



THE FLORIDA SENATE
SPECIAL MASTER ON CLAIM BILLS

Location

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November 19, 1999

<u>SPECIAL MASTER'S FINAL REPORT</u>	<u>DATE</u>	<u>COMM</u>	<u>ACTION</u>
The Honorable Toni Jennings President, The Florida Senate Suite 409, The Capitol Tallahassee, Florida 32399-1100	11/19/99 12/07/99 02/09/00	SM CA FR	Fav/1 amend Fav/1 amend Favorable

Re: SB 18 - Senator Kendrick Meek
Relief of Lawrence Gizzi

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM FOR \$139,971.17 BASED ON A JURY VERDICT AGAINST THE CITY OF HALLANDALE TO COMPENSATE LAWRENCE GIZZI FOR PAST AND FUTURE MEDICAL EXPENSES, AND PAIN AND SUFFERING HE SUSTAINED WHEN HIS LEFT FOOT FELL INTO AND BECAME STUCK IN A HOLE WHILE HE WAS WALKING HIS DOG AT THE INTERSECTION OF NE 12TH AVENUE AND 7TH STREET, IN THE CITY OF HALLANDALE, FLORIDA.

FINDINGS OF FACT:

Mr. Gizzi, a resident of the City of Hallandale Beach, Florida, was walking his dog on the evening of April 16, 1996. At approximately 9:15 p.m., Mr. Gizzi crossed the street at the corner of NE 12th Avenue and 7th Street. As he was crossing the street, the asphalt near a manhole cover collapsed, pinning his left leg, up to the knee, under the asphalt street surface.

Mr. Gizzi was unable to extricate himself from the hole and spent almost an hour with his leg pinned under the asphalt until help arrived. While he was pinned under the road, land crabs bit his left foot and ankle and he was almost run over by a van.

When the City of Hallandale police arrived they were unable to free Mr. Gizzi, so the fire department was called which ultimately freed Mr. Gizzi from the street.

The collapse of the street was caused by a crack in the conveyance box under the manhole cover that was adjacent to the area of the road that collapsed under Mr. Gizzi. Water traveling through the crack eroded the material around the conveyance box, which created a void that caused the road to collapse.

The city admits that the street where the accident occurred is a city street. In addition, the manhole cover on top of the junction or conveyance box adjacent to the hole Mr. Gizzi was extracted from, bears the name of the City of Hallandale.

No written records were produced by the City of Hallandale regarding the maintenance of the manhole in the area adjacent to the manhole either before or after the accident.

While the city admits to patching the hole, with a material called cold patch, the day after the accident, the city claims that it is not responsible for maintaining the manhole and conveyance box, and the connecting drainage system, and that such repair and maintenance is the responsibility of the Florida Department of Transportation (DOT). In addition, the city maintains that DOT repaired the crack in the junction box and repaved a larger area around the manhole cover and adjacent temporary patch that was installed by the city.

Neither the city nor the DOT produced any records documenting the repair of the junction box. The city produced a memo from one of its maintenance personnel stating that he called DOT and requested DOT repair an 18" long by ½" wide crack in the storm drain manhole. At trial, DOT's defense was based on the testimony of Mike Tomecko, a DOT drainage engineer who testified that the junction box, manhole and drainage pipes were not part of DOT's drainage system that conveys water from state roads. The DOT outfall closest to the scene of Mr. Gizzi's accident is located under 9th Street (Atlantic

Shores Boulevard) and is the outfall for State Road 5. This outfall is several blocks away from the accident. The portion of the City of Hallandale drainage system located under the intersection of 12th Avenue and 7th Street, and serving the condominiums located along 12th Avenue collects water from city streets and ultimately discharges the storm water at a DOT maintained outfall located under 9th Street (Atlantic Shores Boulevard). However, the junction box and pipe located at the intersection of 12th Avenue and 7th Street appears to be part of the City of Hallandale's drainage system.

A neighbor (now deceased), Mr. Rusth, who lived adjacent to the intersection of 12th Avenue and 7th Street in Hallandale testified by deposition at trial that he saw city trucks and workmen pumping water in or out of the manhole for weeks prior to Mr. Gizzi's accident and that he personally observed a hole adjacent to the manhole during the 3 or 4 days prior to Mr. Gizzi's accident. *(This conflicts somewhat with Mr. Gizzi's testimony that the road collapsed as he was walking over it.)* The neighbor testified that he witnessed the City of Hallandale placing a larger patch of asphalt around the manhole and that the maintenance workers had to dig up the area to make the repair.

The city admitted in its Answer to Interrogatories in response to the question of "What acts or omissions on the part of DOT would constitute negligence that was a contributing legal cause of the incident," that the failure to maintain the manhole and surrounding area and failure to warn of a dangerous condition would constitute negligence.

