THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
408 The Capitol

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

November 25, 1998

SPECIAL MASTER'S FINAL REPORT	DATE	COMM	ACTION
The Honorable Toni Jennings	11/25/98	SM	Fav/1 amend
President, The Florida Senate	1/06/99	CA	Fav/1 amend
Suite 409, The Capitol		FR	
Tallahassee, Florida 32399-1100			

Re: SB 40 - Senator Walter Campbell
HB 33 - Representative Charles Sembler
Relief of Warren Weathington

THIS IS AN EXCESS JUDGMENT CLAIM FOR $1,005,000 AGAINST CITY OF TALLAHASSEE FOR INJURIES SUFFERED BY CLAIMANT RESULTING FROM A SPORTS RELATED ACCIDENT.

FINDINGS OF FACT: On the afternoon of September 15, 1993, Claimant Warren Weathington, a 15-year-old enrolled in the City of Tallahassee's Tournament Tough Tennis Training Camp, was participating in a fitness exercise to aid in his tennis conditioning. During the training session, Warren and three other junior tennis players were using a piece of training equipment known as the Viper which was purchased, maintained and used improperly by employees/agents (tennis professionals) of the City of Tallahassee.

The Viper training device has an elastic rubber hose attached to a metal hook on one end and a waistbelt, worn by the participant, on the other end. The device is used for resistance training in strength conditioning. A tennis professional improperly attached the Viper's metal hook to a thin, pliable strip of soft metal which secured the chain link panel to a metal fence pole. The soft metal gave way and the metal hook pulled away from the fence while claimant was performing the training exercise. The metal

hook became a dangerous object flying through the air approximately 60 feet behind the running claimant. The hook impacted claimant's head, embedding itself in his skull, and penetrated the edge of his brain tissue. Warren survived the accident, but has sustained a traumatic brain injury resulting in vision problems and headaches of varying degrees of severity.

The City of Tallahassee tennis professional and his supervisors have admitted that they never read the instruction manual or viewed a videotape which described the proper use of the Viper device. The Viper's metal hook should not have been affixed to an unstable, pliable material such as a thin strip of metal twisted around the pole of chain link fence. Furthermore, the instructions state the Viper should not be used for resisted running. Had any of the tennis professionals or their supervisors reviewed the instruction manual or videotape, this accident could have been avoided.

Claimant and the three other players in his training group were instructed to put on the waistband and run away from the fence until they felt resistance (approximately 20 feet) and then back pedal to the starting point. The claimant has admitted that he believed merely running against the fence was "somewhat bland." Accordingly, he and the other players (David Zimmer, Roppy Quimbo and Arien Quimbo) created a game on their own which enhanced their interest in the training exercise. Their "cup game" required one player to hold a cup and challenge the player wearing the Viper to lunge further forward and grab the cup from the other player. Claimant had run to an extended point when he then extended further (over 60 feet) to reach a cup held by another player, David Zimmer. The accident report of September 15, 1993, reflects claimant was nearly three times farther from the fence than he had been instructed to run when the accident occurred. Although the players did not hide the "cup game" from the tennis professional, it is clear the players knew they were not instructed to use the Viper in this manner. However, the city's tennis professionals do not appear to have been closely supervising the claimant's training group at the time of the accident and the primary supervising tennis professional

was cleaning up and putting away equipment to end the training session for the day.

Claimant was an average high school student before and after the accident - making some Bs, some Ds and mostly Cs. He finished high school with a 1.94 grade point average. Claimant has completed 32 hours of college level course work earning Bs and Cs. His grades have improved significantly as he now has a 2.62 grade point average.

Claimant was also a somewhat troubled youth. The testimony at trial and during the Special Masters' Hearing revealed that both before and after the accident Warren has used alcohol and marijuana with some frequency and has experimented with nitrous oxide and LSD. Claimant's drug use interrelates to one of his automobile accidents, two drug arrests and the subsequent criminal proceedings that resulted, and possible lower levels of cognitive ability during his numerous psychological tests.

