THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
1/2/17	SM	Favorable
	AHS	
	AP	

January 2, 2017

The Honorable Joe Negron
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 18** – Senator Anitere Flores
Relief of “Survivor” and the Estate of “Victim”

SPECIAL MASTER’S FINAL REPORT

THIS IS A SETTLED CLAIM FOR $3.75 MILLION AGAINST THE DEPARTMENT OF CHILDREN AND FAMILIES, WHICH AROSE FROM TWO LAWSUITS AGAINST THE DEPARTMENT, ITS EMPLOYEES, AND OTHER DEFENDANTS. THESE LAWSUITS ALLEGED THAT THE NEGLIGENCE OF AND CIVIL RIGHTS VIOLATIONS BY THE DEPARTMENT, ITS EMPLOYEES, AND OTHER DEFENDANTS RESULTED IN THE SEVERE ABUSE AND NEGLECT OF SURVIVOR AND VICTIM AND THE DEATH OF VICTIM.

<u>INTRODUCTION:</u>

On February 14, 2011, Survivor and Victim were found in a pest control truck owned by their adoptive father, Jorge Barahona, along the side of I-95 in Palm Beach County. Victim was dead, and Survivor was severely injured and covered in chemicals. The adoptive parents, Jorge and Carmen Barahona, tortured the children in numerous ways, likely since gaining custody of them in 2004.

For their conduct, the Barahonas are facing charges for first degree murder and aggravated child abuse. The purpose of this special master report is to determine whether the Department of Children and Families is also a legal cause of the abuse and neglect of the children.

The evidence on which the recommendation in this report is based was controlled by the claimants and consisted primarily of large volume of documents or records created by the department and its contractors and subcontractors and provided by the claimants. However, in some respects, the evidence available for the special master proceeding was limited because the underlying lawsuits settled before trial and discovery.[1] Had a trial or discovery occurred, transcripts of testimony made under oath by parties and eyewitnesses would have been available during the special master proceeding.[2] Additionally, because of the settlement, the department did not present any mitigating evidence during the special master proceeding or object to evidence presented by the claimants.

As a result of the limited evidence, the extent to which or the specific point in time the actions or omissions of the department and its employees became a legal cause of the abuse and neglect of Survivor and Victim cannot be determined. Similarly, the claimants made no effort and felt no obligation to present evidence showing the relative fault of the department and other defendants. Nevertheless, there is sufficient evidence to show that a jury likely would have found that failures by the department to uncover abuse were a legal cause of prolonging the suffering of Survivor and Victim and of Victim's death.

FINDINGS OF FACT:

The Findings of Fact are organized into three main components. The first component provides a chronological description of the department's interaction with Survivor and Victim. The second component describes other specific types of evidence or descriptions of specific events which was made available during the special master proceeding. The last

[1] The lack of traditional evidence complicates a special master's responsibility to independently determine liability.

> Because governmental agencies occasionally settle cases against them for reasons not directly related to the merits of the claim, consent-based judgments are scrutinized carefully by the special master, by the legislative committees, and by both houses of the legislature, to ensure that independently developed facts exist to support the judgment and to justify the award.

D. Stephen Kahn, former General Counsel for the Florida Senate, *Legislative Claim Bills: A Practical Guide to a Potent(ial) Remedy,* FLA. B.J., Apr. 1988, at 27.

[2] Despite the settlement with the department, the claimants could have taken depositions of the relevant department employees under Senate Rule 4.81, which allows discovery consistent with the Florida Rules of Civil Procedure.

component is a summation of the evidence including reasonable inferences from the evidence.

I. Chronological Events

A. Initial Involvement with the Department, 2000

In May 2000, Survivor and Victim, a brother and sister who were twins, were born. From a few days after their birth until Victim was found dead in February 2000, the department was very involved in their lives. The department's first contact with the newborn children occurred because of their biological mother's substance abuse and Victim's medical condition.[3] In March 2002, before Survivor and Victim turned 2 years old, their biological mother was arrested for domestic violence.[4]

In August 2003, when the children were 3 years old, the biological mother's rights were terminated.[5] A few months later in March 2004, the children were removed from their father by the department after he was charged with sexual battery against a minor not related to him.[6]

B. Placement with the Barahonas, 2004

The department then placed Survivor and Victim in the foster home of Jorge and Carmen Barahona. Two other children that the Barahonas fostered and adopted also resided in the Barahona home at the time.[7] There was no evidence presented during the special master proceeding that the Barahonas had mistreated their other children or were not qualified to foster additional children.

Within days after Survivor and Victim were placed with the Barahonas, the children's uncle in Texas sent a letter to the judge assigned to the case and department staff which expressed his and his wife's desire to obtain custody of Survivor and Victim. The letter stated in part:

We are eager to get the legal custody of those kids, and will like to know what we need to do to be able to do so. We are planning to fly to Miami next Tuesday or Wednesday to follow the necessary legal steps to gain custody of those kids. The letter further expressed the willingness of the aunt and uncle

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[3] Department of Children and Families, *The Barahona Case: Findings and Recommendations* 2 (Mar. 14, 2011).
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] These two other children have filed separate lawsuits against the department and its employees.

to take full responsibility for the financial needs of the children during the adoption process.

As a prerequisite to placing the children with their relatives in Texas, a home study for the suitability of the placement was necessary. Notes from the children's guardian ad litem show that the department expected the home study would take 3 months.[8] However, the home study was not completed for about 15 months.[9] No explanation for the lengthier time period for the Texas home study was provided during the special master proceeding.[10] Accordingly, what the department or others did or did not do with respect to the home study is unknown.

Evidence, however, showed that the lengthy time period for the completion of the Texas home study, at least in part, caused Survivor and Victim to remain with the Barahonas. After a year and a half with the Barahonas, for example, a psychological evaluation of the children by Dr. Vanessa Archer, concluded that Survivor and Victim had bonded with the Barahonas and that sending them to Texas would be "devastatingly detrimental."[11, 12] The evidence presented by the claimants during the special master proceeding did not disclose whether the department or someone else selected Dr. Archer for the multiple psychological evaluations assigned to her.

