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 50 (2010)** – Senator Nan H. Rich
Relief of Madonna Castillo

SPECIAL MASTER'S FINAL REPORT

THIS IS AN EQUITABLE CLAIM FOR $500,000 AGAINST THE CITY OF HIALEAH ARISING FROM AN ACCIDENT THAT OCCURRED IN A CITY POOL, WHICH THE CITY'S LIFEGUARDS FAILED TO PREVENT, WITH THE RESULT THAT MADONNA CASTILLO IS BLIND IN ONE EYE.

FINDINGS OF FACT:

On July 3, 1998, Madonna Castillo, then aged 12, went to the Milander Pool, which is a public facility located in, and operated by, the City of Hialeah, Florida (City). While standing in the shallow end of the pool, talking with her sister, Ms. Castillo was punched forcefully in the right eye by another swimmer, a boy about 17 years old. There is no evidence in the record, and neither party has argued, that the boy (whom no one ever identified) intentionally struck Ms. Castillo; by all accounts, the collision between them was accidental. The blow happened so quickly that Ms. Castillo literally never saw it coming.

None of the lifeguards on duty at the time of the accident saw it occur, either. Years later, at the jury trial during which Ms. Castillo's negligence claim against the City was heard, the plaintiff presented evidence tending to establish that some time before the accident, a lifeguard had told two

teenage boys, including the one who later struck Ms. Castillo, to move away from the children's area of the pool because their behavior was too rowdy. According to this evidence, the lifeguard left his post shortly afterwards and stopped supervising the teens.

There is no dispute that the Ms. Castillo's eye was severely injured. The impact, which was likened to being struck by a tennis ball traveling at 90 miles per hour, caused a vitreous hemorrhage (essentially, bleeding inside the eye), which led, in turn, to Ms. Castillo's developing neurovascular glaucoma. Despite aggressive medical intervention, Ms. Castillo lost sight in her right eye. In the aftermath of the injury, Ms. Castillo incurred medical expenses totaling approximately $41,000.

Since the accident, the glaucoma in Ms. Castillo's damaged eye has proved resistant to treatment. The uncontrollable pressure causes her to suffer frequent headaches. The injury is disfiguring as well, the right eye appearing visibly damaged. Eventually, Ms. Castillo's right eye will need to be surgically removed and replaced with a prosthetic eye. The procedure will cost approximately $25,000. After that occurs, the prosthetic eye will need to be replaced periodically, at a cost of about $2,000 per procedure.

Ms. Castillo presently uses medications for her eye that cost a couple of hundred dollars per month. She can anticipate a lifetime of medication therapy because, after her right eye is removed, the socket will need routine treatment.

When Ms. Castillo's negligence claim against the City was litigated in court, a key factual issue was whether, before the injury took place, one of lifeguards on duty had reprimanded the swimmer who later collided with Ms. Castillo for engaging in horseplay—and whether the lifeguard should have removed this swimmer from the pool. This was a critical issue because, generally speaking, only if the City (through its agents, the lifeguards) was on notice of the dangerous condition, namely the reckless swimmer, would the City have been under a legal duty to protect invitees to the pool such as Ms. Castillo from this swimmer. Put another way, the injury would not have been foreseeable—and hence preventable by the City in the exercise of due care (as Ms. Castillo has maintained it was)—unless the City

had reason to believe that this swimmer posed a danger to others.

As mentioned, at the civil trial Ms. Castillo presented competent, substantial evidence (i.e. her older sister's testimony) that a prior warning had been given to the swimmer. The City was unable to produce evidence to the contrary, and the jury apparently believed Ms. Castillo's sister's testimony on the subject. The sister did not testify at the hearing on the claim bill, so the undersigned's ability independently to assess her credibility is limited. Because the City is not contesting liability at this point, however, the undersigned accepts as credible the evidence presented at the jury trial and finds that the lifeguard (and thus the City) knew, or should have known, of the dangerous condition that caused Ms. Castillo's injury.

Being on notice that the swimmer posed a risk of harm, the lifeguard should have removed the swimmer from the pool—or at least have kept a watchful eye on him. The lifeguard's failure to take reasonable steps to prevent harm was a breach of the City's duty to use due care to protect invitees. The City, in short, was negligent in this instance.

The jury found, as the undersigned does, that the swimmer who collided with Ms. Castillo was negligent too. The jury in the civil trial was asked to compare the negligence of the swimmer (who was neither identified nor sued) to that of the City and apportion the fault between them by percentages. The jury determined that the City's negligence comprised 80 percent of the cause of Ms. Castillo's injury, the swimmer's 20 percent.