Claimant suffers significant injuries and potential problems from the accident. These injuries include:

1) A permanent hole in his skull;
2) Permanent right-sided quadrant anopsia in both eyes (loss of vision in the lower right quadrant);
3) Encephalomalacia (permanent loss of brain cells) due to necrotic (dead) brain tissue being removed from his head wound;
4) A permanent reading disability due to the resulting loss of vision (blind spots) in the lower right quadrant;
5) Some degree of severe migraine headaches;
6) Slight risk of seizures;
7) A lifetime of medications to control his headaches; and
8) Other possible side effects to these medications.

LITIGATION HISTORY: Warren Weathington and his parents filed suit against the City of Tallahassee's tennis professionals involved in, or responsible for, supervising the tennis training program and the use of the Viper training device on January 7, 1994. The case was heavily litigated with numerous amended pleadings, hearings and pre-trial motions. Ultimately, on May 3, 1996, the City of Tallahassee became the sole defendant after the First District Court of Appeals affirmed the trial judge's ruling that the tennis

professionals were, in fact, agents of the City of Tallahassee and, therefore, not proper parties under Florida's sovereign immunity law. (§768.28, F.S.)

A Leon County Circuit Court jury delivered a verdict in favor of the claimant after a 3-week trial on April 17, 1998, as a result of the City of Tallahassee's employees' negligence. More than 30 witnesses testified at trial including claimant's Idaho relative, United States Senator Larry Craig, on his behalf. A Final Judgment was entered against the City of Tallahassee in the amount of $1,005,000 for Warren Weathington and $11,348.77 for his father, Carl Weathington. The jury found Warren 33 percent negligent for his own actions during the training exercise which reduced his damages from $1,525,353 to $1,005,000.

The Court also entered a cost judgment in the amount of $23,173.89 in favor of Warren Weathington. Because the plaintiffs did not accept the city's offer of judgment in the amount of $33,000 to Carl Weathington for medical expenses (compared to the $11,348.77 awarded at trial), the trial court entered an order finding that the city is entitled to attorney's fees and costs as sanctions against the plaintiffs.

Neither party appealed the final judgment nor were motions for remittitur or a new trial filed. On October 16, 1998, the city paid claimant $100,000 in full satisfaction of its obligations under the sovereign immunity limits of §768.28, F.S.

CLAIMANT'S ARGUMENTS: The claimant argues that the city's failure to use the Viper in the proper manner described in detail by the instructional manual and videotape caused the accident. Had the Viper been used appropriately -- it was not supposed to be affixed to any stationery object -- or even inappropriately hooked to something stable and solid, no injury would have occurred. Furthermore, claimant maintains that the city's negligent use of the Viper should outweigh the 15-year-old claimant's invention of and participation in the "cup game" which contributed to the accident. The claimant maintains that the city's agent alone caused the injury by affixing the Viper to a soft metal

strip on a chain link fence and instructing the participants to run away from the hooked end until "they felt resistance."

RESPONDENT'S ARGUMENTS:

The city admits its tennis professional was negligent in selecting an unsuitable location to anchor the metal hook to the fence. However, the city also produced evidence and testimony that:

1) Claimant had used the Viper as instructed along with the other participants without incident that same day;
2) Claimant had become bored with the drill and created a game designed to stretch the Viper as far as possible;
3) Claimant was only injured when using the Viper in a way he knew it should not be used;
4) Claimant admitted he was not instructed to use the Viper the way he used it; and
5) Another participant, David Zimmer, admitted that he knew they were not supposed to be using the Viper the way they were using it.

The city further produced evidence and testimony that:

1) The participants were instructed to use the Viper in a manner that was consistent with the instructional videotape;
2) Although the city's tennis professionals had not reviewed the manual or the videotape, they had seen the Viper demonstrated and were familiar with its use;
3) The participants were instructed to run until they felt resistance of the Viper and then back pedal to the starting point; and
4) The participants were never instructed to use the Viper for resisted running as claimant did.

Finally, the city produced evidence and testimony that claimant "concocted" his game at the end of the class when one tennis professional was goal-setting with other participants and when the supervising tennis professional was gathering up the equipment to be put away for the day.