C. Medical Neglect, 2004

During the hearing, the claimants presented evidence that in December 2004, the department became aware of allegations that the Barahonas were neglecting Victim's medical needs. The evidence was in the form of notes recorded by the Center

[8] Notes of Paul Neumann, guardian ad litem (May 18, 2004) (Bates 4764).

[9] The Department of Children and Families, *The Barahona Case: Findings and Recommendations*, 2 (Mar. 14, 2011).

[10] The third amended complaint in the underlying federal lawsuit alleged that the delay in the completion of the home study was caused by inexcusable delays in processing the relevant paperwork by the department and other defendants including Our Kids and the Center for Family and Child Enrichment. See Third Amended Complaint, paragraphs 69-70, 140-142, 162-164, and 166, *Survivor and Estate of Victim v. Our Kids of Miami/Dade/Monroe, Inc. et al.*, Case No.: 1:11-cv-24611-PAS (S.D. Fla.).

[11] Psychological Evaluation by Dr. Archer, Archer Psychological Services, Inc., Sept. 13, 2005 (Bates 4564-4567).

[12] The third amended complaint in the underlying federal lawsuit named Dr. Archer and Archer Psychological Services, Inc., as a defendant. The general allegations forming the basis of Dr. Archer's liability were that she made her placement recommendation without full information which would have included medical records, school records, and abuse reports. See *Id.* at paragraphs 171-189. The complaint further alleged that the Center for Family and Child Enrichment and one of its employees failed in its duties to provide the relevant information to Dr. Archer. See *Id.*

for Family and Child Enrichment, Inc., (CFCE) a defendant in the underlying federal lawsuit.[13] Victim would have been 4 years old at the time.

The notes show that the nurse for Victim's endocrinologist did not believe that Victim was in a good placement for two reasons.[14] First, Victim had not been to an appointment in nearly a year when Victim needed to see the doctor three times a year. Second, Victim is sent to the doctor by herself, which shows that the foster mother does not care for Victim's well-being. Apparently, the department or one of its contractors transported Victim to medical appointments.

As part of the department's 2011 review of the circumstances leading to the claim bill, the department reviewed the response to the allegations of medical neglect. The department's review found that there was "no documentation of case management follow-up with the foster mother as to the nurse's concerns raised with [Victim's] medical care."[15]

D. Evidence of Sexual Abuse, 2005

During the hearing, the claimants presented evidence that the department became aware that Victim had been sexually molested though a phone call to the Central Abuse Hotline about 10 p.m., January 27, 2005. Victim was 4 years old at the time. A narrative of the call written by DCF staff describes the caller's concerns as follows: "In the past, the foster father (unknown) tickled [Victim's] private area (vagina) with his fingers. This happened more than once, and the incidents occurred in the presence of other adults in the home."[16]

Within 2 hours after the call, a department child protective investigator consulted a psychologist who had seen Victim the day before. The investigator's notes indicate that Victim had made allegations to the psychologist that were similar to those made to the Hotline. The notes further indicate that the

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[13] The Center for Family and Child Enrichment (CFCE) is described in the underlying federal lawsuit as a contractor for Our Kids of Miami-Dade/Monroe, Inc. CFCE's contract with Our Kids, according to the lawsuit, required it to provide case management services to children in foster care and under protective supervision in Miami-Dade County. Our Kids, which was under a contract with the department, was described in the lawsuit as the lead agency for the coordination and delivery of community-based foster care and related services. See Third Amended Complaint, paragraphs 40-42, *Survivor and Estate of Victim v. Our Kids of Miami-Dade/Monroe, Inc. et al.*, Case No.: 1:11-cv-24611-PAS (S.D. Fla.).

[14] Notes recorded by the Center for Family and Child Enrichment, Dec. 15, 2004 (Bates 4856).

[15] The Department of Children and Families, *The Barahona Case: Findings and Recommendations* 6 (Mar. 14, 2011).

[16] Intake Report to Central Abuse Hotline, 10:04 p.m., Jan. 27, 2005 (Bates 4500).

psychologist found victim's story questionable and unfounded because of how Victim disclosed the story and because of circumstances around the narration of the story.[17] Finally, the psychologist opined that it would be detrimental to wake the children up and confront them as it was then after midnight.[18]

The morning after the Hotline call, there was a face-to-face meeting by a department child protective investigator with all members of the Barahona household. The Barahonas denied any abuse and suggested that the perpetrator was the biological father. The investigator's notes from the meeting further state in part that Victim and Survivor:

> were interviewed initially separately then together. [Victim] denied fo[ster] father touched her. Both children did make statements as to their biological father. They appeared to call both Daddy when speaking in English but called Papa and Papi when addressing them in Spanish clearly differentiating them.[19]

Apparently, department staff concluded that Victim was confusing her foster father with her biological father.[20] On February 9, 2005, department records state that the court was made aware of the abuse concerns as to the biological father and that there were no further concerns about the Barahonas.[21]

As part of the department's 2011 review of the circumstances leading to the claim bill, the department reviewed the sexual assault allegations against Mr. Barahona. The department's review found that the "Documentation suggests that the interview with [Victim] was not adequate."[22] The review further found that Victim and Survivor should have been interviewed away from the Barahonas to get a more candid understanding of how they viewed their caretakers. This interviewing technique was a "fundamental responsibility" according to the

[17] Notes by David Palachi (Jan. 28, 2005) (Bates 4509).
[18] *Id.*
[19] Notes by David Palachi (Jan. 28, 2005) (Bates 4505-4506).
[20] The Department of Children and Families, *The Barahona Case: Findings and Recommendations* 7 (Mar. 14, 2011).
[21] Notes by David Palachi (Feb. 9, 2005) (Bates 4503).
[22] The Department of Children and Families, *The Barahona Case: Findings and Recommendations* 7 (Mar. 14, 2011).

department, which might not have been well understood due to inadequate training and professional insight.[23]

E. Report of Abuse from School, 2006

During the special master hearing, the claimants presented evidence of several incidents, not described in the claim bill, through which the claimants allege the department and others might have become aware of the abuse perpetrated by the Barahonas. For the sake of brevity, only some of the incidents, not identified in the claim bill, will be described in this report. One of these incidents, however, was based on a call to the Central Abuse Hotline at 2:07 p.m. on February 23, 2006, which described Victim as having a "huge bruise on her chin and neck area."[24] According to the narrative of the call written by department staff, Victim made inconsistent statements about whether the bruises occurred at home or at school. The narrative also noted that Victim had missed several days of school.