The undersigned rejects this apportionment of the fault as illogical and contrary to the evidence. To be sure, the City was negligent in not preventing the injury. But it was the swimmer—an independent moral actor responsible in the first instance for his own behavior—who actually struck Ms. Castillo. Given this reality, the undersigned believes not (as did the jury) that the City was four times more at fault than the swimmer, but rather that the swimmer's culpability, by a factor of four, exceeded that of the City. That is, considering the totality of the circumstances, including the fact that the swimmer was a minor (albeit a teenager near the age of majority), the undersigned determines that the proper

apportionment of fault is 80 percent to the swimmer, 20 percent to the City—the reverse of the jury's determination.

LEGAL PROCEEDINGS:

In 2000, Reyna Castillo, the mother and legal guardian of Ms. Castillo, brought suit on her daughter's behalf, and also in her own right, against the City. The action was filed in the Miami-Dade County Circuit Court.

The case was tried before a jury in March 2003. The jury returned a verdict awarding Ms. Castillo a total of $5.8 million in damages, broken down as follows: (a) $600,000 for past pain and suffering; (b) $5 million for future pain and suffering; (c) $41,000 for past medical expenses; and (d) $219,000 for future medical expenses. The trial court entered a judgment against the City in the amount of $4.7 million—or 80 percent of the total damages, in accordance with the jury's apportionment of fault. (All of the foregoing numbers were rounded for ease of reference.) Reyna Castillo apparently did not obtain a recovery in her individual capacity.

The City appealed the adverse judgment. While the appeal was pending, the City entered into a settlement agreement with the plaintiffs pursuant to which the City, in exchange for a release of further liability, agreed: (a) to pay $200,000 ($100,000 to Ms. Castillo and a like sum to her mother), thereby exhausting the City's limits of liability under the sovereign immunity statute; (b) to dismiss its appeal; and (c) to support the passage of a claim bill for $500,000. Although the settlement agreement was reduced to writing, for reasons unknown the parties never signed the instrument. The City, however, paid the $200,000, dismissed its appeal, and currently acknowledges its past promise to support the claim bill. In summary, despite the absence of a formal agreement, no one disputes that the settlement described above was, in fact, made.

The settlement proceeds were distributed to Ms. Castillo in June 2004. Her net recovery, after paying attorney's fees and costs, and outstanding medical bills, was $122,407. Ms. Castillo testified credibly at the hearing on the claim bill (and the undersigned finds) that she spent this money on school, living expenses, transportation, and medical expenses, and little of it is left. As of the hearing, there were no outstanding liens or unpaid bills for the medical expenses Ms. Castillo

has incurred in connection with this accident. (Ms. Castillo did not have health insurance at the time of the hearing.)

CLAIMANT'S POSITION: The City is vicariously liable for its lifeguards' failure to protect Ms. Castillo against injury from a known danger, namely the reckless swimmer, which injury could have been prevented had the lifeguards used reasonable care in supervising the pool. The City's imputed negligence, in conjunction with the swimmer's negligence, directly and proximately caused Ms. Castillo to suffer a severe and permanent bodily injury.

THE DISTRICT'S POSITION: The City accepts liability and acknowledges that it agreed to pay Ms. Castillo a total of $700,000 to settle the case. The City acknowledges that it promised to support the enactment of a claim bill in the amount of $500,000. The City objects to the current bill, however, on the ground that it is presently unable to pay the agreed upon sum due to budgetary constraints stemming from increased costs and diminished revenues, exacerbated by the recent economic downturn.

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. Castillo 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).

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.

The lifeguards on duty the day Ms. Castillo was injured knew or should have known that a swimmer in the pool was behaving recklessly and posed a danger to other swimmers.

These lifeguards either should have removed the rowdy swimmer from the pool or kept him under close supervision. Their failure to take these steps breached the City's duty to keep the pool reasonably safe for invitees.