The city continues to maintain that it is not responsible for maintaining all of the manholes located in the vicinity of the accident, although it has failed to produce evidence of an easement or maintenance agreement with the DOT.

INJURIES: On the night of the accident, Mr. Gizzi was transported by ambulance to the Adventura Hospital. He was treated by the emergency room doctors and then released. Mr. Gizzi continued to experience pain and

wished to see a orthopedist. His HMO, HIP told him he would have a 30-day wait for a referral. Mr. Gizzi decided to use an orthopedic group outside of his insurance plan, Orthopedic Care Center.

Mr. Gizzi sustained a severe ankle injury as a result of the accident which included dislocated peroneal tendon, strained flexor halusis tendon, torn fascia, effusion and swelling in the tibio talur joint of the ankle, bone chips in the ankle joint, and derangement of his left knee. Mr. Gizzi has suffered from severe pain in both his knees, his lower back and left ankle as a result of the accident.

In addition, Mr. Gizzi's injuries necessitated two arthroscopic surgeries on his left ankle, the first in July 1996, and the second in July 1997, to repair impingement lesions in the ankle joint and synovitis. Subsequent to his second surgery, Mr. Gizzi tore his Achilles tendon at the back of his left heel, which resulted from compensating for the other ankle problems.

According to Mr. Gizzi's treating surgeon, Dr. Steven Bernstein, Mr. Gizzi suffered permanent injury to his left ankle, including a bad joint problem. Dr. Bernstein testified that Mr. Gizzi would likely have future scar tissue, instability that will cause other tendon problems around the ankle, and arthritis in his ankle. In addition, Mr. Gizzi will probably need future surgery.

Subsequent to the trial, Mr. Gizzi obtained a second medical evaluation of his ankle from Dr. Robert Sheinberg, D.P.M., that diagnosed the following: synovitis of the left ankle; synovitis subtalar joint; and instability of the left ankle consistent with an injury to the anterior talofibular and calneofibular ligament. Dr. Sheinberg recommended to Mr. Gizzi that he consider undergoing a procedure to stabilize the ankle ligament complex and also scope the ankle in the anterior distal lateral gutter and anterior medial gutter to remove any further thickening of the synovial tissue, and that he may have fibrous band that may need to be debrided.

CLAIMANT'S BACKGROUND: At the time of the crash Mr. Gizzi was 35 years old (he is now 39) and a disabled

former firefighter. In 1991, while employed as a firefighter with the City of Ft. Lauderdale, Mr. Gizzi was injured on the job while fighting a fire when a beam fell on his head and neck. He sustained injuries to his head, neck, mid-back, and suffered from post-traumatic stress disorder. He is characterized as 100% disabled and receives a pension from the City of Ft. Lauderdale, Social Security Disability and Medicare. He has an 11 year old son for whom he shares joint custody and is engaged to be married. He pays \$600/month in child support.

CLAIMANT'S CREDIBILITY: While not relevant to the issue of liability, the city seeks to discredit Mr. Gizzi based on what may be characterized as misleading testimony provided by Mr. Gizzi at the Special Master Hearing. At the hearing, Mr. Gizzi was asked if he had any criminal record that could potentially embarrass a legislator who voted in favor of his claims bill. Mr. Gizzi then asked the Special Master if her question included: ". . . criminal convictions and things of that nature," to which the Special Master responded "yes." Mr. Gizzi then answered the question posed as "No." In a post-hearing submittal to the special master, the city provided a copy of an arrest report dated August 17th, 1999, where Mr. Gizzi was arrested by the Miami-Dade Police Department for grand theft for stealing a set of golf clubs worth \$899.99 from a Sports Authority store.

After repeated requests from the Special Master to provide evidence of the disposition of the charge, Mr. Gizzi's attorney faxed the Special Master a letter dated November 18, 1999 which states: "I have personally checked on the status of the arrest involving Mr. Gizzi on August 17, 1999, and I have been informed that the State Attorney's Office has nolle prossed the case against Mr. Gizzi."

The Special Master contacted law enforcement personnel in Miami-Dade County who checked on the disposition of Mr. Gizzi's charge and provided the Special Master with documentary evidence that Mr. Gizzi was placed in a deferred prosecution program after a hearing conducted on September 7, 1999. According to the law enforcement official, individuals who are charged with shoplifting an

amount of merchandise under \$1,000 are allowed to "plea" to the deferred prosecution program after a hearing conducted on September 7, 1999, as an alternative to the prosecution of the charge. If an individual successfully completes the program, the charges are later dropped or adjudication is withheld.

