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SPECIAL MASTER'S FINAL REPORT

The Honorable John Thrasher
Speaker, The Florida House of Representatives
420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 33 - Representative Sembler
Relief of Warren Weathington and his father, Carl Weathington (SB 40)

THIS IS AN EXCESS JUDGMENT CLAIM AGAINST THE CITY OF TALLAHASSEE FOR $1,005,000 FOR INJURIES SUFFERED BY WARREN WEATHINGTON IN A TENNIS TRAINING CAMP ACCIDENT. IN ADDITION, THE BILL SEEKS PAYMENT OF A COST JUDGMENT AWARDED BY THE COURT TO WARREN WEATHINGTON IN THE AMOUNT OF $23,173.89. THE CITY HAS ALREADY PAID CLAIMANT $100,000 AS PROVIDED UNDER THE SOVEREIGN IMMUNITY LIMITS OF §768.28, F.S. THUS, AFTER DEDUCTING THE $100,000 PREVIOUSLY PAID, THE AMOUNT AT ISSUE FOR PAYMENT TO WARREN WEATHINGTON TOTALS $928,173.89. THE BILL ALSO SEEKS PAYMENT FROM THE CITY OF A FINAL JUDGMENT RESULTING FROM THE JURY VERDICT AWARDING $11,348.77 FOR MEDICAL EXPENSES TO CARL WEATHINGTON, THE FATHER.

FACTS: On September 15, 1993, 15-year-old Warren Weathington (DOB 6/7/78), who was participating in the City of Tallahassee's Tough Tennis Training Camp, was seriously injured when using a conditioning device called the Viper. The Viper consists of a fabric waistband and an elastic flexicord made of rubber tubing with a metal hook on each end of the flexicord. The device is used for resistance training in strength conditioning. The waistband, which is worn by the athlete, is connected to the hook on one end of the flexicord while the other end of the flexicord is designed to be attached by its hook to a connecting/safety strap worn by another person or anchored to a sturdy object. A tennis professional (employee/agent of the city) who was supervising the training group improperly attached the Viper's flexicord hook to a chain link fence by securing it to a thin, pliable strip of soft metal that secured the chain link fence panel to a metal fence pole.

In using the Viper, the participants in the training group were instructed to run out from the fence until they felt resistance. At some point during the use of this device, apparently out of boredom, the claimant and some other members of the group invented a "cup game." The object of the game was for one player to hold a cup and challenge the player wearing the belt to run out from the fence and grab the cup. Claimant had run to an extended point (over 60 feet) to reach the cup. The soft metal strip which held the hook of the Viper's flexicord to the fence gave way, and the metal hook flew through the air striking claimant in the back of the head, embedding itself in his skull. The claimant survived the injury, but has sustained a permanent brain injury.

The Viper, which had been purchased and maintained by the city, apparently had originally been accompanied by both an instructional video tape and a

manual. The instructions in the manual state never to use the Viper for resistance running. According to the manual, the Viper is intended for resisted jumps and hops. The tennis supervisor in charge of the claimant's group and his supervisors acknowledge they never read the instruction manual or viewed the video tape, although they previously had seen the Viper demonstrated for tennis drills at other tennis camps. The participants engaged in playing the "cup game" did not try to hide their activity, but knew they had not been instructed to use the Viper in the way that they were using it. The city's tennis professionals do not appear to have been closely supervising the claimant's training group at the time of the incident, and the primary supervising tennis professional was gathering and putting away equipment to end the training session.

LITIGATION HISTORY:

On January 7, 1994, the claimant, Warren Weathington, and his parents filed suit in the Circuit Court of the Second Judicial Circuit for Leon County against the City of Tallahassee and the city's tennis professionals, individually, who were either involved in organizing or supervising the Tournament Tough Tennis Training Camp. The city eventually became the sole defendant after an appellate court affirmed a summary judgment dismissal of the tennis professionals who were deemed immune from suit as agents of the city pursuant to §768.28, F.S., the sovereign immunity law.

Following extensive pretrial discovery by the parties, the case was tried beginning March 27, 1998, for 3 weeks in Leon County Circuit Court before a jury which returned a verdict on April 17, 1998 finding the city 67% at fault and claimant 33% at fault for damages resulting from the tennis accident. In accordance with the jury's apportionment of fault, the court's order of final judgment reduced the total verdict of $1,525,353.21, which consisted of $401,740 in non-economic damages (pain and suffering) and $1,123,613.21 in economic damages, to $1,005,000 in recoverable damages for claimant, Warren Weathington. The Court also entered a cost judgment of $23,173.89 in favor of Warren Weathington. On October 16, 1998, the city paid claimant $100,000 in full satisfaction of its obligations under the sovereign immunity limits of §768.28, F.S. Thus, after deducting the city's payment, the amount at issue as a result of the jury verdict and cost judgment for payment to claimant, Warren Weathington, is $928,173.89.