The department's records show that by 3:30 p.m. a child protective investigator began investigating the call by obtaining Victim's and Survivor's attendance records and grades.[25] Among the first investigative notes, department staff recorded that between November and February 23, 2006, Victim had 17 absences from school.

Later that day, when the children were interviewed at school, Victim said she had slipped and fallen in class.[26] Both Survivor and Victim denied that anyone had hit Victim. However, the children's teacher said that Victim claimed the injury occurred at home and that Victim sometimes comes to school unclean.

The department's investigator had a face-to-face meeting with the Barahonas on the evening of the call to the Hotline. The Barahonas denied knowing about Victim's bruise. Mr. Barahona further explained that "the child usually gives him a hug before going to school and if the child had a mark, he would have seen it."[27]

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[23] *Id.*
[24] Intake Report to Central Abuse Hotline, 2:07 p.m., Feb. 23, 2006 (Bates 4512-4514).
[25] Chronological Notes Reports, Feb. 23, 2006 (Bates 4527-4528).
[26] Chronological Notes Reports, Feb. 23, 2006 (Bates 4524-4526).
[27] Chronological Notes Reports, Feb. 23, 2006 (Bates 4521).

While department staff were speaking with Ms. Barahona, Victim "jumped in the middle and said she slipped and fell in class."[28] The department's notes further indicate that the Barahona home was clean at the time and well-stocked with food and that the other children in the house were free of bruises.

As part of the department's continued investigation of Victim's bruise, records indicate that a child protection team conducted a specialized interview of Victim about 2 weeks after the call to the Hotline. Child protection teams are a team of professionals who provide specialized diagnostic assessment, evaluation, coordination, consultation, and other supportive services.[29] The child protection team in this case concluded that the bruise was not the result of child abuse and that Victim needed testing for hyperactivity.[30]

During the department's 2011 review of the events leading to the claim bill, the department reviewed its response to the February 2006 call to the Hotline. The department's report expressed concerns that what department staff did to investigate the abuse allegation was not fully documented.[31]

F. Report of Abuse from School, 2007

On March 20, 2007, the principal of Survivor and Victim's elementary school reported potential abuse and neglect to Central Abuse Hotline.[32] The narrative recorded by department staff states:

> For the past five months, [Victim] has been smelling and appearing unkempt. At least 2 or 3 times a week, [Victim] smells. She smells rotten. Her uniform is not clean and her shoes are dirty. On one occasion, [Victim] got applesauce in her hair, the next day she had applesauce still in her hair. [Survivor] also appears unkempt. On 2/20/07, [Victim] had food in her backpack from breakfast and lunch. There is a concern that maybe she is not eating at home. [Victim]

[28] Chronological Notes Reports, Feb. 23, 2006 (Bates 4520-4521).
[29] Section 39.303(1), F.S., (2005).
[30] Chronological Notes Reports, Mar. 13, 2006 (Bates 4515-4516).
[31] The Department of Children and Families, *The Barahona Case: Findings and Recommendations*, 7-8 (Mar. 14, 2011).
[32] Intake Report to the Central Abuse Hotline, 3:46 p.m., Mar. 20, 2007 (Bates 4594-4596).

> is always hungry and she eats a lot at school. [Victim] is afraid to talk.[33]

The department's investigative summary, dated April 12, 2007, of its actions in response to the call to the Hotline concluded: "At this time the risk level is low. No evidence was found to support the allegation of environmental hazards toward the children."[34]

In contrast to the department's conclusion, the children's guardian ad litem felt differently. In an email dated the same date as the department's investigative summary, the guardian ad litem informed his supervisor and a department attorney of the concerns of school staff.[35] The email explained that the reports from school, including the children's approximately 20 absences and failing grades, were causing him to rethink his prior conclusion that the children's placement with the Barahonas was best. In closing his email, the guardian ad litem wrote, "I believe some investigation needs to be done, to determine the very best place for these deserving kids to grow up and lead a healthy, happy life."[36] Whether the guardian ad litem reported his concerns to the dependency court is unknown.[37]

In the department's 2011 review of the events leading to the claim bill, it reviewed its response to the March 2007 Hotline call. The department's review determined that there were "compelling facts" gathered by department staff that should have resulted in "'some indicators' or 'verified' findings for abuse."[38]

G. Survivor and Victim Adopted, May 2009

The Barahonas finalized the adoption of Survivor and Victim in May 2009.

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[33] *Id.*
[34] Investigative Summary (Apr. 12, 2007) (Bates 4616-4618).
[35] Email from Paul Neumann, guardian ad litem, to Cynthia Kline, guardian ad litem supervisor and a copy to Christine Lopez-Acevedo, a department attorney (Apr. 12, 2007) (Bates 4619-4620).
[36] *Id.*
[37] At all times relevant to the events described in the claim bill, s. 39.822(4), F.S., required the guardian ad litem for Survivor and Victim to submit written reports of recommendations to the court. These reports were not made available to the special masters.
[38] The Department of Children and Families, *The Barahona Case: Findings and Recommendations* 8 (Mar. 14, 2011).

H. Final Call to Central Abuse Hotline, 2011

The final call to the Central Abuse Hotline when both Survivor and Victim may have been alive, occurred at 2:22 p.m. on February 10, 2011.[39] The call was made by a therapist for the Barahona's niece. According to excerpts of department records, which the claimants transcribed onto a PowerPoint slide for the special master hearing, the call and the department's response were as follows:

> 2/10/11 2:22 PM Survivor and Victim are tied by their hands and feet with tape and made to stay in bathtub all day and night as a form of punishment tape is taken off to ....RESPONSE TIME 24 HOURS BATES 4684-86---Transcript of Hotline call:-grandmother cares for her and she has foster children who are being abused…. They are being taped up w/their arms and legs and kept in a bathtub-all day and all night and she undoes their arms to eat… and she has been threatened not to say anything….. ….BATES 4672-73
>
> 2/10/11 6:42 PM CPI to home NO CALL TO POLICE when kids not home. Accepts mother's story that kids are with Foster Dad as they have separated. Bates 4634

According to a recording of a hearing before the Barahona Investigative Team, department staff explained that the Hotline operator and her supervisor misclassified the call as one requiring a response within 24 hours. The call, according, to the department should have resulted in an immediate response.

