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Florida House of Representatives
Committee on Claims
SPECIAL MASTER'S FINAL REPORT

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

RE: HB 461 - Representative Jerry Melvin
SB 42 - Senator Roberto Casas
Relief of Andrew Greene

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM AND REQUEST FOR ATTORNEY'S FEES AND COSTS AGAINST THE SCHOOL BOARD OF BROWARD COUNTY BASED ON A JURY VERDICT AND FINAL JUDGMENT, ARISING FROM DAMAGES INCURRED AS A RESULT OF THE SCHOOL BOARD'S RELEASE OF PERSONNEL RECORDS CONTAINING DEROGATORY MATERIAL PRIOR TO A LOCAL RUN-OFF ELECTION FOR A SCHOOL BOARD SEAT.

FINDINGS OF FACT:

Background -- The claimant, Andrew Greene (Mr. Greene), is a 47-year old former employee of the respondent, School Board of Broward County (School Board). The School Board employed Mr. Greene as a part-time, non-contract teacher from 1981 to 1992. Mr. Greene taught primarily adult and community-based education classes, including graduate equivalency degree courses. According to Mr. Greene's W-2 Wage and Tax Statements from 1984 to 1991, his average annual earnings received from the School Board were $13,248. His highest annual earning was $15,193, earned in 1991. Despite his inquiries and requests, the School Board never granted Mr. Greene a permanent or full-time contract teaching position. There is no evidence in the record reflecting negatively on Mr. Greene's qualifications, teaching abilities or performance. However, there is evidence that Mr. Greene may have been considered an "outsider" due to his

temperament, vocal complaints about school operations and officials, and suspected involvement in writing anonymous letters and making disguised-voice phone calls complaining about co-workers and school officials.

The Employee Assistance Program -- In 1984-85, Mr. Greene's uncle, to whom Mr. Greene was very close, suffered a stroke. Since Mr. Greene's uncle did not have a properly drawn will, Mr. Greene became concerned that he would not receive from his uncle's estate the amount promised by his uncle. Distraught about the possibility that his uncle's wife (Mr. Greene's aunt) would inherit his uncle's estate, Mr. Greene entertained thoughts of killing his aunt. Mr. Greene discussed these thoughts, including specific details of a plan to kill his aunt, with several co-workers, including Jean Davis, a teacher, and Nancy Adams, a counselor in the Adult and Off-Campus Program. After learning of Mr. Greene's thoughts about his aunt, Nancy Adams contacted her supervisor who immediately reported the information to the Employee Assistance Program (EAP). In response, the School Board, through the EAP, referred Mr. Greene to a psychologist for counseling. After a seven-week involuntary leave of absence, the School Board cleared Mr. Greene to return to teaching.

The Special Investigative Unit Investigation -- In 1989, the School Board Special Investigative Unit (SIU) initiated an investigation into anonymous letters that were being sent to various employees of the School Board containing disparaging comments about other School Board employees. Although SIU investigators took statements from several individuals, including Nancy Adams, Jean Davis, and Mr. Greene, the investigation seemed to center on Mr. Greene.

The SIU investigation spanned the period from December 1989 through approximately February 1991, when at some point it became inactive. Although the SIU investigation was initiated to investigate the anonymous letter-writing campaign, several people (including Ms. Adams, Ms. Davis, Janet von Zech, Mr. Greene) who gave statements to SIU investigators were questioned about their knowledge of Mr. Greene's plot to kill his aunt and the emotional problems that led to his EAP psychological counseling.

At no time did Mr. Greene receive formal notification that he was under investigation, nor did Mr. Greene receive any formal indication that the investigation found probable cause of any wrongdoing. Likewise, Mr. Greene never received any formal notice that the investigation was closed.

School Board Election -- Due to his personal and professional frustration with school operations and the administration, Mr. Greene decided in December 1991 to run for the School Board's District 5 seat for a 4-year term. The record is not entirely clear, but at some point in 1992, Mr. Greene voluntarily resigned from his teaching position with the School Board. Mr. Greene's campaign platform included eliminating nepotism and trimming the top administrative structure and administrative salaries.

