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SPECIAL MASTER'S FINAL REPORT

The Honorable Tom Feeney
Speaker, The Florida House of Representatives
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: HB 231 - Representative Diaz de la Portilla
Relief of Jack Brett Lemonik

THIS IS AN EXCESS JUDGMENT CLAIM FOR \$300,000 BASED ON A JURY VERDICT RENDERED AGAINST MIAMI-DADE COUNTY TO COMPENSATE JACK LEMONIK FOR DAMAGES HE SUSTAINED AS THE RESULT OF BEING FALSELY ARRESTED BY A MIAMI-DADE POLICE OFFICER.

FINDINGS OF FACT:

LIABILITY: On March 6, 1988, Jack Lemonik was one of several hundred passengers waiting to board a flight to New York City at Miami International Airport. The flight was on Eastern Airlines and was scheduled to leave at 9:00 p.m. Due to the cancellation of several prior flights to New York City, as well as the overbooking of the flight Jack Lemonik was on, the crowd of several hundred people at the gate was very unruly.

In the several months prior to this day, Eastern Airlines employees had been involved in several altercations with angry passengers. The Miami-Dade police department stationed extra officers at the Eastern Airlines terminal due to these prior altercations. On the day of Jack Lemonik's flight two Miami-Dade officers, Officer Perez and Officer Williams, were stationed at the gate where Jack Lemonik, his wife and five children were scheduled to depart.

Jack Lemonik was carrying one of his five children in a baby carrier that was strapped over his shoulders and hung across his back. Lemonik removed the baby from the carrier when it became fussy. Shortly thereafter, a

boarding announcement was made and Lemonik decided to proceed to the boarding area by going behind the counter where two female Eastern Airlines employees were standing. A wall was approximately three to six feet behind the employees.

WITNESSES:

Jack Lemonik

Lemonik testified at trial that, as he walked behind the ticket agents he was suddenly pushed, shoved and grabbed from behind, then spun around. Prior to being grabbed from behind, Lemonik never heard anyone say "stop", "freeze" or give any other type of verbal indication that the person grabbing him was a police officer or that he was under arrest. He put up his hands to protect his face and the next thing he knew he was on the floor under bodies.

Lemonik testified that, when he fell to the ground, his body went limp, he was passive and he was not resisting. Lemonik testified that he was screaming for his kids. Then he was made to stand up and his head was smacked into a wall. Someone was telling him to put his hands behind his back so he could be handcuffed and he did not want to be cuffed. Lemonik testified that he was in a panic at that point, screaming for his kids and did not know what was happening to him.

Lemonik was eventually handcuffed and testified that nobody ever said anything to him about why he was handcuffed. He was taken to a holding area in the airport and eventually transported to the police station. Lemonik was charged with aggravated battery on Officer Perez, resisting arrest with violence, and two counts of battery on the two Eastern Airlines employees.

Lemonik further testified that he had no recollection if either he or the baby carrier on his back came into contact with either one of the two Eastern Airlines employees. Lemonik did not deny that he touched the Eastern Airlines employees; he just has no recollection of doing so. Lemonik further testified that he was not in a position to deny that either airline employee was injured. Lemonik also testified that he had no recollection of what happened to Officer Perez and that he did not remember if he had his hands on Officer Perez's neck.

Officer Perez

Officer Perez testified at trial that he had been on the airport detail for 14 months at the time of the incident. Perez had attended briefings in the 2 months before the incident where the subject of increasing hostility between Eastern Airlines employees and passengers was discussed. Perez testified that one extra officer was placed on the airport detail as a result of these problems.

Perez testified that he first saw Lemonik when he darted from the crowd and struck one of the Eastern employees with the baby carrier. He then saw Lemonik push that Eastern employee out of the way and then make contact with the second employee at the counter. At that point, Perez rushed over to Lemonik, grabbed him from behind, pulled him off the employee, turned him around and told Lemonik he was under arrest.

After telling Lemonik he was under arrest, Lemonik then pushed Perez against the wall. Perez hit his knee on a trashcan and then started to fall down. Perez testified that Lemonik then grabbed him in a headlock, began choking him and the two fell to the ground. Perez testified that Lemonik continued to choke him until Officer Williams pulled Lemonik off Perez.

Perez testified that he did not say anything to Lemonik before grabbing him because he wanted to make sure Lemonik would not continue to strike or make contact with the employees. Perez testified that he was arresting Lemonik for battery on the two employees because Lemonik struck them without their permission. Perez testified that there was plenty of room for Lemonik to go by the employees without coming into contact with them. However, Perez admitted that he did not know whether Lemonik intentionally struck the employees when he decided to arrest Lemonik for battery.