Similarly, in the department's 2011 review of the events leading to the claim bill, it reviewed its response to the final Hotline call. The department's review concluded that the allegations in the call "suggested criminal child abuse incidents requiring immediate response and outreach to law enforcement."[40]

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[39] This information is based on excerpts of documents provided by the claimants on a PowerPoint presentation. Copies of complete records relating to the final call to the Hotline and the department's response to the call were not provided to the special master by the claimants.

[40] The Department of Children and Families, *The Barahona Case: Findings and Recommendations* 10 (Mar. 14, 2011).

II. Specific Types of Evidence or Categories of Events
This component of the Findings of Fact focuses on the interaction of individuals, other than department staff, with Survivor and Victim and events occurring after Victim's death.

A. Judicial Review Proceedings
While Survivor and Victim were placed with the Barahonas, many individuals or entities were overseeing their care. One of these entities was the dependency court. Florida law required the dependency court to review the placement of Survivor and Victim on a regular basis. The information made available during the special master proceeding indicates that the dependency court knew information about the Barahonas' care of the children that, at least in hindsight, is troubling.

For example, during a hearing in December 2004, the guardian ad litem expressed concerns to the dependency court that "'play therapy' that had been originally suggested, and that the judge ordered several months ago had not begun."[41] The guardian ad litem, according to his notes, believed that therapy was needed because Victim "had begun to touch her sexual areas again" since she started visitation with her biological father.[42] In response to these concerns, "the judge told DCF to have another evaluation, and to begin therapy ASAP."[43]

Later in the dependency process, the department reported to the court that Mr. Barahona prevented the guardian ad litem from visiting Survivor and Victim at home from May to August 2007.[44]

Similarly, in October 2007, a Citizen Review Panel, appointed by the dependency court, issued a report of its findings and recommendations relating to Survivor and Victim.[45] Although the panel found that Survivor and Victim's placement with the Barahonas was "APPROPRIATE and SAFE," the report listed several recent legal events and several other concerns.[46]

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[41] Guardian Ad Litem Case Log, Dec. 14, 2004 (BATES 4914).
[42] *Id.*
[43] *Id.*
[44] Recording of hearing of the Barahona Investigative Team. On this issue, the claimants' PowerPoint presentation to the special masters cited to BATES 4635-36.
[45] Recommendations and Findings of the Citizen Review Panel, In and For the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida based on a hearing on Oct. 3, 2007 (BATES 4621—27).
[46] *Id.*

The first legal event described by the panel was that the guardian ad litem had not seen the children in 3 months. The second legal event was an abuse report that had been filed with the dependency court. The panel described the events surrounding the abuse report as follows:

> [The principal] reported that [Victim's] teacher called the foster mother with concerns that there has been an increase in absences and there has not been follow through. Both children doing poorly in school and falling asleep in class. They are scared to go home and is hording food. They are petrified of getting in trouble. The kindergarten teacher for [Survivor] and [Victim] was also present. She reported that she was their teacher for 2 1/2 months. The children were fearful of the mom and was petrified to have the mother called. The court ordered reevaluation of both children. Court order psycho-educational and psychological on the children.[47]

The concerns relevant to the claim bill, which were in the panel's October 2007 report, included a concern that the children's dental exams had not been submitted to the panel for review.[48] The panel also stated that it was concerned that the judicial review social study report was not pre-filed by the Center for Family and Child Enrichment, as required by statute. Finally, the panel expressed a concern that the guardian ad litem had not been able to visit the children at the foster home. Despite the concern, the panel noted the statement of an unidentified foster parent that the guardian ad litem did not show up for visits at the scheduled times and called them at an inconvenient time.

After the Citizen Review Panel issued its October 2007 report and after a hearing in the dependency court, the guardian ad litem supervisor sent an email to the guardian ad litem describing the hearing. The supervisor explained, "the judge was not 'buying' what the foster parents were saying" about the guardian ad litem's access to the Barahona home.[49] The

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[47] *Id.*
[48] *Id.* "On three different occasions, the Citizen's Review Panel held a hearing and found that there was no documentation of the current physical, dental or vision check-ups available for the children, nor were they receiving any required therapy." The Department of Children and Families, *The Barahona Case: Findings and Recommendations* 8 (Mar. 14, 2011).
[49] Email from Cynthia Kline, guardian ad litem supervisor, to Paul Neumann, guardian ad litem, Oct. 23, 2007 (BATES 4658).

supervisor further explained, "it appears everyone (although the Judge did not say so) is under the impression that the foster parents are trying to hide something."[50] It was made very clear, wrote the supervisor, that the guardian ad litem was to be given access to the children in the home.

Nonetheless, the Barahona's complaints about the guardian ad litem were considered. Eventually, the guardian ad litem was "discharged from the case to smooth over relationships with the Barahonas."[51]

B. Psychological Evaluations

During the special master proceeding, the claimants provided the special master with a psychological evaluation written by Dr. Vanessa Archer in September 2005 along with portions of other evaluations written by her.[52] The report from September 2005 concluded that "it would be extremely traumatic, if not devastatingly detrimental to the emotional and psychological well-being of these children if they were removed from their current home to be placed with relatives with whom they have no prior relationship. The effects of such a removal, regardless of what transition phase occurs, would have life-long consequences for these children."[53]

The children were evaluated again by Dr. Archer in 2007 when they were 7 years old. Her report stated that both Survivor and Victim had symptoms of depression and that they had thought of killing themselves.[54] The report further stated that Victim "is sure that terrible things are going to happen to her."[55] Survivor expressed to Dr. Archer that he thought "the purpose of the evaluation was to talk about what his father did to him noting that his father 'tickled' him."[56] Similarly, "[Victim] expressed the belief that the purpose of the evaluation was to talk about what her father said to her and that 'people are lying.'"[57]