The Democratic primary election involved four candidates, including: Miriam Oliphant -- the incumbent; Mr. Greene -- endorsed by the *Sun-Sentinel*, the largest newspaper in Broward County; and Rubye Haile Howell -- endorsed by the *Miami Herald*.

On July 23, 1992, the day the *Sun-Sentinel* first endorsed Mr. Greene, a reporter for the *Sun-Sentinel* reviewed Mr. Greene's personnel file. In neither the July 23, 1992 story (endorsing Mr. Greene) nor a subsequent August 26, 1992 story did the *Sun Sentinel* report any information regarding Mr. Greene's 1985 psychological counseling or his thoughts about his aunt.

In the September 1, 1992 Democratic primary election, Mr. Greene came in second, garnering 34 percent of the votes, while the incumbent, Miriam Oliphant, came in first, garnering 40 percent of the votes. Since no candidate had a majority of the votes, a run-off election was scheduled for October 1, 1992.

Following the Democratic primary election, Mr. Greene's personnel records and related records became the subject of additional inquiries and public record requests. At some point between the September 1, 1992 primary election and September 22, 1992, the School Board released to the press written transcripts of the statements given by Mr. Greene and Nancy Adams during the 1989-1991 SIU investigation. Mr. Greene was not notified by the School Board prior to the release of this information. The SIU

statements given by Mr. Greene and Ms. Adams contained material relating to Mr. Greene's plot to kill his aunt, his referral to EAP counseling, and his alleged involvement in an anonymous letter-writing campaign.

Based on these statements, the *Miami Herald* printed a story on September 22, 1992 entitled, "Candidate Can't Land Full-time School Job." The story referred to Mr. Greene's inability to obtain a full-time teaching position and included quotes from Nancy Adams' SIU statement regarding her understanding of Mr. Greene's plot to kill his aunt. The story also mentioned that Mr. Greene underwent counseling treatment and was kept out of work for seven weeks in 1985 as a result of the plot to kill his aunt. The story also noted that Mr. Greene was suspected by colleagues of writing a series of anonymous letters, but that he was not the target of the SIU investigation.

On September 23, 1992, the *Sun-Sentinel* printed a similar story, entitled, "Candidate: I Was Target of Smear Ploy." This story also referred to Mr. Greene's counseling in 1985 and the fact that he spoke of killing his aunt over an inheritance dispute.

On October 1, 1992, Mr. Greene lost the run-off election to incumbent, Miriam Oliphant. Thereafter, Ms. Oliphant succeeded in her re-election bid in the general election on November 1, 1992, defeating Republican candidate, Lorna Bryan.

PROCEDURAL HISTORY:

In 1993, Mr. Greene filed suit against the School Board in the circuit court of the 17th Judicial Circuit for Broward County, Case No. 93-22732. Mr. Greene advanced two theories of liability for recovery: (1) negligence and (2) invasion of privacy. Mr. Greene claimed damages for loss of employment and mental suffering.

[Note: Mr. Greene brought a second lawsuit against the individual school and non-school board members under essentially the same operative facts but for claims of intentional torts. (Greene v. Siegle, et al., Case No. 96-7215/Appellate Case No. 98-2490). This suit was voluntarily dismissed in October 1999 upon execution of a general release just days before the 4th DCA issued an opinion (now rendered moot) affirming summary judgments entered in

favor of the defendants, with the exception of one individual school board member.]

In March 1997, Mr. Greene made a demand for judgment against the School Board, pursuant to section 768.79, F.S., for $225,000, inclusive of attorney's fees and costs. The School Board did not accept or counter the settlement offer.

In October 1997, after a 5-day jury trial, the jury returned a verdict finding the School Board liable for damages totaling $250,000 based on the negligence count and $600,000 based on the invasion of privacy count. Judge Rosemary Usher Jones entered a final judgment on October 10, 1997.

The School Board appealed the judgment to the Fourth District Court of Appeals. On June 16, 1999, the 4th DCA affirmed the verdict and final judgment but remanded to the trial court to limit the collectibility of the judgment amount to conform with the statutory cap of $100,000.

