THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
12/04/09	SM	Favorable

December 4, 2009

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

Re: **SB 46 (2010)** – Senator Durell Peadon, Jr.
Relief of Edwidge Valmyr

SPECIAL MASTER'S FINAL REPORT

THIS IS AN EQUITABLE CLAIM FOR $750,000 AGAINST THE CITY OF NORTH MIAMI ARISING FROM AN ACCIDENT THAT OCCURRED IN A CITY POOL, WHICH THE CITY'S LIFEGUARDS FAILED TO PREVENT, WITH THE RESULT THAT STANLEY VALMYR DIED FROM COMPLICATIONS OF DROWNING.

FINDINGS OF FACT:

On March 28, 2007, Edwidge Valmyr registered her son Stanley, 6, for a "Fun Day" sponsored by the City of North Miami (City). The Fun day was to take place on Friday, March 30, a day when school would be out for teacher planning. To register Stanley for this program, Ms. Valmyr paid a $15.00 fee. She also was required to sign two identically worded release forms, which provided in part as follows:

> For myself . . . or as the parent or guardian of a minor child participating in activities or using any facilities of the Parks and Recreation Department, I hereby waive any claim against the City of North Miami (City) and its agents, servants and employees, hereafter arising from injuries to myself or said child, which said injury

> is sustained while upon said facilities, participating in said activities or being transported therefrom or thereto, regardless of whether such injury is caused in whole or in part by the negligence of the City or by the negligence of agents, servants or employees of the City . . . .

At the time Ms. Valmyr registered Stanley, she understood that the Fun Day would be held at the Sunkist Grove Community Center, where the children would engage in various arts and crafts such as finger painting and coloring.

When Ms. Valmyr dropped Stanley off at the community center two days later on the morning of March 30, 2007, however, she learned that the children would be taken instead to the nearby Thomas Sasso Pool, which is a public facility located in, and operated by, the City. Stanley had not brought a bathing suit, but his mother told him he could swim in his short pants.

Ten children attended the Fun Day. They ranged in age from six to about 13. Stanley was one of the youngest children in the group. Three "counselors" employed by the City had charge of the children. None of the counselors had brought bathing suits to work; like Ms. Valmyr, they had not been notified in advance about the last-minute change in the program's venue, from the community center to the community pool.

The counselors took the kids to the pool, where one of the lifeguards instructed them on the pool rules. There were four lifeguards on duty that day—all employees of the City. After reviewing the rules, the lifeguard gave each child a swimming test. Many of the children were poor swimmers or, like Stanley, unable to swim. These children, including Stanley, were directed to remain in the shallow end of the pool, where the water is three feet deep.

While Stanley and the others played in the pool, the three counselors supervised them from the deck. Although the counselors ordinarily would get into the water with children who were swimming, on this day they did not do so. Also observing the children was Juliet Cam, one of the lifeguards. In accordance with policy, Ms. Cam was sitting in the

"primary" lifeguard chair near the deep end, rather than in the only other chair, which was located closer to the shallow end where the children were situated. Consequently, Ms. Cam was at least 15 feet away from the children, who comprised the only (or substantially all of the) bathers in the pool at the time.

The three other lifeguards on duty were not stationed around the pool, but rather remained inside the office, which is adjacent to the pool. This was the policy, which required that the lifeguards stay in the office unless guarding the pool. Because there were so few swimmers present that day, no one believed that more than one lifeguard was needed to watch the pool.

Some time in the middle of the afternoon, around 2:30 p.m., Stanley got into trouble in the water. Unnoticed by the counselors or the lifeguard, Stanley (according to several of the children) was "jumping" and strayed out of the shallow end of the pool into deeper water, where he was unable to keep his head up. One of the counselors, Shacora Jackson, heard a child yell, "He's pulling on me!"—or words to that effect—and saw Stanley being pushed or pulled toward the wall of the pool. Ms. Jackson immediately pulled Stanley out of the pool. Stanley was unresponsive and expelling water from the mouth. Ms. Cam, the lifeguard, noticed the commotion and began blowing her whistle. Two other lifeguards, hearing the whistle, ran from the office, quickly sized up the situation, and began performing CPR on the boy. Meantime, Ms. Jackson and Ms. Cam each separately dialed 911 on their cell phones to summon help.