CONCLUSIONS OF LAW:

The Special Master finds as a matter of law that the city's agent, the tennis professional teaching the training exercise, negligently used the training device known as the Viper. Furthermore, the Special Master finds that affixing the metal hook of the Viper in such an unsafe manner

caused claimant's injuries. However, the Special Master does not agree with the jury's finding that claimant was 33 percent responsible for this accident.

In the negligence standard applicable to claimant, "reasonable care" is defined as that degree of care which a reasonably careful child of the same age, mental capacity, intelligence, training and experience would use under like circumstances.

While investigating the issue of claimant's comparative negligence, the Special Master interviewed David Zimmer, the junior tennis player who was playing the "cup game" with claimant at the time of the accident. The Special Master asked Zimmer if he was holding the cup immediately before the accident or if Warren had to pick the cup up off the ground. David Zimmer said, "I was holding the cup" at the time. Consequently, the Special Master finds that the claimant and David Zimmer should jointly share the jury's finding of comparative negligence. Therefore, the Special Master finds that the claimant was only 16.5 percent at fault for his resulting injuries and damages. The Special Master realizes upon reflection of the jury's finding that using the jury's perceived reasoning he could find David Zimmer and claimant each 33 percent negligent. However, using the reasonable care standard of a child - the actions (poor judgment) of David Zimmer and claimant do not appear to be significantly different than what other 14 or 15 year-old boys might have done in a similar situation.

ATTORNEYS FEES: The claimant's attorneys have submitted an Affidavit stating at such time as the Defendant satisfies the Final Judgment, which was rendered in Plaintiff's favor, the firm will receive an attorney's fee of no more than the 25 percent allowed by law. This firm has represented the claimant in the great majority of the litigation.

The law firm that provided appellate legal services has submitted an Affidavit stating at such time as the Defendant satisfies the Final Judgment, which was rendered in Plaintiff's favor, the law firm will receive an attorney's fee of 5 percent.

By copy of this final report, claimant's counsels are reminded that they are legally limited to receive a 25 percent aggregate amount under §768.28, F.S.

LEGAL POLICY ISSUES: This claim again raises the applicability and retroactivity in the legislative forum of the concepts underlying §768.81, F.S., the statute that applies "comparative fault" in certain "negligence" cases insofar as noneconomic damages are awarded. It also raises the applicability in the legislative claim bill forum of the concepts underlying Fabre v. Marin, 623 So.2d 1182 (Fla. 1993), that judgment should be entered against each "party" on the basis of that party's percentage of fault, regardless of whether they could have been joined as a defendant. Finally, it raises the question of whether, in the legislative claim bill forum, these principles should be made to apply to all damages awarded on the verdict, including economic damages. These issues are ones of policy, to be argued by the parties to the respective legislative committees that consider this claim bill.

LITIGATION COSTS INCURRED: As of November 12, 1998, the plaintiff's attorneys had incurred costs of $147,290.91. In addition, the law firm that represented the claimant in the initial phase of the litigation incurred costs of $995.28.

SUBROGATION: It appears Blue Cross/Blue Shield has a subrogation claim against the claimant from the proceeds of this future award.

GENERAL CONCLUSIONS: Claimant was a talented 15-year-old competitive tennis player and all of his teaching professionals agreed he had the potential to earn a college tennis scholarship. He had a modest Florida Tennis Association ranking in the boys 14-and-under Division, but had shown continued, steady improvement. Good vision with a full visual field was an important factor for the claimant to fulfill his potential. It is undisputed that the claimant has never played tennis as well, or improved at the same rate, after the accident. However, many additional factors appear to have impeded claimants' tennis future, including his own lack of commitment to the sport, extracurricular drug use, smoking addiction and general adolescent activities that were not in keeping with a high school athlete seeking to earn a college athletic scholarship.

Claimant's ability to complete college has been contested during this litigation and the testimony is conflicting. Most recently at the Special Master's Hearing, the claimant stated he expected to earn his undergraduate degree in an additional 6 to 7 years. Thus, it may take the claimant a total of 8 or 9 years to complete his degree as he has a reduced course load due to his permanent reading disability caused by his vision loss.