MR. GREENE'S POSITION:

1. The School Board is liable based on the same legal arguments made at the trial court and appellate court: that the School Board breached multiple duties owed to Mr. Greene when it invaded Mr. Greene's right of privacy by negligently placing and disseminating to the press private or confidential information that was of a derogatory nature and that was not open for public inspection in contravention of the procedure in section 231.291, F.S. (1991).

2. The jury awarded damages based on substantial competent evidence and testimony, and the final judgment was upheld on appeal.

3. Mr. Greene is entitled to attorney's fees, representing 25% of the judgment, and to costs, based on section 768.79, F.S.

SCHOOL BOARD'S POSITION:

1. The School Board is not liable based on the same legal arguments made at the trial court and appellate court: that the School Board did not violate its statutory duty regarding the release of files under section 231.291, F.S., and that the

documents released were not confidential and were subject to public inspection under section 231.291, F.S.

2. The evidence is insufficient to prove damages, and alternatively, the amount is excessive.

3. Mr. Greene is not entitled to attorney's fees and costs under existing case law, statutory law, or otherwise, or alternatively, Mr. Greene has failed to provide sufficient evidence to support the claims for attorney's fees and costs.

STANDARDS FOR FINDINGS:

Findings of fact must be supported by a preponderance of the 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 on each element of the claim.

CONCLUSIONS OF LAW:

The Legislature typically gives deference to jury verdicts in the claim bill process. In this case, the jury found liability against the School Board for negligence and invasion of privacy. Nevertheless, to be entitled to relief under a claim bill, Mr. Greene must still prove liability -- the elements of negligence and invasion of privacy -- and damages.

I. LIABILITY

Negligence

To support a claim of negligence, the claimant must show that the School Board owed him a duty, that the School Board breached the duty, and that the breach caused him to suffer damages. 38 Fla. Jur. 2d, Negligence, Section 16 (1998).

Duty -- The duties owed by the School Board in this case are established in section 231.291, F.S. Section 231.291(1)(a), F.S., provides that, "[e]xcept for materials pertaining to work performance or such other matters that may be cause for discipline, suspension, or dismissal . . . no derogatory materials

relating to an employee's conduct, service, character, or personality shall be placed in the personnel file of such employee."

Prior to placing materials relating to work performance into an employee's personnel file, section 231.291(2)(c), F.S., imposes a duty upon the School Board to provide a copy of the materials to the employee either by certified mail or by personal delivery. This requirement exists because section 231.291(2)(d), F.S., gives the employee "the right to answer in writing" any materials to be placed in the personnel file and to have the answer attached to the file.

Section 231.291(3)(a), F.S., outlines the School Board's duties with respect to making employee personnel files open to public inspection. This paragraph states that employee personnel files are open to public inspection under s. 119.07(1), F.S., but for a few exceptions.

Subparagraph 1. states that material relating to investigations shall be confidential until the conclusion of the investigation or until the investigation ceases to be active. According to this subparagraph, if the preliminary investigation is concluded with the finding that there is no probable cause to proceed, a statement to that effect shall be attached to the complaint, and the complaint and all such materials shall be open to inspection. And, if the preliminary investigation is concluded with the finding that there is probable cause to proceed further, the complaint and all such materials shall be open to inspection. Finally, subparagraph 1. states that if the preliminary investigation ceases to be active, the complaint and all such materials shall be open to inspection.

Under this subsection, a preliminary investigation is considered active as long as it is continuing with a reasonable, good faith anticipation that an administrative finding will be made in the foreseeable future. An investigation is "presumed to be inactive if no finding relating to probable cause is made within 60 days after the complaint is made." Section 231.291(3)(a)1., F.S.