Officer Williams

Officer Williams testified that he was standing next to Officer Perez when the incident began. According to Williams, Lemonik charged by him and Perez and he then saw Lemonik come into contact with one of the Eastern employees. Lemonik then came into contact with the other employee and pushed her into the counter.

Officer Williams testified that Officer Perez then went over to the counter area and grabbed Lemonik from the rear.

Williams then observed Perez going down and Lemonik getting Perez in a headlock. By the time Williams reached the scuffle, Lemonik was on top of Perez with his hands around Perez's neck.

Williams then yanked Lemonik off Perez, stood him up and placed him up against the wall. Williams testified that he told Lemonik several times to put his hands behind his back as he was under arrest but Lemonik resisted his attempts to handcuff him. A third officer, Captain Otero, then arrived and helped Williams place Lemonik in handcuffs. They then escorted Lemonik out of the area.

Captain Otero

Captain Otero testified that when he arrived on the scene he saw Lemonik with his hands around Officer Perez's throat while Perez was on the floor on his back. Otero observed Officer Williams trying to pull Lemonik off Perez while advising him that he was under arrest. Otero then helped Williams pull Lemonik off Perez and placed him up against the wall. Lemonik continued to resist arrest and was screaming obscenities. He and Williams had to use force to put Lemonik's hands behind his back and handcuff him.

Sharon Logan

Sharon Logan was one of the Eastern employees involved in the incident. Logan testified that, prior to the incident, she heard Lemonik say, while he was in front of the counter, that he had to get on the flight to New York. Shortly thereafter, while looking at her computer, Logan felt the force of Lemonik's body push her on the right side of her body. She braced herself on the counter to avoid falling down.

Logan then looked to her right and saw Lemonik go by her in a split second. She then felt the baby carrier on Lemonik's back hit her in the back, which resulted in pain and bruising to her back. Logan then saw Lemonik pushing Patty Negrette, the employee next to her at the counter. The push spun Negrette around 90 degrees.

Logan testified that after Negrette was spun around she observed the police pull Lemonik back from Negrette. A struggle between the police and Lemonik ensued. Logan did not see the entire struggle, but she did observe Lemonik choke one of the officers and push him down to the ground.

Patricia Negrette

Patricia Negrette was working at the Eastern counter on the night of the incident. She testified that she first saw Lemonik when he collided with her right side. The collision flung her back into the wall. Negrette testified that Lemonik did not hit her with his hands but the baby carrier, while on Lemonik's back, did hit her in the chest with resulting pain and bruising.

Negrette testified that an officer then came over and pushed Lemonik. A struggle then ensued. Negrette saw Lemonik force Perez to the ground and also saw Lemonik's hands around Perez's neck.

Other Eyewitnesses

Three passengers waiting in the area were witnesses to the events. These three witnesses testified that they did not see Lemonik come into any contact with the Eastern employees. The three witnesses also testified that a struggle ensued between Lemonik and the police for no apparent reason. The witnesses also testified that the police were very rough with Lemonik.

Expert Witness

Ronald Lynch, a former police officer, current college professor, lawyer, and consultant to law enforcement agencies on police practices and procedures, testified on behalf of Lemonik. It was Lynch's opinion that Officer Perez's initial arrest of Lemonik was not legal because Perez did not identify himself before grabbing Lemonik from behind and because there was no probable cause to arrest Lemonik for battery as the element of intent on Lemonik's part was missing. Lynch was also of the opinion that the officers used excessive force on Lemonik.

However, Lynch admitted that Perez had a duty to help the Eastern employees if Perez had probable cause to arrest Lemonik for battery. Lynch also admitted that, assuming Perez had probable cause to arrest him, Lemonik had a duty to surrender. Lynch also admitted that Officer Williams had a duty to assist Perez when he observed Lemonik choking Perez.

DAMAGES: Lemonik testified that he spent the night in jail and was bailed out the next morning. He hired an attorney and subsequently pled no contest to the criminal charges and was placed on thirty days probation, which

he successfully completed.

Several media entities in Miami and the New York City area published written reports about the incident. Lemonik placed copies of several of the newspaper articles into evidence at trial. Lemonik testified that, as a result of the negative publicity, his computer consulting business failed. Lemonik testified that he had gross profits of \$200,000 before the incident. According to Lemonik, his clients stopped calling him after the incident and they never returned any of his phone calls.

Lemonik had bilateral retinal surgery a few months prior to the incident. However, Lemonik did not sustain any injury to his eyes or face in the incident. The only injury that occurred during the incident was a slight sprain of one of his fingers, which never required medical treatment.

