



## THE FLORIDA SENATE

### SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
12/01/01	SM	Fav/1 amendment
01/28/02	CJ	Fav/1 amendment
	FT	

December 1, 2001

The Honorable John M. McKay  
President, The Florida Senate  
Suite 409, The Capitol  
Tallahassee, Florida 32399-1100

Re: **SB 64 (2002)** – Senator Ron Klein  
**HB 359** – Representative Renier Diaz de la Portilla  
Relief of Jesner Exanor

### SPECIAL MASTER'S FINAL REPORT

THIS CLAIM BILL SEEKS AUTHORITY FOR THE CITY OF DELRAY BEACH TO PAY \$1,500,000 FROM LOCAL FUNDS, UNDER A COURT-APPROVED SETTLEMENT, TO COMPENSATE THE SURVIVING SPOUSE AND MINOR CHILDREN OF A WOMAN WHO WAS KILLED WHEN A POLICE VEHICLE DRIVEN BY A CITY POLICE OFFICER STRUCK HER VEHICLE.

#### FINDINGS OF FACT:

At approximately 9:38 p.m., on July 27, 2000, 24-year-old Nancy Mervil pulled her vehicle into a left-turn lane adjoining the two eastbound through lanes of Linton Boulevard (also known as County Road 782) in the City of Delray Beach. She stopped her vehicle in the turn lane, evidently waiting for the westbound lanes of traffic to clear so that she could turn left onto Catherine Drive, en route to pick up her infant daughter. While Ms. Mervil was stopped at the intersection, a City of Delray Beach police vehicle, driven by an on-duty police officer, slammed into the rear of Ms. Mervil's vehicle, causing it to spin counterclockwise, roll over, become airborne, and crash onto the hood of an oncoming, westbound vehicle. Ms. Mervil's vehicle ultimately came to rest upside down, facing west, with Ms. Mervil still restrained in the seatbelt. Ms. Mervil died in the accident, as a result of blunt head trauma.

Through its traffic homicide investigation, the Florida Highway Patrol found that the police officer involved in the automobile accident was approximately 1.8 miles west of the site of the eventual accident when the police radio dispatcher issued notice of a domestic disturbance between a man and a woman. The dispatcher sent three other officers to the scene of the disturbance. Hearing the communications, the police officer notified the dispatcher that he had made an arrest at the same address a week earlier and that he was proceeding to the scene of the domestic disturbance. While the police vehicle was traveling eastbound in the outside lane of Linton Boulevard, its right tires left the paved road and traveled onto the grass shoulder. The police vehicle then traveled back fully onto the paved road and veered leftward toward a raised median dividing the eastbound and westbound lanes. The vehicle then began to slide sideways and spin in a clockwise direction. Ultimately, the police vehicle spun approximately 180 degrees, and its rear struck the rear of Ms. Mervil's vehicle.

The investigator determined that the police vehicle was traveling at approximately 85-90 miles per hour when it spun out of control. The posted speed limit was 45 miles per hour. There are conflicting witness-statement summaries in the traffic homicide report regarding whether the overhead emergency lights on the police vehicle were illuminated. None of the witnesses reported hearing a siren. The traffic homicide investigator concluded that the police officer violated a provision of the Florida Statutes specifying that the operator of an emergency vehicle is not relieved of his or her duty to drive with due regard for the safety of others. [See §316.072(5)(c), F.S. (2000).]

At the time of the accident, Ms. Mervil was married to Mr. Jesner Exanor. She had a 7-month old daughter, Taisha, with Mr. Exanor, and a 6-year-old son, Orlens, from a prior relationship. Ms. Mervil was a native of Haiti with permanent-residency status in the United States. Her son was living in Haiti with his maternal grandmother; her daughter was born in the United States and was living with Ms. Mervil and Mr. Exanor. (Mr. Exanor testified at the Special Master's hearing that he and Ms. Mervil were helping to provide financial support for Orlens and intended

for him to come to the United States to live with them.) Ms. Mervil was employed as a housekeeper at a South Florida resort and club. She was at the conclusion of a 75-clock-hour program of evening coursework at FLC Nursing Tutorial Services to become a home health aide. The completion date for the program was July 28, 2000 – one day after her death. The claimant presented evidence that Ms. Mervil desired to enroll subsequently in a nursing-assistant program.

PROCEDURAL HISTORY:

Mr. Exanor filed an action under the Florida Wrongful Death Act [§§768.16-768.26, F.S. (2000)], as the personal representative of the estate of Ms. Mervil. The action was brought on his behalf, as the surviving spouse, and on behalf of Ms. Mervil's two surviving children, Taisha Exanor and Orlens Poulard. The action named as defendants the City of Delray Beach and the police officer involved in the accident. The police officer was later dropped as a defendant because he lacked liability coverage.

In its answer to the complaint, the City of Delray Beach admitted that the negligence of its employee caused the accident. Before trial, the parties entered into mediation that resulted in a \$1.5 million settlement, under which the city agreed to pay \$195,000 in cash and agreed to support passage of a claim bill for the balance (\$1,305,000), with the balance to be paid under a structured settlement. (Approximately \$5,000 previously had been paid for vehicle damage.)