At trial and on appeal, the parties disagreed as to what duties were established by subparagraph 1. of section 231.291(3)(a), F.S. The School Board contended that after 60 days of inactivity, investigations automatically become inactive and, therefore, open

to public inspection. At trial, the claimant called Dr. Frank Lagotic, a former school board member in Alachua County, as an expert on the law of section 231.291, F.S. Although the construction of statutes is generally a question of law for the court, Dr. Lagotic was permitted to testify that -- even though an investigation is inactive for 60 days -- section 231.291(3)(a)1., F.S., requires the School Board to submit a document indicating there was no probable cause. Without submitting such a document, Dr. Lagotic testified that investigation materials are not open to public inspection. On appeal, the School Board argued that permitting Dr. Lagotic to testify on the construction of section 231.291(3)(a)1., F.S., was reversible error. The 4th District Court of Appeal affirmed the final judgment without addressing this argument.

In addition to the public record exceptions in subparagraph 1., subparagraph 3. of section 231.291(3)(a), states "[n]o material derogatory to an employee shall be open to inspection until 10 days after the employee has been notified pursuant to [section 231.291(2)(c)]."

Finally, subparagraph 5., of section 231.291(3)(a), establishes the duty that the School Board must maintain the confidentiality of employee medical records, including psychological records.

Breach -- The jury instructions and the jury verdict form do not indicate which duty or duties were breached by the School Board. However, based on the information contained in the record, a preponderance of the evidence supports the finding that the School Board breached its duty to Mr. Greene under section 231.291(2)(c) and (3)(a)3., F.S., by failing to give Mr. Greene a copy of the materials, and by failing to give Mr. Greene notice and an opportunity to respond, prior to releasing the SIU statements of Mr. Greene and Nancy Adams. These statements contained derogatory material regarding Mr. Greene's ability to obtain a full-time teaching position, his psychological state, and his alleged involvement in an anonymous letter-writing scandal (the evidence of which was apparently insufficient to support a finding of probable cause).

This finding is supported by the very broad definition of the term "personnel file," which include "all records, information, data, or

materials maintained by a public school system, in any form or retrieval system whatsoever, with respect to any of its employees, which is uniquely applicable to that employee whether maintained in one or more locations." Section 231.291(4), F.S.

Regarding section 231.291(3)(a)1., F.S., it is not clear from the jury instructions or the jury verdict form what the jury concluded. However, since the jury found the School Board negligent, it must have determined that the material released by the School Board was not open to public inspection. Thus, the jury must have concluded one of the following: (1) that the SIU investigation was still active, thereby triggering the public records exception contained in subparagraph 1. of section 231.291(3)(a), F.S. or (2) that the SIU investigation was inactive, but that inactivity does not automatically render the material open to public inspection. [*One plausible argument for the latter conclusion could be that subparagraph 3., of section 231.291(3)(a), F.S., which requires the School Board to give notice and wait 10 days prior to releasing derogatory material, controls when derogatory materials are contained in inactive or closed investigations under subparagraph 1.*]

Regarding section 231.291(3)(a)5., F.S., a preponderance of the evidence supports the conclusion that the School Board did not breach any duties imposed under this subparagraph. Rather, the evidence shows that the School Board released SIU statements, which made reference to Mr. Greene's referral to psychological counseling, not actual medical or psychological records.

Invasion of Privacy

The elements of the tort of invasion of privacy are public disclosure of private facts that are offensive and are not of public concern. See Cape Publications, Inc. v. Hitchner, 549 So.2d 1374 (Fla. 1989).

It is not clear from the record that the facts were not of public concern. By virtue of Mr. Greene's election bid as a local school board member, it is questionable whether Mr. Greene had a legitimate expectation of privacy. Although Florida citizens are afforded greater protection under the state's constitutional right of

privacy in Sec. 23, Art. I of the Florida Constitution than under the federal constitution, there is no guarantee against all intrusion, and the expectation of privacy depends upon the circumstances. See City of North Miami v. Kurtz, 653 So.2d 1025 (Fla. 1995)

The public interest in a candidate transcends the bounds of privacy accorded an individual citizen. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Nonetheless, the jury was instructed (and must have found) that the School infringed on Mr. Greene's privacy in the:

> wrongful dissemination or publication of truthful private information concerning Andrew Greene that is not a legitimate news item, is not a part of the public records, and has not previously been disseminated or published, and the dissemination or publication is so objectionable that it would offend the sensibilities of a normal person.

