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
2/15/08	SM	Fav/1 amendment

April 9, 2008

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

Re: **SB 64 (2008)** – Senator Alex Diaz de la Portilla
HB 787 (2008) – Representative Anitere Flores
Relief of Brian Daiagi

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM FOR $4,008,616.63 BASED UPON A JURY VERDICT TO COMPENSATE BRIAN DAIAGI FOR INJURIES HE SUFFERED IN A DIRT BIKE ACCIDENT AT A DRAINAGE CULVERT LOCATED ON PROPERTY OWNED AND MAINTAINED BY THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT.

FINDINGS OF FACT:

A hearing on this claim was held by a Senate Special Master in a prior year. In the absence of a request for another hearing, relying on the record and documents provided by the parties to supplement the record, in this de novo review, the prior Special Master's findings of fact and conclusions of law are adopted with modifications.

On August 10, 1992, Brian Daiagi, then 20 years old, and Richard Truntz, an off-duty police officer, were riding dirt bikes on the shoulder of Griffin Road near 178th Street in western Broward County. The property was owned and maintained by the South Florida Water Management District (SWFMD). Mr. Daiagi, an experienced dirt bike rider, was wearing full protective gear (helmet, chest guard, and boots) when he drove his dirt bike into a drainage culvert. He was thrown across the culvert, and based on the distance,

Mr. Daiagi's speed, at impact, was determined to be reasonable at 25.6 miles and hour.

Mr. Daiagi suffered spinal fractures and was paralyzed from the waist down. He is confined to a wheelchair, has bowel dysfunction and a non-functioning bladder which requires 24-hour catheterization.

LITIGATION HISTORY:

In 1996, Mr. Daiagi filed suit against the SFWMD, and BellSouth Telecommunications, inc. ("BellSouth"), owner of buried cables in the culvert. When it received permission to install the cables in 1987, BellSouth represented to the SFWMD that it would erect a fence blocking the culvert. An internal memorandum disclosed that the plan was abandoned when BellSouth determined the fence was not necessary to protect the cables. Prior to trial, Mr. Daiagi settled with BellSouth which subsequently paid him $200,000.

The major issue at trial and continuing now is whether SFWMD had absolute immunity based on the provisions of § 373.1395, Florida Statutes, the "recreational use immunity statute," or whether it had a duty to warn of a known, inconspicuous dangerous hazard that constituted an unforeseeable trap. See Department of Transportation v. Konney, 587 So.2d 1292 (Fla. 1991). Before trial, the court denied the SFWMD's motion for summary judgment, leaving to the jury as issues of fact whether the property was open for public use (thus, providing absolute immunity to the SFWMD under the statute), whether the SFWMD knew of the dangerous condition, and whether that condition was open to ordinary observation or a hidden trap.

In response to the verdict form questions, the jury answered that the land in question was not open to the public because the SFWMD had not allowed access across the land for recreational use, for example, as a park or for fishing, and, therefore, the recreational land immunity statute was not applicable. The jury determined that Mr. Daiagi was 20 percent negligent and that the SFWMD was 80 percent negligent for causing his injuries. The total jury verdict was $5,430,000, which when decreased by 20 percent equaled $4,344,000. The Amended Final Judgment of $4,008,616.63 reflects the setoff of insurance benefits and collateral sources.

In addition to $200,000 from BellSouth, the Claimant has received $33,000 of the $100,000 distribution from the SFWMD, after $25,000 was deducted for attorneys' fees and $42,000 was deducted for costs.

CLAIMANT'S POSITION: Mr. Daiagi continues to be a wheelchair-dependent paraplegic. The claim bill accurately reflects the facts, and should be passed. The Legislature has the discretion and, in 2007, passed claim bills that were outside the 4-year limit set by Section 11.065(1), Florida Statutes. The argument that the "recreational immunity" statute is applicable was rejected by the jury, the appellate court, and by previously assigned House and Senate Special Masters.

RESPONDENT'S POSITION: The Respondent makes the following points:

1. The 4-year statute of limitations in Section 11.065(1), F.S., is applicable and bars a favorable recommendation and passage of the bill. The limitation was only waived, during the legislative session of 2007, in cases against local hospital districts, cities, counties, and the state when the governmental entity supported the passage of the bill or did not raise the issue.

2. Numerous state senators in considering a prior Daiagi claim bill indicated that it was incredulous that anyone could state that a no-trespassing sign three miles away on the other side of the canal, even if in existence at the time of the accident, could reasonably be used as a basis to hold the SFWMD liable when the area where Mr. Daiagi was injured was clearly in fact made open and available and used by the public for outdoor recreation.

3. Recent history has shown us that there are numerous jury and court decisions that have been ludicrous and flat out wrong. One only needs to hear the words "O. J. Simpson case" or "McDonald's hot coffee case" to realize that our justice system can yield unjust results.