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[50] *Id.*
[51] The Department of Children and Families, *The Barahona Case: Findings and Recommendations* 9 (Mar. 14, 2011).
[52] Dr. Archer was a defendant in the underlying lawsuits. She was released, according to one of the claimants' attorneys, because she had no insurance.
[53] Dr. Vanessa Archer, Archer Psychological Solutions, Inc., Psychological Evaluation (Sept. 7, 2005).
[54] Dr. Vanessa Archer, Archer Psychological Services, Inc., Psychological Evaluation (June 11, 2007) (BATES 4631, 4633).
[55] *Id.*
[56] *Id.*
[57] *Id.*

Despite the findings in her previous evaluations, in an excerpt of an evaluation from February 2008, Dr. Archer wrote, "it is astounding how these children have thrived. They clearly have a strong bond with their current care givers." As a result, Dr. Archer concluded that adoption was clearly in the children's best interest and "should be allowed to proceed without further delay."[58]

With respect to the February 2008 evaluation, the Barahona independent investigative panel appointed by the department concluded that Dr. Archer:

> failed to consider critical information presented by the children's principal and school professionals about potential signs of abuse and neglect by the Barahonas. That omission made Dr. Archer's report, at best, incomplete, and should have brought into serious question the reliability of her recommendation of adoption. Several professionals, including the Our Kid's case manager, the GAL, and the Children's Legal Services attorney as well as the judge, were, or should have been, aware of that significant omission, and yet apparently failed to take any steps to rectify that critical flaw in her report.[59]

No evidence was produced for the special master proceeding showing whether the department or someone else selected Dr. Archer to perform the psychological evaluations.

C. Abuse Suffered by Survivor and Victim

During the special master hearing, Dr. Eli Newberger testified about the specific types of abuse and neglect suffered by Survivor and Victim. Dr. Newberger is a pediatrician and an expert in matters relating to child abuse and neglect. His testimony was based on his physical examinations of and interviews with Survivor in February 2013 and September 2015. His testimony is also based on interviews of Survivor's aunt and uncle in Texas, who were finally able to adopt Survivor in May 2012.

Dr. Newberger testified that the Barahonas abused and neglected Survivor and Victim in numerous ways. As explained to Dr. Newberger by Survivor:

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[58] Excerpt of a psychological evaluation reproduced on the claimants' PowerPoint presentation, labeled Vanessa L. Archer PhD Report: 2/12/08 (BATES 4991-95).

[59] *The Nubia Report: The Investigative Panel's Findings and Recommendations*, 5

- Mr. Barahona put hot sauce in Survivor's and Victim's eyes, nose, ears, and private parts, both front and back.
- Mr. Barahona shoved a noisemaker in Survivor's ear.
- Mr. Barahona made Survivor and Victim sleep in the bathtub with ice nearly every day for almost 3 years.
- The Barahonas tied Survivor's and Victim's hands and feet together with tape.
- Mr. Barhahona would hit Survivor with a shoe and a mop, hard enough to cause bleeding.
- Mr. Barahona punched Survivor in the mouth, which resulted in Survivor having corrective surgery.
- Mr. Barahona would place a plastic bag at random times over Survivor and Victim's heads for as long as Mr. Barahona would like.
- Mr. Barahona would give electric shocks to Victim for a minute at a time.
- Mr. Barahona had doused Survivor with chemicals.
- Survivor had gone without eating in the Barahona home for as long as 3 days.
- Before Victim had been found, Mr. Barahona gave Survivor pills that caused Survivor to have seizures.

Dr. Newberger's physical examinations of Survivor found numerous scars across his body which were consistent with the abuse described by Survivor above. On Survivor's forearms and ankles, Survivor had linear healing lacerations from cuts through the lowest level of the skin. These scars, according to Survivor, were from having been bound in the bathtub. On his lower abdomen and back, Survivor had scars that are consistent with chemical burns. Survivor also had scarring on his penis, consistent with chemical burns.

Between Dr. Newberger's first examination of Survivor in 2013 and his examination of Survivor in 2015, some of Survivor's scars faded, but others expanded and became more prominent. How long the scars will last is unknown, but they constantly remind Survivor of the abuse he suffered.

When Dr. Newberger asked Survivor whether he was frightened all the time in the Barahona home, Survivor replied, "At night, in the bathtub, we were scared about what would happen in the morning." Additionally, Survivor told Dr. Newberger that at some point in time near Victim's death, she

told him that she wanted to die because she couldn't take the abuse anymore.

The abuse Survivor suffered in the Barahona home continues to affect him in many ways. Survivor's aunt and uncle explained to Dr. Newberger that soon after Survivor was placed with them, they would find Survivor gasping for air in the middle of the night. He was having nightmares about bags being placed over his head.

Unusual smells tend to trigger memories of abuse. Survivor might suddenly say: "I can't stay here," "It reminds me of the chemicals in the truck," or "it reminds me of what [Victim's] body smelled like after she died." Mr. Barahona operated a pest control business, and Mr. Barahona's truck was carrying pest control chemicals when Survivor and Victim were found.

In school, Dr. Newberger explained, Survivor cannot solve math problems or understand what he is reading without a full-time aide by his side. He cannot take any tests without the presence of an aide. Survivor's grades are poor or failing. According to Survivor, he cannot concentrate because he is constantly thinking about the abuse.

A recent example of how memories of abuse affect Survivor occurred after Survivor met with a prosecutor for one of the Barahonas. After he met with the prosecutor, Survivor was tremendously distressed. He insisted on being treated as an infant for a few days. He wanted to be cuddled and called by various pet names that one would call an infant. In psychological terms, this event was a serious regression and was very unusual for a 15 year old, according to Dr. Newberger.

Dr. Newberger has diagnosed Survivor as having chronic post-traumatic stress disorder, noting that Survivor's entire arc of development has been nothing but deprivation, assaults, witnessing assaults, including a murderous assault on his sister. Dr. Newberger further opined that within a reasonable degree of medical probability, Survivor has suffered a permanent injury because of the abuse in the Barahona home.