Notably, the record reflects that during the jury deliberations, the jury came back with a request to provide a definition for invasion of privacy and to explain the distinction between private and public. The jury subsequently found the School Board liable on this count, and the jury verdict was upheld on appeal.

II. Causation and Damages

The jury verdict, which was upheld on appeal, awarded $850,000 to Mr. Greene. Although each count alleged damages for loss of employment and mental suffering, the jury verdict is not itemized and, thus, does not indicate how much of the award for each count is attributable to loss of employment and how much is attributable to mental suffering. However, a preponderance of the evidence would support a finding that Mr. Greene suffered damages for both loss of employment and for mental suffering.

Loss of Employment -- At trial and during the Special Master process, Mr. Greene offered evidence of at least 22 letters (dating from 1992 to 1999) that were sent to prospective teaching employers and the negative responses from those employers. In addition, Mr. Greene offered evidence of at least 60 pages of

handwritten notes documenting his efforts to find teaching work between 1992 and 1998.

While this evidence alone does not prove that Mr. Greene's inability to find teaching work was caused by the negligence or invasion of privacy of the School Board, the jury must have concluded that it was. The jury was instructed on the issue of causation and the verdict form clearly asked the jury to assign damages that were the "result of" the negligence and invasion of privacy.

Psychological Damages, Mental Suffering, Injury to Reputation -- At trial, the claimant offered the testimony of Dr. Thomas Macaluso, a psychiatrist, regarding Mr. Greene's mental suffering and psychological state that resulted from the School Board's release of materials. Despite a vigorous cross-examination of Dr. Macaluso by the School Board and testimony from the School Board's own psychiatric expert, Dr. Burton Cahn, the jury must have concluded that the School Board's release of derogatory materials from his personnel file caused Mr. Greene psychological injury, damage to his reputation, and humiliation.

CURRENT STATUS OF CLAIMANT:

Employment -- At the November 5, 1999 Special Master hearing, it was disclosed that Mr. Greene found part-time teaching work at the beginning of 1999 and continues to work in that capacity. In an affidavit of Mr. Greene dated November 10, 1999, Mr. Greene stated that he tutors students for Dr. Elda Corby two to three hours per week at an hourly wage of $10 in the areas of math, science, social studies, reading, English, penmanship, and religion. In addition, Mr. Greene stated in his affidavit that he teaches as a substitute teacher with the Peace Lutheran School in Ft. Lauderdale on an as-needed basis for $8 per hour, teaching K-8 in English, science, math, social studies, religion and physical education. In his affidavit, Mr. Greene testified that he averages from "zero to two" days per week, which, based upon an 8 hour day, would be between zero to 16 hours.

However, at the November 5, 1999 Special Master hearing, Mr. Greene testified that he worked an average of 30 hours per week at the Peace Lutheran School. Based on the latter testimony, Mr. Greene's annual salary, combined with his tutoring earnings, would

be $13,500, which is higher than his average salary from 1984 through 1991.

Psychological and Mental State -- Mr. Greene testified at the November 5, 1999 Special Master hearing that he is not currently undergoing any psychological counseling or treatment, although he did attend a series of counseling sessions in 1992 and 1993. Mr. Greene testified that he voluntarily quit the counseling sessions because he felt his psychological improvement was hampered by the ongoing anger and obsession over the incident and the lengthy litigation.

BREAKDOWN OF DAMAGES:

In this case, the School Board argues that the jury award is excessive and not supported by the evidence. For purposes of a claim bill, any attack on a jury verdict as being excessive must be supported by a showing that the verdict: lacked sufficient credible evidence; was influenced by corruption, passion, prejudice, or other improper motives; has no reasonable relation to the damages shown; imposes an overwhelming hardship on the respondent out of proportion to the injuries suffered; 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.

Jury Award: Although technically not evidence, the only hint in the record as to the jury's breakdown of the damages is contained in the closing argument of Mr. Greene's attorney at trial. Therein, Mr. Greene's attorney, regarding damages on the negligence count, argued:

> [Mr. Greene's] income, his damages, past and future, the problems he may have, the problems you have heard that he does have psychologically and emotionally and otherwise, I submit to you should be worth no less than two hundred fifty, three hundred or $400,000.