The City's negligence, however, did not *independently* cause any harm to Ms. Castillo. Rather, the City's negligence set the stage for the reckless swimmer to collide with Ms. Castillo and injure her eye. The swimmer's concurrent fault (without which no harm would have occurred) therefore must also be considered. While the standard of care against which a minor's conduct should be measured might be less demanding than that to which an adult would be held, see McGregor v. Marini, 256 So. 2d 542, 543 (Fla. 4th DCA 1972)(standard for measuring minor's conduct is that level of care reasonably to be expected from a child of like age, intelligence, experience, and training); Medina v. McAllister, 196 So. 2d 773, 774 (Fla. 3d DCA 1967)(conduct of minor who was engaged in a childish pursuit when injury occurred is tested by what would have been reasonable under the circumstances, among which are the child's age, experience, and state of mental development), the undersigned nevertheless concludes that a 17 year-old young man can reasonably be expected to conduct himself so as not to smash another person in the eye while swimming in a public pool. It is found and concluded that the swimmer breached the general duty each person owes to another to use reasonable care under the circumstances to avoid causing harm.

Because the City and the swimmer were joint tortfeasors whose negligence combined to cause Ms. Castillo's injury, it is necessary to determine how much of the resulting damages each, respectively, was responsible for causing. As noted above, the jury's allocation of 80 percent of the fault to the City is unreasonable. The undersigned concludes instead that the City was 20 percent to blame for the accident.

The evidence supports the jury's award of $260,000 in economic damages. The undersigned believes, though, that the jury's award of $5.6 million in noneconomic damages is open to legitimate criticism. At a minimum, it seems clear to the undersigned that reasonable minds can disagree about whether such an award is excessive. In this particular case,

however, the settlement reduces the debate about the noneconomic damages (for the most part) to an academic exercise.

Facing a $4.7 million judgment that it could not be confident would be reversed on appeal, the City agreed to pay Ms. Castillo $700,000 (with $500,000 contingent on the enactment of a claim bill) in full satisfaction of all claims. One way to view the settlement is to consider that the total amount the City agreed to pay is equal to 20 percent of $3.5 million. A jury verdict totaling $3.5 million—with approximately $250,000 for economic damages and $3.25 million for pain and suffering—would not have raised the undersigned's eyebrows (as does the actual award of $5.8 million). Ultimately, therefore, while the undersigned does not agree fully with the jury's verdict, he concludes that the settlement at hand is both reasonable and responsible—and that the agreed upon sum of $700,000 would compensate Ms. Castillo fairly for the City's culpability in this unfortunate incident.

LEGISLATIVE HISTORY:

This is the second 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. Castillo's attorney, Ronald Rodman, Esquire, has submitted an affidavit attesting that his fee in connection with the instant claim bill would be limited to $125,000, or 25 percent of the compensation being sought. (To date, Mr. Rodman has been paid $50,000 for his legal services, that being 25 percent of the $200,000 that the City previously paid pursuant to the settlement agreement.) In addition, Ms. Castillo has agreed to pay her lobbying firm, Robert M. Levy & Associates, $25,000 contingent upon the enactment of the bill. Mr. Rodman estimates that the legal expenses associated with the claim bill will not exceed $1,000.

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 this claim may not exceed 25 percent of the amount awarded under this act." Unless the bill is amended to remove lobbying fees from the foregoing limitation, either Ms. Castillo's attorney or her

lobbyist, or both, will not be compensated fully in accord with the contractual arrangements that Ms. Castillo has made with these professionals.

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 $125,000 earmarked for attorneys' and lobbying fees.

OTHER ISSUES:

The City's sole "defense" to the enactment of the claim bill is that the City, which is self insured, cannot afford to pay Ms. Castillo a lump sum of $500,000 as promised. The City proposes instead to satisfy its financial obligation to Ms. Castillo over time, making ten annual installments of $50,000, payable on the first of July, starting July 1, 2010. Ms. Castillo has not accepted this proposal.

While the undersigned does not doubt that the City is facing tough times financially, he was not persuaded that paying Ms. Castillo the agreed upon sum of $500,000 would be impossible for the City. Paying the bill would be difficult and probably would require the City to make some hard choices concerning budget cuts in other areas—but it could be done.

The undersigned also was somewhat taken aback by the testimony of the City's treasurer, who confirmed that, following the settlement agreement in 2004, the City did not reserve any funds to pay Ms. Castillo in the event a claim bill were enacted. No persuasive explanation for this was given.

In summary, while the City's ability to pay (or lack thereof) is a legitimate factor for the legislature to consider in deciding whether to enact this bill, it is fundamentally a political or policy consideration—not a legal one. From a legal standpoint, the City's financial condition diminishes neither the strength of Ms. Castillo's claim nor the City's culpability in connection with her injury.

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 50 (2010) be reported FAVORABLY.

Respectfully submitted,

John G. Van Laningham
Senate Special Master

cc: Senator Nan H. Rich
R. Philip Twogood, Secretary of the Senate
Counsel of Record