Mr. Gizzi's failure to disclose this matter does raise an issue as to the general credibility of his testimony, but does not directly relate to the liability issues in this case.

PROCEDURAL BACKGROUND OF CASE: This case was tried by jury in Broward County on January 11-13, 1999. The jury found no liability against the Florida Department of Transportation and 100 percent liability against the City of Hallandale. The jury assessed the following damages:

Past Medical Expenses	\$ 74,971.17
Future Medical Expenses	\$ 120,000.00
Past Pain and Suffering	\$ 30,000.00
Future Pain and Suffering	\$ 15,000.00
Total Damages	\$ 239,971.17

On January 26, 1999, the circuit court entered a Final Judgment of \$239,915.17. (Note: the Final Judgment amount is \$56 dollars less than the jury verdict, which appears to have been a typographical error. The claims bill is based on the Jury Verdict amount.) On January 21, 1999, the city filed a Renewed Motion for directed Verdict and Motion for New Trial alleging that the trial record failed to establish that the city failed to maintain the area in question. The Motions were denied.

No appeal of the verdict was filed by the City of Hallandale.

The city is self-insured and has paid the initial \$100,000 authorized by law.

CLAIMANT'S MAIN ARGUMENTS:

The City of Hallandale is 100% responsible for Mr. Gizzi's injuries. The city had previously ignored a leaking manhole adjacent to the hole, where an old patch had

been placed over the leaking manhole, but the leak had never been fixed, therefore causing the ground underneath the old patch to continue to erode, which caused the cave-in of the street.

While the city blames the Florida Department of Transportation for the incident, the city admitted in its "Answers to Interrogatories of the City of Hallandale that the area did constitute an unreasonable dangerous condition.

Mr. Gizzi sustained a severe ankle injury as a result of the accident which included dislocated peroneal tendon, strained flexor halusis tendon, torn fascia, effusion and swelling in the tibio talur joint of the ankle, bone chips in the ankle joint, and derangement of his left knee. Mr. Gizzi has suffered from severe pain in both his knees, his lower back and left ankle as a result of the accident.

The jury award was reasonable. Mr. Gizzi incurred \$74,971.00 in past medical expenses and is likely to incur substantial future medical expenses. The jury awarded future medical expenses of \$120,000.00 based on a life expectancy of 37 years (approximately \$3200 per year). In addition the jury awarded \$30,000.00 for pain and suffering, disability, disfigurement, mental anguish and loss of capacity for the enjoyment of life in the past, and \$15,000.00 for those elements in the future.

THE CITY'S MAIN
ARGUMENTS:

The city is not liable because it had no prior notice or knowledge of the defect. If Mr. Gizzi could not see the defect prior to the street collapsing, city personnel could not see it. The city maintains that the defective condition that caused the road to collapse is part of a "State of Florida drainage system" and that the Florida Department of Transportation ultimately repaired the defect.

The jury award is excessive. With respect to past medical expenses, the city maintains that some of the expenses claimed were to treat prior disabling injuries and not injuries caused by the April 1996 accident that is the subject of this claims bill. The specific bills disputed

include: an MRI and physician visit for his back; a fall and hospitalization for injury to his ribs; and hospitalization for chest pains.

In addition, the city disputes compensating the claimant for any medical expenses because the claimant receives Social Security disability and Medicare coverage as a result of Mr. Gizzi's 1991 firefighting accident that rendered him totally disabled. Through his Medicare coverage, Mr. Gizzi receives health insurance through an HMO. Mr. Gizzi sought orthopedic care outside of his HMO coverage. Accordingly, the HMO only paid \$2,048.00 of the total medical expenses and this payment has not been subtracted out of the past medical expenses figure.

With respect to future medical expenses, the city maintains that there is no evidentiary support for the \$120,000 award and that an independent doctor, hired by DOT as an expert witness, concluded that no further treatment would be required.

The city maintains that the claimant is not entitled to any award because of an incident which occurred on August 17th, 1999, where Mr. Gizzi was arrested by the Miami-Dade Police Department for grand theft for stealing a set of golf clubs worth \$899.99 from a Sports Authority store. The city maintains that the claimant was not truthful in responding to the Special Master's question of whether he had any criminal record.

In addition, the city raises the issue of whether Mr. Gizzi stole golf clubs because he plays golf, which may raise issues regarding the cause and duration of his ankle injuries.

The city maintains that the payment of the claims bill would impose a financial hardship on the city, largely based on an argument that the city faces a large jury verdict (\$17.5 million) against it arising out of a pool drowning at a public park. However, this jury verdict was recently overturned on appeal so that it is unclear that this case affects the present ability of the city to pay the amount at issue in this case.