However, in discussing the invasion of privacy count, Mr. Greene's attorney argued that Mr. Greene suffered a different kind of injury. Mr. Greene's attorney argued that there was a violation of rights that resulted in an intangible injury to Mr. Greene's reputation that

is difficult to translate into a dollar amount. Mr. Greene's attorney argued to the jury:

> Somebody said to me once, "Your reputation is worth a million dollars. Slander you, your reputation is almost irreparable." So, I'm going to say to you that his reputation and what happened to him, the violation of rights, is worth a million dollars. Does that mean I expect you to come back with a million? I want you to wrestle with that one. You decide.

After deliberation, the jury came back with an award of $250,000 for the negligence count and $600,000 for the invasion of privacy count. Based on the information available, the only conclusion I can draw is that the jury assigned damages as requested by Mr. Greene's attorney:

- $250,000 (negligence) -- for past and future loss of employment and past and future psychological damages; and

- $600,000 (invasion of privacy) -- for intangible damage to reputation.

Conclusion Regarding Reputation/Humiliation Damages -- There is no yardstick for measuring humiliation or injury to a person's reputation. For this reason, because the jury had the opportunity to view each witness, assess their demeanor and credibility, and consider their testimony in light of all of the relevant evidence, and because none of the bases for deeming the verdict excessive have been met, I would defer to the jury's determination. Therefore, I cannot conclude the jury's award of $600,000 for the injury to Mr. Greene's reputation was excessive.

Conclusions Regarding Loss of Past and Future Employment and Past and Future Psychological Damages -- Unlike damages to reputation, damages for loss of employment and psychological treatment can be calculated. And, although the jury had the benefit of experiencing first-hand witness testimony, it did not have the benefit of knowing Mr. Greene's current employment status.

For this reason, I believe the evidence supports a modification of the jury's award relating to damages for loss of employment.

But, because the jury award is not itemized, it is not clear how much money was awarded for loss of employment and for psychological injury. In order to reduce the damages, it is necessary to reconstruct the damages for loss of employment and psychological injury based on the full evidentiary record, including evidence adduced during the Special Master process, which was not available to the jury.

Because the evidence shows that Mr. Greene is currently working in a part-time teaching position, just as he did prior to his resignation from the School Board, and because Mr. Greene is earning a salary similar to that earned prior to his resignation, I find that the evidence does not support an award of damages for future loss of employment.

Regarding damages for past psychological injury, evidence of Mr. Greene's counseling bills from 1992 and 1993 was presented at trial and to the Special Master. For the future psychological damage, the evidence brought out at trial supports a finding that Mr. Greene would need psychotherapy and pharmacotherapy. At trial, Dr. Macaluso forecasted the specific costs of such treatment.

Therefore, the evidence supports the following damages for loss of employment and psychological damages:

Category	Calculation	Amount
Past Employment	$15,193 (1991 salary, which was highest) multiplied by 6.5 years (mid-1992 through 1998)	$98,754.50
Future Employment	none	$0.00
Past Psychological	18 counseling sessions @ $20 per visit	$360.00

Future Psychological	Psychotherapy - Weekly visits for first three months (12 visits @ $100); monthly visits for two years (24 visits @ $100). Pharmacotherapy - Medication for one year (12 months @ $60); once a month follow-up for one year (12 visits @ $75)	$5,220.00
TOTAL		$104,334.50

Conclusion Regarding Total Damages -- I find that the evidence, including the evidence not available to the jury, supports total damages in the amount of $704,334.50 ($600,000 for damage to reputation/humiliation plus $104,334.50 for employment and psychological damages).

ATTORNEY'S FEES AND COSTS:

Under section 768.79, F.S., litigants are encouraged to carefully assess the merits of a case. If an offer of judgment or demand is made and rejected, and the final judgment exceeds that offer by 25 percent or more, the party rejecting the offer or demand is liable for attorney's fees incurred after the date the demand was served.