The jury also returned a verdict of $11,348.77 for medical expenses for which the Court entered final judgment in favor of Carl Weathington, the claimant's father. Prior to trial in January 1997, the city made an offer of judgment in the amount of $33,000 to Carl Weathington in payment of medical expenses. Since the offer of $33,000 (compared to $11,348.77 awarded at trial) was not accepted, the trial court entered an order entitling the city to attorney's fees and costs as a sanction against plaintiff for not accepting the offer of judgment. §768.79, F.S. The amount of attorney's fees and costs still remains to be determined by the Court.

Neither side sought to increase or decrease damages by way of remittitur or additur and neither side appealed the final judgment.

ATTORNEYS FEES: The claimant's attorneys have submitted an affidavit stating at such time as the defendant satisfies the final judgment in plaintiff's favor, the firm will receive an attorney's fee of no more than the 25% allowed by law. The trial firm has represented the claimant in the great majority of the litigation.

The law firm that provided appellate legal services has submitted an affidavit stating at such time as the defendant satisfies the final judgment in plaintiff's favor, the appellate firm will receive an attorney's fee of 5%.

By copy of the Senate Special Master's Report issued in November 25, 1998, claimant's counsel was reminded of the legal limit of 25% for attorney's fees contained in §768.28, F.S.

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

CLAIMANT'S ARGUMENTS RELATING TO LIABILITY:

The claimant argues that the city's failure to use the Viper in the proper manner described in detail by the instructional manual and videotape caused the accident. Had the Viper been used appropriately -- it was not supposed to be affixed to any stationery object -- or even inappropriately hooked to something stable and solid, no injury would have occurred. Furthermore, claimant maintains that the city's negligent use of the Viper should outweigh the 15-year-old claimant's invention of and participation in the "cup game" which contributed to the accident. The claimant maintains that the city's agent alone caused the injury by affixing the Viper to a soft metal strip on a chain link fence and instructing the participants to run away from the hooked end until "they felt resistance." Claimant argues that "but for" the negligence of the city's agent, the disabling problems would not exist.

RESPONDENT CITY'S ARGUMENTS RELATING TO LIABILITY:

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

1) Claimant had used the Viper as instructed along with the other participants without incident that same day;

2) Claimant had become bored with the drill and created a game designed to stretch the Viper as far as possible;

3) Claimant was only injured when using the Viper in a way he knew it should not be used;

4) Claimant admitted he was not instructed to use the Viper the way he used it; and

5) Another participant admitted knowing they were not supposed to be using the Viper the way they were using it.

The city further maintains that it produced evidence and testimony that:

1) The participants were instructed to use the Viper in a manner that was consistent with the instructional videotape;

2) Although the city's tennis professionals had not reviewed the manual or the videotape, they had seen the Viper demonstrated and were familiar with its use;

3) The participants were instructed to run until they felt resistance of the Viper and then back pedal to the starting point; and

4) The participants were never instructed to use the Viper for resisted running as claimant did.

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

MEDICAL INJURIES:

The claimant was helicoptered to Tallahassee Memorial Hospital where he immediately underwent neurosurgery to remove the embedded hook from his skull and to clean dirt and bone fragments from the brain. During the process of repairing the wound, necrotic (dead) brain tissue had to be removed. The area of the brain which was injured contains the visual cortex and is correlated anatomically to the area where the parietal and occipital lobes of the brain join. It is undisputed that claimant has suffered the following injuries and problems from the accident:

1) A permanent hole in his skull;

2) Permanent right-sided quadrant anopsia in both eyes (loss of vision in the lower right quadrant);

3) Encephalomalacia (permanent loss of brain cells due to necrotic (dead) brain tissue being removed from his head wound;

4) A permanent reading disability due to the resulting loss of vision (blind spots) in the lower right quadrant.

The claimant and city have continued to dispute the following issues related to the nature of the injuries and problems associated with them, as well as the consequent damages recoverable because of them:

CLAIMANT'S ARGUMENTS RELATING TO DISPUTED

1) Severe migraine headaches -- The claimant maintains he experiences very frequent disabling

INJURIES & DAMAGES:

migraine headaches triggered especially by excessive reading, bright sunlight, greasy foods, caffeine, and excessive noise.