Lemonik also testified that he was devastated by the experience as he was handcuffed in front of his wife and kids. He had to explain himself to his children, parents, friends and neighbors. He has spent a great deal of time talking about the incident with his wife and also talked to his rabbi and a doctor friend in an attempt to cope with the situation.

PROCEDURAL HISTORY: At trial, the jury returned a verdict in favor of Lemonik finding that Officer Perez did not have probable cause to arrest Lemonik and that the false arrest was a legal cause of damage to Lemonik. The jury did not find that Perez acted maliciously in falsely arresting Lemonik. The jury also found that Officer Williams did have probable cause to arrest Lemonik for battery on Officer Perez and resisting arrest with violence. The jury also found that Officer Williams did not use excessive force in arresting Lemonik.

The jury awarded Lemonik damages for past lost wages in the amount of \$200,000 and damages for past and future mental anguish, injury to reputation, shame, humiliation, hurt feelings, and loss of the capacity for the enjoyment of life in the amount of \$200,000.

The trial court subsequently granted Miami-Dade County's post-trial motion to direct a verdict in its favor on Lemonik's claim for past lost wages. Accordingly, a final judgment for the \$200,000 in noneconomic damages was entered in favor of Lemonik. Both parties appealed the final judgment, which was upheld by Florida's Third District Court of Appeal.

MISCELLANEOUS ITEMS:

Miami-Dade County has an insurance policy with National Union Fire Insurance Company which provides coverage in the amount of \$50,000,000, with a deductible of \$50,000. As of this date, the insurer and Miami-Dade County, in accordance with the statutory limit of liability in §768.28, F.S., have each paid Lemonik \$50,000, for a total of \$100,000. The insurance policy does provide coverage for any amount over the statutory limit of liability, up to \$50,000,000, but only upon the passage of a claim bill by the Legislature.

In addition to the testimony at trial, the following facts are pertinent:

1. Lemonik pled no contest to the criminal charges that were filed against him (aggravated battery, battery and resisting arrest).
2. Officer Perez filed a civil lawsuit against Lemonik and received a cash settlement from Lemonik's insurer.
3. The two Eastern Airlines employees filed civil lawsuits against Lemonik and both received cash settlements from Lemonik's insurer.

Lemonik sued Eastern Airlines in the same lawsuit he filed against Miami-Dade County and he received a \$25,000 settlement from Eastern.

CONCLUSIONS OF LAW:

Under Florida law, a police officer is invested with discretion to decide whether to arrest or not arrest a person who is properly the subject of an arrest and sovereign immunity applies to this discretionary activity. See, *White v. City of Waldo*, 659 So.2d 707 (Fla. 1st D.C.A. 1995). However, a police officer does not have the discretionary authority to arrest a citizen whom the officer does not have probable cause to believe has committed an offense and there is no sovereign immunity for false arrest. See, *Lester v. City of Tavares*, 603 So.2d 18 (Fla. 5th D.C.A. 1992). Additionally, the use of excessive force by a police officer in effecting an arrest may render the public employer liable for this intentional conduct. See, *Hennagan v. Department of Highway Safety and Motor Vehicles*, 467 So.2d 748 (Fla. 1st D.C.A. 1985).

Probable cause is an affirmative defense to a claim of false arrest and the existence of probable cause is a common sense, practical question dependent upon the totality of the circumstances involved. See, *LeGrand v. Dean*, 564 So.2d 510 (Fla. 5th D.C.A. 1990). Probable cause for arrest exists where the facts and circumstances, as analyzed from the officer's knowledge, special training

and practical experience, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed. See, *City of Jacksonville v. Alexander*, 487 So.2d 1144 (Fla. 1st D.C.A. 1986).

The plaintiff is entitled to damages for all injuries that were the proximate result of a false arrest. See, *Black v. Crowder*, 693 So.2d 649 (Fla. 4th D.C.A. 1997). Elements of damages that may be taken into account include bodily injuries, physical and mental suffering, illness, discomfort, inconvenience, loss of time, losses sustained in business or in employment, expenses, and injury to reputation. See *Margaret Ann Super Markets, Inc. v. Dent*, 64 So.2d 291 (Fla. 1953).

Miami-Dade County's primary defense at trial and on appeal was that Officer Perez had probable cause to arrest Lemonik for battery on the Eastern Airlines employees. The trial court denied the County's motion for directed verdict, and subsequent similar post-trial motions, on the basis that a jury question was presented on the issue of probable cause.