As currently drafted, Senate Bill 64 authorizes the city “to draw warrants in the total amount of \$1.5 million” to Mr. Exanor and the minor children. The city has already paid \$195,000 on behalf of Mr. Exanor and the children, which is within the amount (\$200,000) allowable without a claim bill under the state statute governing the waiver of sovereign immunity. [§768.28(5), F.S.] Consequently, the additional amount to be authorized through the claim bill should be \$1,305,000, thereby accurately reflecting the terms of the settlement.

Of the \$195,000 previously paid by the city, after a reduction for attorney's fees, advanced costs, and a future cost retainer, 40 percent of the balance (\$56,646.30) was paid to

Mr. Exanor, and 30 percent was paid on behalf of each of the children (\$42,484.72 each).

The Civil Division of the Circuit Court for Palm Beach County issued an order approving the settlement, based upon a motion from the claimant's attorney which specified that the net settlement proceeds from a claim bill also would be distributed on the basis of 40 percent to Mr. Exanor and 30 percent on behalf of each of the children, with the children's portion to be used to purchase annuities for their benefit. Draft annuity plans have been prepared for Mr. Exanor and for the children. A guardian ad litem submitted a report to the court stating that the settlement agreement and the proposed distribution of settlement proceeds is in the best interests of the minor children.

The Probate Division of the Circuit Court for Palm Beach County has issued letters of plenary guardianship naming Mr. Exanor as the guardian of the property of Taisha Exanor and naming Ms. Gertha Desir, who is Ms. Mervil's sister, as the guardian of the property of Orlens Poulard. Ms. Desir has adopted Orlens. The claimant's attorney reports that guardianship accounts have been established at a financial institution.

CONCLUSIONS OF LAW:

Each claim bill must be based on facts sufficient to establish liability and damages by a preponderance of the evidence. This requirement is true even for cases in which the parties have entered into a settlement agreement, as the parties have in this matter.

**Relating to Liability:** Chapter 316 of the Florida Statutes is the Florida Uniform Traffic Control Law and establishes duties for pedestrians, bicyclists, and operators of motor vehicles. Under §316.1925(1), F.S. (2000):

Any person operating a vehicle upon the streets or highways within the state shall drive the same in a careful and prudent manner, having regard for the width, grade, curves, corners, traffic, and all other attendant circumstances, so as not to endanger the life, limb, or property of any person. Failure to drive in such manner shall constitute careless driving and a violation of this section.

For the driver of an authorized emergency vehicle, in particular, the law prescribes specific conditions under which certain driving privileges may be exercised, such as exceeding the maximum speed limit. For such privileges to apply, the driver of an authorized emergency vehicle must be responding to an emergency call, pursuing an actual or suspected violator of the law, or responding to a fire alarm. Under these conditions, a driver may, among other privileges, “[e]xceed the maximum speed limits *so long as the driver does not endanger life or property.*” [§316.072(5), F.S. (2000), emphasis added.] In addition, the statute cautions that, in spite of meeting the specified conditions, the driver of an emergency vehicle shall not be relieved from “the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his or her reckless disregard for the safety of others.” [§316.072(5)(c), F.S. (2000).] In other words, although §316.072(5), F.S., allows the driver of an authorized emergency vehicle to disregard certain traffic-control provisions when responding to an emergency call, the statute specifies that the driver is not relieved of his or her duty to drive with due regard for the safety of others.

Florida common law also imposes a duty of care on public officials and employees, such as police officers, in the operation of motor vehicles during the course of employment. [See, e.g., *Trianon Park Condominium v. City of Hialeah*, 468 So. 2d 912, 920 (Fla. 1985).]

The evidence in the record of the Special Master supports a conclusion that the police officer breached a duty of care to Ms. Mervil. By driving 85-90 miles per hour (mph) in a 45-mph zone at 9:38 p.m., on a road that is heavily traveled and boarded by a grass shoulder, the police officer, even if authorized to exceed the speed limit, failed to drive with due regard for the safety of others. It was reasonably foreseeable that the officer, who was or should have been aware from the radio dispatches that other officers were already en route to the scene of the domestic disturbance, might lose control of his vehicle at such a high rate of speed and that other drivers or pedestrians would be endangered. The Special Master concludes that the officer was negligent, that his negligence was the actual and legal cause of Ms. Mervil’s death, and that the City of Delray Beach is liable for the action’s of its employee. Further, there is no evidence in

the record of the Special Master to suggest that by her own actions Ms. Mervil was in any degree responsible for this accident.

The traffic homicide report of the Florida Highway Patrol also contains information indicating that there were mechanical problems with the police vehicle, including wear on a part which could cause a driver to use more input into steering the vehicle than normal. However, because the Special Master concludes that liability attaches to the city based upon the manner in which the police officer was driving (i.e., excessive speed), the Special Master does not offer conclusions on the extent to which vehicle maintenance by the city also may have been a contributing factor in the accident.