Dr. Newberger concludes that Survivor will need psychiatric and psychological care for the rest of his life as he comes into

contact with things that provoke memories and distress. Moreover, Dr. Newberger opined that if Survivor does not have the capacity to learn, his capacity to have a job and provide for himself, his ability to live independently, and his capacity to have a family and conduct himself as an adult are crippled.

D. The Barahona Case: Findings and Recommendations

On February 21, 2011, days after Victim's body was found, the Secretary of the Department of Children and Families established an independent investigative panel to examine issues relating to the Barahonas.[60] The department attached the findings and suggestions from the investigative panel in its report titled *The Barahona Case: Findings and Recommendations.* When available, the department's assessments of its actions are included in the chronological description of its interaction with the children.

During the special master hearing, a member of the investigative panel, David Lawrence, [61] described the panel's activities, information it reviewed, and the findings described in its report titled *The Nubia Report: The Investigative Panel's Findings and Recommendations*.[62] The investigative panel's findings include the following:

- Dr. Archer failed to consider critical information about potential signs of abuse, making her reports incomplete.[63]
- The case manager from Our Kids, the guardian ad litem, and the Children's Legal Services attorney, as well as the judge, were, or should have been, aware of significant omissions in Dr. Archer's reports but failed to take any serious steps to correct the critical flaws.[64]
- There was no centralized system to ensure the dissemination of critical information to all parties overseeing the care of Survivor and Victim.[65]

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[60] David Lawrence Jr., Roberto Martinez, and Dr. James Sewell, *Barahona Investigative Team Report* 4 (Mar. 10, 2011).
[61] Mr. Lawrence was the president of The Early Childhood Initiative Foundation and chair of the Children's Movement of Florida.
[62] *The Nubia Report: The Investigative Panel's Findings and Recommendations* is available at https://www.dcf.state.fl.us/initiatives/barahona/docs/meetings/Nubias%20Story.pdf.
[63] David Lawrence, Jr., et al., *supra* note 60.
[64] *Id.* at 5.
[65] *Id.*

- The guardian ad litem, school personnel, and a nurse practitioner raised serious concerns that should have required "intense and coordinated follow-up."[66]
- There was no person serving as the "system integrator" who ensured that relevant information, including allegations of abuse, was shared and made accessible to others.[67]
- There is evidence of multiple instances in which the Barahonas did not ensure the health of Survivor and Victim.[68]
- During the hearings before the panel, the actions and testimony of the Chief Executive Officers of Our Kids and the Center for Family and Child Enrichment "created suspicions as to what, if anything, they were trying to hide."[69]
- Post-adoption services should have been identified by Our Kids after a post-adoption call to the Hotline in June 2010.[70]
- Much of the necessary information raising red flags about the Barahonas was present within the system, but the individuals involved relied on inadequate technology instead of talking to each other.[71]

E. Letter of Support

The department has provided a letter of support for a claim bill in an amount not to exceed $3.75 million, consistent with the settlement agreement in this matter.

III. Inferential Findings of Fact

The evidence presented, including the guardian ad litem's access to the children, lack of documentation of necessary medical care, the nature of the complaints to the Hotline, and the children's statements to Dr. Archer, show that the department and other defendants to the underlying lawsuits would have had good reason to be suspicious of how the Barahonas were treating Survivor and Victim. Moreover, the shortcomings of the department in its responses to allegations of abuse and neglect, including admissions that its staff failed

[66] *Id.* at 6.
[67] *Id.*
[68] *Id.* at 7.
[69] *Id.* at 8.
[70] *Id.*
[71] *Id.* at 9.

to follow procedures, are credible along with the findings of the independent review panel.

Because the individuals overseeing the care of Survivor and Victim, which included department staff and others, had reason to be suspicious, it seems appropriate to ask, what possible explanation could there be for failing to discover the abuse and neglect? Because this matter settled before discovery and trial and because the individuals involved were not asked to testify for the special master proceeding, they were never asked this question on the record. However, the evidence available suggests that their conduct might be explained by:

- Evidence and allegations of abuse and neglect by the children's biological mother who was a drug addict and their biological father, a child molester.
- The lack of evidence that Barahonas had improperly cared for their other adoptive children.
- The convincing nature of the Barahona's lies and the Barahona's ability to coerce the children into denying the allegations of abuse.
- Wishful thinking, coupled with a belief that the signs of the type of unimaginable abuse perpetrated by the Barahonas would have been more obvious.

Although one might explain the conduct of the department and others as above, the explanations become less and less of an excuse as the signs and allegations of abuse and neglect increase.

CONCLUSIONS OF LAW:

The lawsuits leading to this claim bill were based on allegations of negligence and civils right violations.

I. Negligence

In a negligence action, "a plaintiff must establish the four elements of duty, breach, proximate causation, and damages."[72] Whether a duty of care exists is a question of law.[73] The Department of Children and Families has a duty to reasonably investigate complaints of child abuse and neglect, which is recognized by case law.[74] Once a duty is found to

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[72] *Limones v. School Dist. of Lee County*, 161 So. 3d 384, 389 (Fla. 2015).
[73] *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992).
[74] *Dept. of Health and Rehabilitative Svcs. v. Yamuni*, 498 So. 2d 441, 442-43 (Fla. 3d DCA 1986) (stating that the Dept. of Health and Rehabilitative Services, a precursor to the Dept. of Children and Families, has a statutory

exist, whether a defendant was negligent in fulfilling that duty is a question for the finder of fact.[75] In making that determination, a fact finder must decide whether a defendant exercised the degree of care that an ordinarily prudent person, or caseworker in this instance, would have under the same or similar circumstances.[76]

I find that the claimants provided sufficient evidence in the proceeding to show that, had this case proceeded to trial, a jury would have found that the department and others breached their duties to Survivor and Victim. Juries have done so in somewhat similar lawsuits. However, due to the limited evidence, especially the lack of testimony of any of the various caseworkers, case managers, and child protective investigators, the specific point in time that the department breached its duty cannot be identified with precision.