The Third District Court of Appeal affirmed this ruling. I find that Officer Perez's testimony that he did not know whether Lemonik intentionally struck the employees, which was one of the elements of the crime of battery, was sufficient to create an issue for the jury to resolve on the question of probable cause. It is important to note that the County's position at the Special Master's final hearing was that it would not contest the jury's finding that Officer Perez falsely arrested Lemonik.

I also find the jury's determinations that Officer Perez did not act maliciously when he falsely arrested Lemonik, that Officer Williams had probable cause to arrest Lemonik for battery on Perez and resisting arrest with violence, and that Officer Williams did not use excessive force in arresting Lemonik are supported by competent, substantial evidence. I also find that the trial court was correct in striking the jury's award of \$200,000 for Lemonik's lost profits. This ruling of the trial court was appealed by Lemonik and was upheld by the Third District Court of Appeal.

However, I find that the jury's award of \$200,000 for past and future noneconomic damages is excessive. Although Florida law holds that the amount of damages to be awarded is peculiarly within the province of the jury, an award that is so inordinately large as to obviously exceed

the maximum limit of a reasonable range is improper. See, *City of Jacksonville v. Alexander*, 487 So.2d 1144 (Fla. 1st D.C.A. 1984); *Black v. Crowder*, 693 So.2d 649 (Fla. 4th D.C.A. 1997); and *Cardenas v. Miami-Dade Yellow Cab Co.*, 538 So.2d 941 (Fla. 3rd D.C.A. 1989). I find the following evidence supports the conclusion that the jury's award of \$200,000 for past and future non-economic damages exceeded the maximum limit of a reasonable range:

- Lemonik suffered no physical injury that required medical treatment.
- Lemonik's testimony about mental anguish, shame, humiliation and injury to his reputation took up only a few pages in the record.
- Lemonik's only evidence about these damages came from his own testimony and he offered no other witnesses to support his claims----neither his wife, any of his five children, his parents, any other relatives nor his friends testified about the impact of the events on Lemonik.
- Lemonik did not offer any evidence from any mental health counselors, psychologists, or psychiatrists to show he was in need of professional help in coping with the incident.
- Lemonik offered absolutely no evidence about the time he spent in jail until he was bonded out and the time spent in jail was only 10-12 hours.
- There was absolutely no evidence that Lemonik continues to suffer from mental anguish, humiliation, and injury to his reputation, shame or loss of the capacity to enjoy life as a result of Officer Perez's false arrest.

The following evidence also supports the finding that the award of non-economic damages was excessive:

- The criminal charges against Lemonik were not dropped by the State of Florida, as Lemonik pled no contest to them. A plea of no contest, or nolo contendere, is neither an admission nor denial of guilt and the plea was not admissible at the civil trial. However, the plea does signify an unwillingness of Lemonik to contest the charges.
- Lemonik's testimony at trial about the occurrence of events was less than exemplary as it was filled with statements to the effect that he had no recollection of whether he came into contact with the Eastern employees, whether he had his hands

on Perez's neck, and most of the crucial details about his actions. Lemonik also did not deny that any of these events occurred. Lemonik's inability to recall any of these important details is less than credible.

- The jury specifically found that Officer Perez did not act maliciously.
- The jury specifically found that Officer Williams had probable cause to arrest Lemonik for battery on Officer Perez and resisting arrest with violence. This finding means the jury believed the testimony that Lemonik attacked Officer Perez.

The jury's finding that Officer Williams had probable cause to arrest Lemonik for battery on Perez and resisting arrest with violence is persuasive as it means that, regardless of Officer Perez's false arrest, Lemonik was still going to be arrested, handcuffed, booked and placed in jail. This finding by the jury supports the conclusion that Lemonik substantially caused the events at issue. Arguably, the only period of time for which non-economic damages could be awarded is the brief period of time between Officer Perez's initial grabbing of Lemonik (i.e. the false arrest) and Lemonik's subsequent violent resisting of the arrest.

ATTORNEYS FEES:

The claimant's attorney has submitted an affidavit that his fees will be, and have been, limited to the statutorily prescribed amount of 25 percent as provided in §768.28, F.S.

RECOMMENDATIONS:

Because the claimant has already received \$100,000 from Miami-Dade County pursuant to §768.28, F.S., and he has also received \$25,000 from Eastern Airlines which the claimant admits Miami-Dade County is entitled to receive credit for, as well as the fact that the evidence does not support an award of \$200,000 in noneconomic damages and \$200,000 in economic damages, I recommend that HB 231 (2001) be reported UNFAVORABLY.

Respectfully submitted,

Stephanie Birtman
For Michael Carlson
House Special Master

cc: Rep. Diaz de la Portilla, House Sponsor
Sen. Meek, Senate Sponsor
John Forgas, Senate Special Master
House Claims Committee