STANDARDS FOR FINDINGS:

Findings of fact must be supported by a preponderance of evidence. The Special Master may collect, consider, and include in the record, any reasonably believable information that the Special Master finds to be relevant or persuasive. At the Special Master's level, the claimant has the burden of proof of each required element.

CONCLUSIONS OF LAW:

A respondent has the burden of showing the Legislature that the verdict was unsupported by sufficient credible evidence; or that it was influenced by corruption, passion, prejudice, or other improper motives; or that it has no reasonable relation to the damages shown; or that it imposes an overwhelming hardship on the respondent out of proportion to the injuries suffered; or that it obviously and grossly exceeds the maximum limit of a reasonable range within which a jury may properly operate; or that there are post-judgment considerations that were not known at the time of the jury verdict.

The Special Master believes the jury finding of 100% liability against the city is supported by sufficient credible evidence.

GENERAL CONCLUSIONS:

Past Medical Expenses: As a contested element of damages, the record supports the \$74,971.17 figure awarded by the jury. While the city contests specific medical bills related to an MRI of Mr. Gizzi's back; treatment for heart problems which occurred during his hospitalization for arthroscopic surgery, and an emergency room visit resulting from a fall, the city has failed to show that these costs are not a consequence of the incident or resulting treatment of the ankle injuries suffered by Mr. Gizzi.

However, Mr. Gizzi has settled a lien for these outstanding medical expenses for the amount of \$47,000. In addition, while Mr. Gizzi's HMO has denied coverage of his orthopedic treatment and surgeries, it covered \$2,048.00 of medical expenses associated with his emergency room visit after the accident. Accordingly, \$30,000 should be deducted from the award of past medical expenses.

Future Medical Expenses: The jury awarded Mr. Gizzi \$120,000 for future medical expenses to provide compensation over his remaining life expectancy of 37 years. I believe the record does not support this amount. At trial, the only testimony as to future medical expenses was the testimony of Mr. Gizzi's treating orthopedic surgeon that Mr. Gizzi's injury resulted in a permanent reduction in the function of his ankle, a likelihood of additional scar tissue in his ankle, and have problems with instability and arthritis in the future. However, the record before the jury contained no evidence of the extent of future medical care Mr. Gizzi may require. To the degree the damage to Mr. Gizzi's ankle is permanent, it is unclear what level of treatment would be necessary in the future. A second medical opinion provided to the Special Master concludes that Mr. Gizzi may need an additional arthroscopic surgery on his ankle. Accordingly, I believe it is appropriate to base a figure for future medical expenses on the assumption that Mr. Gizzi will need future arthroscopic surgery, possibly more than once. However, the record does not support the conclusion that his future medical expenses related to treatment of his ankle will exceed the expenses for the treatment he has received to date.

An additional consideration is the position of Mr. Gizzi's HMO, HIP. While HIP denied Mr. Gizzi coverage for orthopedic care he received outside of its network, HIP has stated in writing that it will not cover Mr. Gizzi for any related claims relating to future medical bills associated with Mr. Gizzi's ankle injury until such time as the \$120,000 award of future medical costs is exhausted. Once this amount is exhausted, HIP agrees to process all authorized claims. One interpretation the letter is that HIP, but for the \$120,000 award, would cover future medical costs associated with Mr. Gizzi's ankle. However, it is impossible to predict whether HIP will actually pay future claims made by Mr. Gizzi that are related to his ankle injury.

Accordingly, I recommend reducing the future medical expense component of damages from \$120,000 to \$80,000, or a reduction of \$40,000.

Pain and Suffering: The jury awarded the claimant damages for pain and suffering, disability, disfigurement, mental anguish, and loss of capacity for the enjoyment of life in the amount of \$30,000 for past pain and suffering and \$15,000 for in the future. I find these amounts to be reasonable and supported by the evidence. Mr. Gizzi experienced considerable discomfort associated with his ankle injuries and suffered some permanent loss in the function of his ankle.

ATTORNEYS FEES:

Section 768.28(8), F.S., limits claimant's attorneys' fees to 25 percent of claimant's total recovery by way of any judgment or settlement obtained pursuant to s. 768.28, F.S. Claimant's attorney has acknowledged this limitation and verified in writing that nothing in excess of 25 percent of the gross recovery will be withheld or paid to him or his firm or to any other lawyer as attorneys' fees.

RECOMMENDATIONS:

I recommend that the total award to Lawrence Gizzi be adjusted from \$139,971.17 to \$69,971.17 to reflect a \$30,000 adjustment in past medical expenses and a \$40,000 adjustment in future medical expenses.

Accordingly, I recommend that Senate Bill 18 be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

Janet Bowman
Senate Special Master

cc: Senator Kendrick Meek
Faye Blanton, Secretary of the Senate
Phillip Miller, House Special Master