result, Angelica's own negligence contributed to her death. The percentage of fault

allocated to Angelica by the jury -- 39 percent -- is reasonable under the circumstances.

Ms. Wagner's failure to supervise Angelica on the night of the accident was, in my view, irresponsible and unreasonable. Ms. Wagner knew or should have known that Angelica might cross SR 436 based upon prior instances of her crossing the road without permission. Furthermore, it is irresponsible and unreasonable for Ms. Wagner to allow an 11-year-old child to be unsupervised and to stay out on her own until 9:00 p.m., which was after dark. Ms. Wagner's negligent supervision of Angelica contributed to her death because if she had been supervised she would not have gone across SR 436 in the first place. Thus, notwithstanding the jury verdict on this issue, I find that a portion of the fault for Angelica's death should be apportioned to Ms. Wagner and, in my view, a figure of 10 percent is reasonable.

In summary, I conclude that liability for Angelica's death should be apportioned as follows: 51 percent to the County; 39 percent to Angelica; and 10 percent to Ms. Wagner.

As to the damages, I find the amounts awarded by the jury -- \$8,000 in funeral expenses and \$1.4 million in non-economic damages -- to be reasonable.

The amount of the claim bill should be reduced to reflect a set-off of the \$8,000 received by Ms. Wagner from another source (*i.e.*, Angelica's uncle) to pay the funeral expenses and to reflect the allocation of a portion of the fault to Ms. Wagner. As adjusted, the claim bill should be for \$652,080, which is calculated as follows: \$1,408,000 (verdict) x 51% (County's revised share of liability) = \$718,080 + \$42,000 (taxable costs) - \$100,000 (partial satisfaction by County) - \$8,000 (set-off for funeral expenses paid by uncle).

ATTORNEY'S FEES
AND LOBBYIST'S FEES:

The claimant's attorney provided an affidavit stating that that attorney's fees will be capped at 25 percent in accordance with s. 768.28(8), F.S. The attorney's fees will be \$163,020 if the bill is approved at the amount recommended.

The lobbyist's fees are in excess of the 25 percent attorney's fee, and according to the contract between the claimant's attorney and the lobbying firm, the lobbyist's fees will be an

additional 5 percent of the final claim. Thus, the lobbyist's fees will be approximately \$32,604 if the bill is approved at the amount recommended.

The bill, as filed, provides that payment of attorney's fees, costs, and lobbyist's fees are limited to 25 percent of the final claim. If that language remains in the bill and the claim is paid in the amount recommended, the claimant will receive \$489,060 and the balance of \$163,020 will go towards attorney's fees, costs, and lobbyist's fees. If that language was not in the bill, the claimant would receive only \$456,456.

LEGISLATIVE HISTORY:

This is the second year that this claim has been presented to the Legislature. Last year's bill, SB 62 (2007), was not referred to committee.

RECOMMENDATIONS:

For the reasons set forth above, I recommend that Senate Bill 26 (2008) be reported FAVORABLY, as amended.

Respectfully submitted,

T. Kent Wetherell
Senate Special Master

cc: Senator Gary Siplin
Faye Blanton, Secretary of the Senate
House Committee on Constitution and Civil Law
Counsel of Record