However, it should be noted that many students take 5 or 6 years to complete their undergraduate course work. In fact, claimant's 23-year-old brother is currently enrolled in community college level work. Claimant's grade point average is currently 2.62. It is interesting to note that the claimant made his best grades (three Bs) during the Spring 1998 semester, which began January 7 and ended May 4, and coincided with his 3-week jury trial which ended April 17 and no doubt required extensive pretrial preparation. His tuition has been, and is currently being paid for, by the Division of Blind Services. His tutors and readers are also funded by the Division of Blind Services. Apparently, locating these tutors and readers is somewhat difficult at times.

Another significant issue in the claimant's life is his ability to drive. While the claimant may have a fear of driving, he has never been told by a medical expert that he cannot drive. In fact, the claimant's parents allowed and encouraged his driving until March of 1996. They even provided an automobile for his use. The claimant passed a Department of Highway Safety and Motor Vehicles' vision test on August 17, 1994. His drivers license record indicates he had 20/40 vision in each eye with no correction necessary. There has been no testimony that his vision has worsened since August 1994. In fact the claimant testified he has not had an eye examination in about a year.

Claimant then had a series of automobile accidents beginning in November of 1994. This first accident occurred, according to claimant, because he was "playing with his radio" and not paying attention to the road. By his own admission, it was not related to a vision defect. His

second accident occurred in January 1996, due to a black out resulting from his admitted use of nitrous oxide just hours before he wrecked into a tree. Finally, his third accident occurred in March of 1996, and could have been the result of many factors, not the least of which was the fact that he was traveling at 45 mph with four other passengers - two of which were in an open bed of a pickup truck. This accident resulted in a serious injury to one of his passengers and subsequent litigation against the claimant. Claimant surrendered his license on March 26,1996, shortly after the wreck. His parents' insurance records reflect their premiums were expected to increase from $3,000 to over $7,800 annually after claimant's accident.

Claimant admits these skyrocketing insurance rates were a major factor in surrendering his license. Interestingly, claimant did not have one accident after his November 1994 automobile accident until January of 1996. His parents explained that this was due to the fact that the claimant was often being grounded for various discipline problems and was not really driving very often. They did not state specifically how frequently claimant was using the car they provided for him during that interval.

The claimant had six part-time jobs from November 1994 until the spring of 1996. Some of the jobs were initially found with the help of the Division of Blind Services. They ranged from helping at a veterinarian's office to working at a movie theater. The claimant testified that he did not suffer headaches at three of the jobs. The headaches appeared to occur at jobs which were outdoors (Florida Game & Fresh Water Fish Commission and Reeves Espy Landscaping). His past employment history is similar to other teenagers who seek to make some walking around money. The Special Master finds nothing definitive can be gleaned from these employment opportunities which would establish any negative or positive pattern for claimant's future employment situations except that outdoor employment resulting in long hours in the heat and sunlight may add to his risk of headaches.

Surprisingly, claimant raised a potentially important new issue at the Special Master's Hearing. Claimant said he

was experiencing sexual dysfunction/erection problems as a side effect to his medication, Depakote. However, the literature on Depakote's side effects and the city's rebuttal by Dr. Richard Hall appear to contradict claimant's allegation. Perhaps future testing as to the cause of claimant's erection difficulties would be proper. Further, the Special Master cannot understand how the claimant could have only recently discovered the phenomenon. The claimant testified at the Special Master's Hearing that he has taken Depakote from "early 1997 to present." His jury trial transpired last spring, in March and April of 1998. Incredibly, he claims that he just recently discovered he cannot have an erection.

The Special Master simply does not find competent and substantial evidence to support the claimant's claim that his erection problems are due to Depakote. Furthermore, the city's expert, Dr. Hall, suggests and the Special Master agrees that the claimant should experiment with alternative medications if, in fact, the problem persists.