**Relating to Damages:** Under the Florida Wrongful Death Act:

- Each survivor may recover for the value of lost support and services.
- The surviving spouse may recover for loss of the decedent's companionship and protection and for mental pain and suffering.
- Minor children of the decedent may recover for lost parental companionship, instruction, and guidance and for mental pain and suffering.
- The decedent's personal representative may recover, for the estate, lost earnings of the deceased and lost prospective net accumulations of the estate, and incurred funeral expenses. [§768.21, F.S. (2000).]

There is competent and substantial evidence in the record of the Special Master to conclude that Mr. Exanor and the minor children have sustained substantial economic and non-economic damages in these categories. With respect to economic damages, the claimant has submitted an analysis from an economist estimating past and future losses of \$823,657, based in part on an assumption that Ms. Mervil would have secured employment as a home health aide. Assuming she had indeed continued her education, as evidence in the record indicates she desired, and secured

employment as a nursing assistant, the estimated losses increase to \$1,101,081.

After Ms. Mervil's death, Mr. Exanor reduced his employment, and ultimately stopped working, in order to more readily care for Taisha. He is her primary caregiver. Mr. Exanor is not currently employed, though he stated his intent to return to full-time employment upon enrolling Taisha in day care after her second birthday. Mr. Exanor, who is a native of Haiti, is pursuing permanent-residency status. Ms. Mervil's son, Orlens, is now living in South Florida with his aunt, who adopted him, and his maternal grandmother. The aunt, Ms. Gertha Desir, is pursuing permanent-residency status for Orlens.

With respect to non-economic damages, the testimony of Mr. Exanor during the Special Master's hearing on this claim bill supports a conclusion that he has experienced substantial mental pain and suffering associated with the death of his wife, whom he married in February 2000. Because the children were young at the time of their mother's death (6 years old and 7 months old, respectively), the precise nature and degree of their mental pain and suffering is not known. Ms. Desir, who is the decedent's sister and the legal guardian of Orlens, offered testimony during the Special Master's hearing indicating that the boy evidences loss associated with his mother's death and expresses some hostility regarding the circumstances of her death. The children, now 8 and 2, at a minimum have lost maternal companionship, instruction, and guidance.

**Relating to the Claim Overall:** The evidence in this case was reviewed with recognition of the parties' settlement agreement. Settlements may be entered into for reasons unrelated to the actual merits of a claim or the validity of a defense. Consequently, settlement agreements between the parties to a claim bill are not necessarily binding on the Legislature, its committees, or the Special Master. All such agreements, however, must be evaluated and can be given effect, at least at the Special Master's level, if they are found to be reasonable and based on equity. Such is the case with respect to this claim bill. The Special Master finds that the settlement agreement is reasonable, is not inequitable to either side, was negotiated in good faith by the attorneys representing the parties, and should be given effect.

COLLATERAL SOURCES:

As of the writing of this report, there are no collateral sources or outstanding liens related to the accident claiming Ms. Mervil's life.

ATTORNEY'S FEES:

Section 768.28(8), F.S., limits attorney's fees to 25 percent of a claimant's total recovery by way of any judgment or settlement obtained pursuant to §768.28, F.S. An attorney for the claimant has submitted documentation attesting to compliance with this limitation.

CLAIM BILL LANGUAGE:

As currently drafted, Senate Bill 64 does not recognize that \$195,000 has been paid by the City of Delray Beach, and the claim bill therefore seeks authority for the payment of the full settlement amount (\$1.5 million) rather than the balance (\$1,305,000). In addition, the proposed distribution of net claim bill proceeds does not reflect the ratios for which the claimant sought court approval (40 percent to Mr. Exanor and 30 percent on behalf of each of the children), and the distribution is not reflected in the body of the bill. Also, there are some errors in the claim bill relating to the facts (e.g., suggesting that Mr. Exanor is the father of both minor children) and conclusions of this case. It is recommended that the claim bill be amended throughout to reflect the record of the Special Master. The Legislature also may wish to specify a deadline for the purchase of annuities benefiting the children, and specify that funds on behalf of the children be paid into the guardianship accounts and be expended under supervision of the circuit court.

Finally, the Special Master notes that the language of the claim bill specifically states that annuities will be purchased for the benefit of Mr. Exanor (as well as for the benefit of the minor children). During the Special Master's hearing, Mr. Exanor indicated his intention to purchase annuities for his own benefit.

RECOMMENDATIONS:

Based upon the foregoing, I recommend that the amount authorized in this claim bill be amended to \$1,305,000 to recognize the payment of \$195,000 by the city previously and to reflect the balance due under the terms of the settlement agreement, and that Senate Bill 64 be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

Eric W. Maclure  
Senate Special Master

cc: Senator Ron Klein  
Representative Renier Diaz de la Portilla  
Faye Blanton, Secretary of the Senate  
House Claims Committee