However, section 768.28(8), F.S., limits claimant's attorney's fees to 25 percent of claimant's total recovery by way of any judgment or settlement obtained pursuant to section 768.28, F.S. Thus, any recovery of attorney's fees under the offer of judgment statute is limited by the provisions of section 768.28(8), F.S. See Pinellas County v. Bettis, 659 So.2d 1365 (Fla. 2d DCA 1995); Hellman v. City of Orlando, 634 So.2d 245 (Fla. 5th DCA 1994).

On March 10, 1997, Mr. Greene made an offer of judgment to the School Board for $225,000, inclusive of attorney's fees and costs. The School Board did not respond and Mr. Greene prevailed with a jury verdict of $850,000, which exceeds the offer by more than 25 percent. But, there has never been any trial court determination of the amount of attorney's fees to be awarded under section 768.79, F.S. In fact, nothing in the record indicates that there has been any order from the trial court awarding attorney's fees. Therefore, any attorney's fees awarded under this claim bill would not only be limited by the 25 percent limitation provided in section 768.28(8), F.S., but would come out of the damages awarded to the claimant.

By affidavit, dated November 11, 1999, Mr. Greene's attorney testified that his total attorney's fees incurred were $215,000. By affidavit, Scott Mager, Mr. Greene's appellate attorney testified that his firm incurred $48,216.50 in attorney's fees. The sum of these attorney's fees equals $263,261.50, which exceeds 25 percent of the total claim bill damages of $704,334.50.

Therefore, consistent with section 768.28(8), F.S., I recommend a reduction in the amount of attorney's fees to $176,083.63, which equals 25 percent of $704,334.50. Also, I recommend that the attorney's fees be deducted from the damages awarded to Mr. Greene under this claim bill.

By affidavit, Mr. Greene's attorney testified that $16,000 in costs were expended during the course of the litigation. In an affidavit by Mr. Greene's appellate attorney, $1,639.34 in costs were expended in the appellate proceedings. Therefore, I recommend that $17,639.34 be deducted from the claimant's total damages to pay the costs incurred in litigation.

COLLATERAL SOURCES: Mr. Greene has had no other collateral sources of income, other than dividends and capital gains he receives annually arising out of a $50,000 inheritance in 1987.

IMPACT ON SCHOOL BOARD: According to John M. Quercia, Associate Superintendent for Financial Management and Support Services in a letter dated November 12, 1999, the School Board of Broward County is self-insured to $300,000 per occurrence, and has a policy in effect providing $700,000 in coverage in excess of the self-insured retention. As of November 9, 1999, in a letter from the National Director for Arthur J. Gallagher & Co-Boca Raton regarding the status of the insurance policy, the School Board has expended $518,371.58 in expenses under this claim, including the $100,000 already paid to Mr. Greene. However, this is largely the fault of the School Board since it could have significantly reduced its exposure had it accepted Mr. Greene's offer of judgment of $225,000 in 1997.

Thus, $481,628.42 remain under the policy limit for expenses and potential loss payments. In the event the claims award were to

exhaust the School Board's insurance coverage, the claim would be paid from the county's unappropriated general funds.

RECOMMENDATIONS: I recommend the bill be amended to direct the School Board to compensate Mr. Greene in the amount of $704,334.50, inclusive of Mr. Greene's attorney's fees and costs, without interest. Since the School Board has already paid $100,000, I recommend the Legislature direct the School Board to pay Mr. Greene $604,334.50. Since this amount exhausts the limits of the School Board's insurance coverage on this claim, I recommend the School Board pay any amount above its coverage limits out of funds of the School Board not otherwise appropriated.

Further, since the record supports the finding that actual medical or psychological records were not released by the School Board, I would also recommend that the bill be amended to remove the references to the release of employee medical and psychological records.

Accordingly, I recommend HB 461 be reported FAVORABLY AS AMENDED.

Respectfully submitted,

Robert E. Wolfe, Jr.
House Special Master

cc: Representative Jerry Melvin
Senator Roberto Casas
Maria Matthews, Esq., Senate Special Master
John Phelps, Clerk of House