Claimant's most serious injury is that he no doubt suffers continuing difficulties with headaches. Testimony reflects these headaches are short, lengthy, moderate, and severe. He testified these headaches are triggered by certain "stressors." The claimant listed these "stressors" which caused his headaches, as:

1) School - longer time to graduate, cannot take full load, cannot read well, and needs special help and attention;
2) Migraines - his diet, no greasy foods, no caffeine, no chocolate;
3) Cannot drive;
4) Tennis - plays at a lower level;
5) Drugs - the side effects of the medication he takes, acid stomach, and more bowel movements;
6) Vision - takes longer for eyes to focus;
7) Sunlight - cannot tolerate much sunlight;
8) Dating - difficult to date when you cannot drive;

9) Computer - cannot work on computers too long;

10) Must be careful with his soft spot on his head;

11) He does not look injured but he is;

12) Cannot keep job; and

13) Many things trigger flashbacks.

Interestingly, he acknowledged that there were additional "stressors" when asked about them by the Special Master. These were "stressors" such as:

1) Other litigation - his litigation resulting from his third automobile accident;
2) Drug arrests - his drug arrests and subsequent court appearances and attorney's fees;
3) School - general school/ test anxiety;
4) His home life - his continued living situation with his parents;
5) Community service - his community service requirement subsequent to his accidents and/or drug arrests;
6) Doctor appointments - related and unrelated to this litigation;
7) The fact that his friends were hospitalized after the automobile wreck he caused in March 1996;
8) General peer pressure; and
9) Previous loss of employment opportunity due to failing a drug test.

It also appears other current factors could be preexisting sinus headaches before the accident, a possible head injury from a wall ball accident subsequent to the accident, a head injury from his subsequent car wreck in March 1996, his criminal record which may have to be disclosed to potential employers and his recently discovered sexual dysfunction.

All of these "stressors" undoubtedly contribute to claimant's current conditions and make it virtually impossible to allocate the degree and severity of his headaches which directly resulted from the accident of September 15, 1993. Therefore, the Special Master is unable to determine the specific cause of the claimant's headaches.

As stated above, the issue of the claimant's comparative negligence is of utmost importance in this claim bill. The Special Master finds the claimant only 16.5 percent negligent and correspondingly responsible for that percentage of his own damages.

RECOMMENDATIONS: The claimant's future employment is of particular concern due to his visual and reading disability. For example, the claimant will no doubt have difficultly in employment opportunities which require extensive reading. Also, the claimant's headaches and potential for missing work because of them could also raise employment problems. The claimant's future employment opportunities may be somewhat limited.

Additionally, competent and substantial evidence indicates the claimant will likely endure a lifetime of medical needs and counseling.

The jury found claimant 33 percent negligent for his actions during the training exercise and thereby reduced his damages from $1,525,353 to $1,005,000. However, the jury did not itemize its findings related to economic damages, and, therefore, it is difficult to determine the basis of its award. In contrast, the Special Master--as previously stated in this report--finds the claimant only 16.5 percent at fault for his resulting injuries and damages and David Zimmer 16.5 percent at fault. Furthermore, the Special Master finds the claimant's total damages to equal $1,200,000. By reducing the total damage award for claimant and David Zimmer's comparative negligence by 33 percent ($400,000) the claimant's net award will be $800,000.

After thorough and complete evaluation of every element of damages the claimant's counsel presented at trial and reviewing thousands of pages of testimony and documents, the Special Master finds that SB 40 should be amended to

provide a total award of $800,000 which is to be further reduced by the $100,000 the city has already paid the claimant for his injuries as provided under the sovereign immunity limits of §768.28, F.S.

The Special Master recommends that in this particular case the claimant will be benefited by a three-tiered payment of the award. The tiering will no doubt help encourage claimant to complete his college degree prior to his receiving a substantial amount of money in the year 2004. This payment plan will provide funds for his attorney's fees and costs immediately. An amount of $350,000 should be paid by the city by July 1, 1999, $250,000 paid by July 1, 2004, and $100,000 paid by July 1, 2009.

ACCORDINGLY, I recommend that SB 40 be amended to authorize and require the City of Tallahassee to pay claimant a total of $700,000, in three payments: $350,000 on or about July 1, 1999; $250,000 on or about July 1, 2004; and a final payment of $100,000 on or about July 1, 2009, and passed FAVORABLY, AS AMENDED.

Respectfully submitted,

Mark W. Casteel
Senate Special Master

cc: Senator Walter Campbell
Representative Charles Sembler
Faye Blanton, Secretary of the Senate
Paul Liepshutz, House Special Master