Miami-Dade Fire Rescue paramedics responded promptly, as did officers from the North Miami Police Department. Upon arrival, the paramedics took over the task of performing CPR on Stanley, who had not been revived. Stanley was soon taken by ambulance to the hospital, where he was eventually stabilized with assisted respiration. Sadly, however, the near drowning had triggered a cardiac arrest and other complications, which starved his brain of oxygen, causing considerable damage; Stanley was alive but functionally brain-dead.

In time, Stanley was transferred to a rehabilitation center. There, on July 26, 2007, his tracheostomy tube became

dislodged, and Stanley passed away, despite the aggressive efforts undertaken to resuscitate him.

Some additional facts are relevant to the ultimate determination regarding the City's liability for damages in consequence of Stanley's death.

The Claimant's aquatic safety expert, Dr. John R. Fletemeyer, gave the opinion that, due to the size and shape of Thomas Sasso Pool, and in view of the number of nonswimmers in the water on March 30, 2007, a minimum of two lifeguards reasonably should have been on active duty and engaging in preventative life guarding practices at the time of Stanley's near drowning. The undersigned credits this testimony, which was not rebutted, and determines that the City breached the standard of care, which requires the provision of a reasonably sufficient number of attendants for the protection of bathers at a public pool.

It is further determined that the lifeguard on duty failed to exercise reasonable care in systematically scanning the entire pool for potential perils, thereby failing to observe in a timely manner the trouble that Stanley experienced keeping his head above water.

As a direct and proximate result of the City's failure to provide reasonable supervision of the children playing in the Thomas Sasso Pool, Stanley Valmyr nearly drowned, sustaining catastrophic injuries that led to his death a few months later.

The damages recoverable in a lawsuit for the wrongful death of a young child are potentially high. In this case, the City elected to settle with Ms. Valmyr for the sum of $950,000, plus up to $40,000 for medical expenses. (There is a medical lien of approximately $130,000, which the Claimant's counsel hopes will be reduced through negotiation.) Under the facts and circumstances, the undersigned finds that the amount of the settlement is reasonable and responsible.

LEGAL PROCEEDINGS:

In April 2008, Edwidge Valmyr, as personal representative of her son's estate, brought a wrongful death suit against the City. The action was filed in the Circuit Court in and for Miami-Dade County.

In or around August 2009, the City settled with Ms. Valmyr for $950,000, plus up to $40,000 to cover medical costs, receiving in return a release of further liability. The parties agreed that the City would make an initial payment of $200,000 under the sovereign immunity cap within 90 days after the signing of all settlement documents. The balance of $750,000 would be payable in eight annual installments of $93,750, beginning on the first anniversary of the enactment of a claim bill and ending on the eighth anniversary thereof. The parties anticipate the entry of a Final Consent Judgment that will incorporate and approve the terms of the settlement agreement.

As drafted, the claim bill provides that the initial installment payment will be due on the date upon which the bill becomes law. This does not conform to the terms of the settlement agreement, which calls for the first payment to be made one year after the claim bill is enacted. Moreover, the existing language is ambiguous and could be understood to mean that the sum of $93,750 is to be paid out in eight equal installments, rather than the sum of $750,000, payable in eight installments of $93,750.

CLAIMANT'S POSITION:

The City is vicariously liable for the failure of its employees to see Stanley go under water and nearly drown, which caused fatal injuries that could have been prevented had the City supplied a sufficient number of lifeguards, and had the lifeguards used reasonable care in supervising the pool. The City's imputed negligence directly and proximately caused Stanley's death from complications of drowning.

THE CITY'S POSITION:

The City accepts liability and acknowledges that it agreed to pay Ms. Valmyr a total of $950,000 to settle the case. The City supports the claim bill. Payment of the bill will not impair the City's ability to conduct normal operations.

CONCLUSIONS OF LAW:

As provided in s. 768.28, F.S.(2008), sovereign immunity shields the City against tort liability in excess of $200,000 per occurrence. Unless a claim bill is enacted, therefore, Ms. Valmyr will not realize the full benefit of the settlement agreement she has made with the City.