2) Behavior problems -- The claimant maintains that he developed behavior difficulties post injury that are typical of patients with severe head injuries. Counsel for the claimant argues that the claimant's angry outbursts, drug taking (which included 2 misdemeanor possession arrests resulting in 100 hours of community service), hostility to authority figures, and running away from home are all part of what claimant and his family have suffered through since the injury and until he came under the care of his psychiatrist who prescribed a medication called Depakote.

3) Inability to drive a motor vehicle safely -- Although the claimant acknowledges that rising insurance premiums were a consideration in relinquishing his driver's license and that his driving record cannot be blamed entirely on his visual problem, he feels he cannot be a safe driver. One accident, in particular, he attributes to his blind spot, which prevented him from seeing the tail lights of the vehicle in front of him. The claimant has given up his driver's license voluntarily.

4) Claimant maintains that as a result of the accident, he faces a lifetime of medications to control his migraine headaches and behavioral problems.

5) Claimant further maintains that the brain injury has left him with a lifetime risk of developing seizures.

6) Medication side effects -- Claimant maintains that one of side effects that he recently discovered is sexual dysfunction and his counsel points out that this new and very disturbing problem was not known at the time of trial and, therefore, not considered by the jury.

Counsel for the claimant argues that the evidence shows that every aspect of the claimant's life has been affected by the above injuries and the problems associated with them including his tennis, his schoolwork, his social life, and his future employment opportunities. Accordingly, it is maintained that every day of his life has been different than it should have been and every day of his future will be changed, as well.

RESPONDENT CITY'S ARGUMENTS RELATING TO DISPUTED INJURIES & DAMAGES:

The City of Tallahassee maintains in regard to the disputed injuries and associated problems and damages that:

1) Migraine headaches -- The medical record only supports the claimant's contention that he has suffered from migraines starting 17 months after the accident. The city contends the evidence establishes: that the claimant suffered from some degree of headaches prior to the accident; that its expert witness's testimony supports a conclusion that migraines of the sort he suffers from are not likely to result from the Viper injury, but rather from a less traumatic head injury, such as the bump on the head the claimant incurred in a later car accident; that claimant's lifestyle choices, such as his alcohol and tobacco use, past history of illegal drug use, frequenting of late night clubs that feature loud music, and occasionally eating foods that he knew might bring on migraine headaches, may all have contributed to causing his headaches and call into question how disabling his headaches are.

2) Behavior problems -- The city contends that the record does not support that the claimant experienced a personality change due to his accident. The kind of lifestyle choices described above, as well as, instances of a strained relationship with his parents and associating with a bad crowd are entirely consistent with those choices made by other teenagers throughout the country. The city argues that the claimant's treating neuropsychologist never diagnosed claimant with a personality change or closed head injury in spite of regular evaluations for the nine months immediately following the injury, nor did his neurologist, his neurosurgeon, or his family practice physician.

3) Inability to drive a motor vehicle safely -- The city contends that the evidence does not support claimant's contention inasmuch as he has passed all tests, including the vision test for licensing. The city argues that his parents allowed him to drive following a series of accidents, as well as, after his being stopped for suspicion of DUI and being involved in an accident when he passed out at the wheel, which the city argues was a result of his having inhaled nitrous oxide. The city further argues that the claimant voluntarily turned in his license only after being sued by an injured passenger in his final accident and in light of a significant increase in his parent's insurance premiums.

4) A lifetime of medications to control his headache and behavior problems -- It would appear to be the city's contention that for the reasons outlined in the city's argument above, that medications, other than those to prevent seizures, would be unrelated to the injuries resulting from the accident.

5) A lifetime risk of developing seizures -- While the city acknowledges that the claimant technically has an increased risk of seizures, it points out that he has never had one and that the evidence supports a conclusion that the longer he goes without one, the less likely one is to occur. It concludes that claimant's risk for seizures, if any, is insignificant.

6) Medication side effects -- The city maintains that at the Special Master's hearing at which the problem of sexual dysfunction was first raised, no competent, substantial evidence of any kind was offered as to the cause of claimant's problem, how long he has experienced it, or his condition at the time he experienced the problem. The city argues that sexual performance problems can be attributed to any number of causes including alcohol abuse and has submitted by way of affidavit the opinion of a pharmacological expert. In the expert's opinion, neither one of the two medications the claimant is taking is likely the cause of his dysfunction.

CONCLUSION: The Court directed a verdict in favor of the claimant finding, as a matter of law, the actions of the city's agent or agents negligent. Apparently, it was the Court's opinion that, given the evidence presented, a jury could reach only one conclusion in regard to whether the city was vicariously negligent. However, in regard to the claimant's contributory negligence, the Court, apparently surmising that reasonable minds could disagree on the issue, submitted the question to the jury, which found the claimant contributorily negligent and apportioned fault at 67% for the city and 33% for the claimant. After review of the records and submissions of the parties, the Special Master concludes there is substantial, competent evidence to support both the Court and jury on the issues of negligence.