I also find that the claimants presented sufficient evidence in this matter to show that a jury would have found that actions and inactions by the department proximately caused the suffering of Survivor and Victim to be prolonged and caused Survivor's death. "[T]he issue of proximate cause is generally a question of fact concerned with 'whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred.'"[77] In cases against the department having some similarities to this matter, the appellate court determined that "[t]he plaintiffs presented evidence that there is a natural, direct, and continuous sequence between DCF's negligence and [a child's] injuries such that it can be reasonably said that but for DCF's negligence, the abuse to [the child] would not have occurred."[78]

Finally, I find that the claimants presented sufficient evidence that a jury would have further found that Survivor and Victim suffered damages because of the department's negligence. No amount of money can compensate for the pain and

duty of care to prevent further harm to children when reports of child abuse are received); *Dept. of Children and Family Svcs. v. Amora*, 944 So. 2d 431 (Fla. 4th DCA 2006).
[75] *Yamuni, 529 So. 2d* at 262.
[76] *Russel v. Jacksonville Gas Corp.*, 117 So. 2d 29, 32 (Fla 1st DCA 1960) (defining negligence as, "the doing of something that a reasonable and prudent person would not ordinarily have done under the same or similar circumstances, or the failure to do that which a reasonable and prudent person would have done under the same or similar circumstances").
[77] *Amora*, 944 So. 2d at 431.
[78] *Id.*

suffering that Survivor and Victim endured. However, the $5 million settlement by the department in this matter is not excessive compared to jury verdicts in similar cases.

II. Federal Civil Rights Violations

The federal lawsuit underlying this claim bill alleged that the department, its employees, Our Kids and its employees, and the Center for Family and Child Enrichment and its employees violated the federal civil rights of Survivor and Victim.

The specific legal standard governing civil rights claims is set forth in 42 U.S.C. s. 1983, which states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

In contrast to a negligence action, in a civil rights action, the defense of sovereign immunity or the limits on the collectability of a judgment or the payment of a claim under s. 768.28, F.S., do not apply.[79] For the time periods applicable to the claim bill, s. 768.28, F.S., limited the collectability of a judgment or claim to $100,000 per person and $200,000 for all claims arising out of the same incident.[80]

Case law clearly shows that under 42 U.S.C. s. 1983, state officials and contractors such as Our Kids can be held liable for violations of a foster child's civil rights.[81] The applicable rights protected by statute include the "constitutional right to

[79] *Howlett v. Rose*, 496 U.S. 356 (1990).

[80] Chapter 2010-26, Laws of Fla., increased the limits on the payment of a claim or judgment to $200,000 per person and $300,000 for all claims arising out of the same incident. The increased limits apply to claims arising on or after October 1, 2011.

[81] *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987); *Crispell v. Dept. of Children and Families*, 2012 WL 3599349 (M.D. Fla. 2012) (denying Children's Homes Society of Florida's motion to dismiss a civil rights action because the court found that the entity was not an arm of the state entitled to immunity under the 11th Amendment to the United States Constitution); *Woodburn v. Dept. of Children and Family Svcs.*, 854 F.Supp.2d 1184, 1201 (S.D. Fla. 2011) (finding that the plaintiff "alleged sufficient facts to support a facially plausible claim that her constitutional rights were violated by . . . Our Kids for the purpose of surviving a motion to dismiss").

be free from unnecessary pain and a fundamental right to physical safety."[82]

Proving a civil rights violation is different than proving negligence.[83] In a civil rights action, the plaintiff must show that the defendant was deliberately indifferent to the violation of a federal right. The defendant's knowledge of a risk of harm is key. A state official acts with deliberate indifference only when disregarding a risk of harm of which he or she is actually aware.

Following the guidance above, the Federal 11th Circuit Court of appeals has stated that "in order to establish deliberate indifference, plaintiffs must be able to allege (and prove at trial) that the defendant (1) was objectively aware of a risk of serious harm; (2) recklessly disregarded the risk of harm; and (3) this conduct was more than merely negligent."[84]

The evidence presented during the special master proceeding showed that the actions of the department were negligent, not civil rights violations.[85]

<u>RELATED ISSUES:</u>

A claim bill is an act of legislative grace, not an entitlement.[86] These bills are a "voluntary recognition of its moral obligation by the legislature . . . based on its view of justice and fair treatment of one who ha[s] suffered at the hands of the state."[87] Consistently, the legislative proceedings relating to claim[88] bills are "separate and apart from the constraints of an earlier lawsuit."[89]

For these reasons, special masters inquire into matters that might not be admissible in court but may be relevant to

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[82] *Ray v. Foltz*, 370 F.3d 1079, 1082 (11th Cir. 2004) (citing *Taylor v. Ledbetter*, 818 F.2d 791, 794-95 (11th Cir. 1987) (en banc)).
[83] *Ray v. Foltz*, 370 F.3d 1079, 1083 (11th Cir 2004).
[84] *Id.* (citing *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999)).
[85] Nonetheless, the department made a payment of $1.25 million, which was in excess of the amounts authorized for negligence actions under s. 768.28, F.S. Perhaps there are facts that are known by the parties that were not presented. When I asked the claimants' attorneys during the special master hearing what facts took the Barahona lawsuits from negligence to a civil rights action, they declined to directly answer the question.
[86] *Searcy Denny Scarola Barnhart & Shipley, P.A. v. State,* 2015 WL 4269031, *5 (Fla. 4th DCA), *review granted*, 2015 WL 6127021 (Fla. Oct. 14, 2015).
[87] *Noel v. Schlesinger*, 984 So. 2d 1265, 1267 Fla. 4th DCA) quoting *Gamble v. Wells*, 450 So. 2d 850, 853 (Fla. 1984).
[88] *Searcy, et al., supra* note 86.
[89] *Id.*

decisions by legislators. These inquires do not affect the recommendation of this report. However, common inquiries include: What is the claimant's criminal history? Is the claimant lawfully present in the United States? Is there any information about the claimant which would cause embarrassment to the Legislature should it enact the claim bill?