As a governmental entity operating a public swimming pool, the City owed its invitees a duty to keep the premises in a

reasonably safe condition. See Fla. Dep't of Natural Res. v. Garcia, 753 So. 2d 72, 75 (Fla. 2000). This duty includes the obligation to "warn the public of any dangerous conditions of which [the governmental entity] knew or should have known." Id. (footnote omitted).

Further, the standard of care for the operator of a public pool requires that "a reasonably sufficient number of attendants for the protection of the bathers" be provided. Pickett v. City of Jacksonville, 20 So. 2d 484, 487 (Fla. 1945). Whether a lifeguard "at a municipal swimming pool [who] fail[ed] to see a boy go and remain under water" was negligent is a question of fact for the jury. Id.

Under the doctrine of respondeat superior, the City 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 City is liable for the negligence of its lifeguards.

At least two lifeguards should have been actively observing the pool on the day Stanley nearly drowned, and the sole lifeguard who was watching should have prevented the tragic occurrence. These failures to use ordinary care breached the City's duty to keep the pool reasonably safe for invitees.

The pre-injury release that Ms. Valmyr executed on Stanley's behalf arguably extinguished the City's liability. Although the Florida Supreme Court recently ruled, in Kirton v. Fields, 997 So. 2d 349 (Fla. 2008), that such releases are invalid and unenforceable when the release involves participation in a commercial activity, the court specifically left open the possibility that a parent might have the authority to bind a minor's estate by the pre-injury execution of a release involving participation in a school- or community-supported activity. At the same time, however, the court hinted that the distinction between commercial and community-supported activities, such as it is, might not justify different treatment of pre-injury releases signed by the parents of minors. The court wrote:

> Our decision in this case should not be read as limiting our reasoning only to pre-injury

> releases involving commercial activity; however, any discussion on pre-injury releases in noncommercial activities would be dicta . . . .

Id. at 350 n.2.

Given the uncertainty surrounding the question of whether the release Ms. Valmyr signed is enforceable, the City could not be confident of prevailing on a waiver defense. On the other hand, Ms. Valmyr needed to be mindful that the release might be held to bar her recovery. Each side no doubt took the release into consideration in making decisions regarding settlement. Ultimately, the undersigned concludes that the release does not afford a sufficient basis for rejecting the instant claim. The amount that the City agreed to pay in settlement is sufficiently discounted from the much higher amount a jury might have awarded had the case gone to trial to convince the undersigned that the settlement at hand is both reasonable and responsible. The agreed upon sum of $950,000 would compensate Ms. Valmyr fairly for the City's culpability in this unfortunate incident.

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), F.S., 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." Ms. Valmyr's attorneys, Grossman Roth, P.A., have submitted an affidavit attesting that their fee in connection with the instant claim bill would be limited to 25 percent of the compensation being sought. If there are lobbying fees, those fees will be included under the 25 percent cap.

Ms. Valmyr's former attorney has filed a charging lien seeking compensation for his work in the matter. The bill provides that the "total amount paid for attorney's fees, lobbying fees, costs, and other similar expenses relating to this claim may not exceed 25 percent of the amount awarded under this act." Presumably this means that any sum paid to extinguish the charging lien would need to come under the 25 percent cap.

OTHER ISSUES:

Stanley's father, Edgar Osias, has not asserted a claim against the City or otherwise sought to assert any rights that he might have in consequence of Stanley's death. His current whereabouts are unknown. As part of the settlement, Ms. Valmyr agreed to indemnify the City against any claims arising from her decisions as Stanley's personal representative, including decisions relating to the lawsuit, settlement, and disbursement of settlement funds.

Ms. Valmyr is not a U.S. citizen. She is a Haitian national who has been living in the United States, legally, since February 19, 2000. Her Permanent Residence Card expires on May 16, 2011. Ms. Valmyr reports that she is seeking U.S. citizenship.

RECOMMENDATIONS:

For the reasons set forth above, I recommend that Senate Bill 46 (2010) be reported FAVORABLY.

Respectfully submitted,

John G. Van Laningham
Senate Special Master

cc: Senator Durell Peadon, Jr.
R. Philip Twogood, Secretary of the Senate
Counsel of Record