Prior to the accident, claimant was a promising tennis player, who frequently competed in tournaments which had resulted in a modest state ranking. He had a reasonable chance of receiving a college scholarship to play tennis or compete at the collegiate level. Although his high school grades were only average, he did score very high on a standardized college entrance test which he took after his brain injury, but for which he was given special accommodation. His most serious undisputed injury from the accident is his loss of vision in the lower right quadrant of both eyes which is medically termed right-sided anopsia. The claimant's eyes are physically uninjured and his visual acuity is good, but his brain injury has left him with blind spots in his lower right quadrant. This has seriously affected his reading ability and, therefore, his ability to process written or printed information quickly. Since the accident, he has required a reader (and, in some cases, availed himself of tutoring) supplied by Blind Services, which also has paid for his tuition to community college. The claimant continued after the accident to play varsity tennis successfully in high school in his sophomore and junior years. While undoubtedly claimant has managed to compensate for his blind spots to some degree, his potential to compete successfully at higher levels has been permanently altered as a result of the accident.

The degree to which claimant's brain injury has affected his behavior, cognitive functioning, ability to drive a motor vehicle, his collegiate academic potential, or his future employment or earnings potential has been vigorously contested throughout the protracted litigation surrounding this case. The litigants have been represented on both sides by extremely able legal counsel. This Special Master recognizes that the distillation of their positions contained in this report cannot hope to capture the comprehensiveness of or the nuances embraced by their arguments or evidentiary submissions. This litigation began in January 1994 and culminated in April 1998 with a jury verdict after a three

week trial at which more than 30 witnesses testified, including numerous expert witnesses.

The Special Master recognizes that the facts in this case, and the inferences and conclusions which may be drawn from them, are issues upon which reasonable minds can disagree and, as such, appropriately fell within the province of the jury. Many of the contested matters in this case involve the extent of the claimant's injuries and the resultant problems and, therefore, the economic damages he will suffer in the future. Since the jury did not itemize its findings related to economic damages, it is impossible to determine exactly what the jurors intended the award to pay for. Likewise, it is impossible to determine the degree to which the jury may have sided with one litigant or the other in regard to the disputed issues of recoverable damages. Clearly, had the jury found in favor of the claimant on every issue of damages, the award to the claimant against the city might have been much higher.

Neither side in this case sought to alter the jury's verdict by way of remittitur, additur or by appeal; both litigants apparently believed the verdict was not vulnerable to legal attack. After review of the voluminous records made available by the parties and their submissions for purposes of the claim bill, the Special Master finds that there exits competent, substantial evidence to support the jury verdict in regard to the jury's award of damages to the claimant.

In regard to the issue of claimant's sexual dysfunction, which arose for the first time during the hearing on this claim, the Special Master finds the evidence insufficient to support damages and notes that this question was neither before the jury nor is it part of the damages being sought by HB 33, which is based upon the jury award and judgment costs provided by the Court.

RECOMMENDATION:

The Special Master recommends that HB 33 be amended to reflect the previous payment made by the City of Tallahassee of $100,000 in satisfaction of its obligation under the limits of the sovereign immunity statute. Thus, it is recommended that the jury award and cost judgment awarded by the Court to the claimant, Warren Weathington, (currently in the bill as totaling $1,028,173.89) should be reduced to a total of $928,173.89.

The Special Master further recommends that the bill also be amended to delete the relevant provisions in the bill seeking payment of a jury award and final judgment of $11,348.77 for medical expenses in favor of Carl Weathington. The City of Tallahassee has not paid this amount to Mr. Weathington, ostensibly, because the Court has entered an order entitling the city to attorney fees and costs as a sanction against the plaintiff for failing to accept the city's pretrial offer of judgment in an amount of $33,000 for medical expenses. Presumably, the attorney fees and costs for which Mr. Weathington may be deemed responsible relate only to the legal representation and costs attributable to the medical expense portion of the case. In any event, the city may be entitled to a set-off against the $11,348.77. Additionally, it does not appear that Mr. Weathington is without legal remedy to collect the medical expense judgment since the sovereign immunity limits of liability under

§768.28, F.S. allow payment by the city of up to $100,000 to any one person or a total of $200,000 per occurrence.

Accordingly, I recommend HB33 be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

Paul Liepshutz
House Special Master

cc: Representative Charles W. Sembler
Senator Walter Campbell
Mark W. Casteel, Senate Special Master