Because of the complexity of the department's system to oversee foster care and investigate allegations of abuse and neglect, different questions arise in this matter. These questions relate to the liability of other parties who were also defendants to the underlying lawsuits and were under contract to care for Survivor and Victim.

I. Fault and Damages Collected from Other Defendants
With respect to this claim bill, the most relevant inquiry asks: Who besides the Department of Children and Families was at fault for the abuse and neglect of Survivor and Victim? Of the others at fault, why were they at fault and what was their relative contribution to the damages suffered by Survivor and Victim? Finally, what amounts have been recovered from others?[90]

The claimants declined my request to explain the responsibility of others for the abuse of Survivor and Victim and Victim's death.[91] Nonetheless, there is information suggesting that others bear substantial responsibility, including Dr. Archer, Our Kids, and the Center for Family and Child Enrichment.
According to the settlement agreement in this matter, the department agreed to work cooperatively to reach a settlement with Dr. Archer "as part of which she will agree to take no more court or agency appointments relating to the foster care or dependency system, or children in it."[92] Further,

[90] If the lawsuit had proceeded to trial after the claimants reached a settlement with other defendants, a court may have found that the settlement agreement could not be used as a basis for offsetting damages owed by the department by damages paid by one of the defendants to the underlying lawsuits. *See Wal-Mart Stores v. Strachan*, 82 So. 3d 1052 (Fla. 4th DCA 2011). With the abolition of joint and several liability, an award against a defendant generally may not be offset by amounts recovered by a settlement with another defendant. *Id.*
[91] The State Constitution permits a legislator to consider any information he or she deems to determine whether a claim bill is in the interests of his or her constituents or the state as a whole. Moreover, because claim bills are a type of appropriation bill, a legislator should have access to information necessary to determine how to rank a claim bill among the state's funding priorities.
[92] Mem. of Settlement, paragraph 5 (Mar. 6, 2013), *Survivor and Estate of Victim v. Our Kids of Miami/Dade/Monroe, Inc. et al.*, Case No.: 1:11-cv-24611-PAS.

according to one of the attorneys for the claimants, Dr. Archer was dismissed from the federal court case; she had no insurance, and she made no payment.[93]

The claimants disclosed that they reached a settlement agreement with Our Kids and the Center for Family and Child Enrichment. I asked for the claimants' attorneys for details about the settlement agreement. They refused to make the settlement agreement available or disclose the settlement amount.[94]

Had the claimants fully disclosed information relative to the conduct of the other defendants to the underlying lawsuits and any settlements, the Legislature could independently evaluate whether the department's settlement agreement is in the best interests of the state. Similarly, the lack of disclosure restricts the Legislature from independently determining whether it has a moral obligation to provide compensation in excess of the settlement agreement with the department.

The Supreme Court's opinion in *Fabre v. Marin* shows that, had this matter been presented to a jury, the jury would have apportioned the damages among all the responsible persons.[95] Thus, the department would have been responsible only for that portion of damages equivalent to its percentage of fault.[96, 97]

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[93] Statement of Neal Roth during the special master hearing (Oct. 30, 2015).
[94] The settlement agreement between the claimants and Our Kids and the Center for Family and Child Enrichment should be readily available as a public record, just as the claim bill, investigative reports by the department, and the settlement agreement between the claimants and the department is a public record. *See* ss. 409.1671 (2011), 287.058(1)(c), 119.011(2), and 119.07(1), F.S.; *see also* s. 69.081(8), F.S. The information is also available to the Legislature under s. 11.143, F.S.
[95] *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).
[96] *Id.* at 1185.
[97] Additionally, the lack of disclosure by the claimants' attorneys precludes an analysis of whether the department could be legally responsible for the contractors. According to *Del Pilar v. DHL Customer Solutions, Inc.,* 993 So. 2d 142, 145-46 (Fla. 1st DCA 2008):

> Generally, a principal is not vicariously liable for the negligence of its independent contractor, but the principal is liable for the negligence of its agent. *See generally Fla. Power & Light Co. v. Price*, 170 So.2d 293 (Fla.1964). Whether one laboring on behalf of another is a mere agent or an independent contractor "is a question of fact ... not controlled by descriptive labels employed by the parties themselves." *Parker v. Domino's Pizza, Inc.*, 629 So.2d 1026, 1027 (Fla. 4th DCA 1993) (internal citations omitted); see also *Font v. Stanley Steemer Int'l, Inc.*, 849 So.2d 1214, 1216 (Fla. 5th DCA 2003) (noting that question of status "is normally one for the trier of fact to decide").

II. Distribution of Settlement Proceeds

A second related issue is whether the settlement funds paid by the department have been distributed to Survivor and the Estate of Victim. Pursuant to its settlement agreement with the claimants, the department has made the required payment of $1.25 million. The Memorandum of Settlement, filed in the federal lawsuit, required the department to pay the settlement funds to the claimants' attorneys by the beginning of April 2013.

In October 2015, the claimants successfully terminated any rights the Barahonas may have had to inherit from Victim's estate. However, as of the date of this report, the claimants' attorneys have not provided any information showing that the settlement funds were distributed to their clients.

ATTORNEYS FEES:

Section 768.28(8), F.S., states "[n]o attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement." In compliance with the statute, Neal Roth, one of the claimants' attorneys, submitted an attorney fee affidavit that states in pertinent part:

> 1. My name is Neal A. Roth and I am a partner of the Law Firm of Grossman Roth . . .
> 2. Grossman Roth, P.A., is counsel for Claimants, Survivor and Richard Milstein, as Personal Representative of the Estate of Victim, deceased.
> 3. As counsel for the Claimants, we have fully complied with all provisions of Section 768.28 (8).
> 4. Insofar as lobbying fees are concerned, the bill as filed provides that any lobbying fees related to the claim bill will be included as part of the statutory cap on attorneys' fees in Section 768.28.

Additionally, closing statements provided by the claimants' attorneys indicate that the contract with the claimants provides for an award of attorney fees in the amount of 25 percent of the $5 million settlement, which is $1.25 million, plus costs.

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 18 be reported FAVORABLY.

Respectfully submitted,

Thomas C. Cibula
Senate Special Master

cc: Secretary of the Senate