4. Claimant's "case/claim" in essence is based upon emotion and this is further demonstrated by the comments found in the claimant's November 9, 2007 response to the Special Masters. The claimant attempts to evoke emotion by alleging that the District has gone "so far as to impugn the integrity of the previous Senate Special Master assigned this

case, Reynold Meyer, by explicitly alleging that Special Master Meyer recommended passage of the previously filed Daiagi claim bill in 2004 because Special Master Meyer had a sister who suffered from similar injuries as Mr. Daiagi."

First, the District response did not mention Mr. Meyer by name but only referenced "the Senate Special Master."

Further, the District's response stated solely, "it became apparent that the Senate Special Master may have based his recommendation on emotion as it was revealed that he had a sister who was a paraplegic, like Mr. Daiagi." As noted on page five of the District's October 30, 2007, response, it wasn't just the District that believed that the Senate Special Master's recommendation was out of line. In fact, it was stated by several of the Senators, who voted for the bill to get out of committee, that if the bill came up for any further review that they would vote "no" on the claim bill. "The Special Master was questioned by the Senate committee considering the claim bill and based upon the line of questioning it became very clear that the Senators recognized that there was no logic for District liability and in fact, an injustice would be served if the District would be required to pay any more money to Mr. Daiagi."

The District was not attempting to impugn the integrity of the Senate Special Master but merely making the point that it is likely that a person who is supposed to be independent may be influenced, perhaps even unconsciously, by latent biases and emotions when a close relative such as a sister is also a paraplegic as a result of an accident. Clearly, if such a person were a prospective juror, both the Courts and any defendant would be highly concerned that there would be an increased likelihood that emotional considerations and latent biases would reduce the persons objectivity and skew that person's opinion even where that person may have the best of intentions and the utmost integrity. There is no intent or attempt to impugn the prior Special Master's integrity and the facts which the claimant seeks to avoid clearly demonstrate that the District was immune from liability under Section 373.1395, Florida Statutes, because the land was open and available to the public for outdoor recreation and was accessed by the public for outdoor recreation without any genuine issue to the contrary.

5. Regarding funding the claim bill, the Chief Financial Officer Paul Dumars of the SFWMD wrote, on October 25, 2007, that the SFWMD is self-insured and that a large, unbudgeted liability claim "of this magnitude" would result in "extensive hardship and programmatic impacts" forcing the District "to undertake mid-year evaluations and funding reductions within ad valorem core programs such as Lake Okeechobee, Kissimmee River, Everglades . . . functions."

LEGISLATIVE HISTORY: Previous claim bills filed on behalf of Mr. Daiagi were, SB 16 in 2003, which died in the Committee on Rules and Calendar; and, SB 12 in 2004, that passed in the Committee on Natural Resources, was withdrawn from the Committee on Comprehensive Planning, and withdrawn from further consideration from the Committee on Finance and Taxation.

CONCLUSIONS OF LAW: In response to the issues raised by the Respondent, SFWMD, the conclusions of law are as follows:

1. Section 11.065(1), Florida Statutes, states:

> "no claims against the State shall be presented to the Legislature more than four years after the cause for relief accrued. Any claim presented after this time of limitation shall be void and unenforceable"

However, because the Legislature has demonstrated that it can and will waive the requirement, as the SFWMD noted, the claim bill has been reviewed on the merits.

2. With regard to the comments regarding the debates over a previous claim bill, the undersigned, having not been the assigned Senate Special Master at the time, has no knowledge and is unable to comment.

3. Concerning the issue of whether the jury verdict was improper and based on emotion, the undersigned, having not had a Special Master's hearing, must determine the merits of the claim based on the documents presented, including the jury verdict form and the appellate court decision.

4. With regard to issues related to the family of the previous Special Master, the undersigned has no knowledge or information.

Finally, based on the documents provided and reviewed, the SFWMD failed to warn of a known, inconspicuous dangerous hazard that constituted an unforeseeable trap and was the direct and proximate cause of severe and permanent injuries to the Claimant.

ATTORNEY'S FEES AND LOBBYIST'S FEES: Attorneys' fees are set at 25 percent of any recovery, as required by s. 768.28, F.S. Costs for publications of notice of the claim bill in thirteen of the sixteen counties of the SFWMD were $195.19, as of October 1, 2007. Costs and lobbyists' fees of 7 percent of any monies paid to Mr. Daiagi are not within the limits set by section 3 of the bill.

OTHER ISSUES: The bill should be amended to reduce the amount of the award by $100,000 to reflect the amount of the judgment that has already been paid by the SFWMD.

RECOMMENDATIONS: Based on the foregoing, I recommend that Senate Bill 64 (2008) be reported FAVORABLY, as amended.

Respectfully submitted,

Eleanor M. Hunter
Senate Special Master

cc: Senator Alex Diaz de la Portilla
Representative Anitere Flores
Faye Blanton, Secretary of the Senate
House Committee on Constitution and Civil Law
Michael Kliner, House Special Master
Counsel of Record