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DATE: January 13, 2000

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

January 13, 2000

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

Re: HB 535 - Representative Hill
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 IN A CITY STREET IN HALLANDALE, FLORIDA.

FINDINGS OF FACT:

Mr. Gizzi, a resident of the City of ¹Hallandale 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 surface 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 surface to collapse.

The City admits that the street where the accident occurred is a city street. In addition, the manhole cover on top of

¹The City of Hallandale changed its name to the City of Hallandale Beach subsequent to Mr. Gizzi's accident.

the junction or conveyance box adjacent to the hole into which Mr. Gizzi fell, 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 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. The City further claims 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 1/2" 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 after Mr. Gizzi's accident 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 emergency room doctors and released. Mr. Gizzi continued to experience pain and wished to see an orthopedist. His HMO, HIP Health Plan of South Florida, told him that he would have a 30-day wait for a referral to a network orthopedist. Mr. Gizzi instead decided to seek treatment at Orthopedic Care Center, an orthopedic group outside of his insurance plan's network.

Mr. Gizzi sustained a severe ankle injury as a result of the accident which included dislocated and strained tendons, torn or strained ligaments, swelling of the ankle joint, 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 remove inflamed soft tissue and scar tissue from the ankle joint. Subsequent to his second surgery, Mr. Gizzi tore his Achilles tendon at the back of his left heel, which may have 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: inflamed soft tissue of the ankle joints and instability of the left ankle consistent with ligament injury. Dr. Sheinberg recommended to Mr. Gizzi that he consider undergoing a procedure to stabilize the ankle ligament complex and also arthroscopic surgery of the ankle to remove inflamed soft tissue and scar tissue.

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 joint custody of his 11 year old son for whom he pays \$600 per month in child support. He is engaged to be married.

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 ²\$239,915.17. 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. Because the leak had never been fixed the ground underneath the old patch continued to erode, causing the cave-in of the street surface.

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

²Note: 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.

Mr. Gizzi sustained a severe ankle injury and derangement of his left knee as a result of the accident. 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 \$74,971.17 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. This payment was not subtracted from the past medical expenses amount awarded by the jury.

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.

While not directly relevant to the issue of liability, the City seeks to discredit Mr. Gizzi based on what it characterized as untruthful testimony provided by Mr. Gizzi at the Special Master Hearing. At the hearing, Mr. Gizzi was asked by the Senate Special Master if he had any criminal record or anything that could potentially embarrass a legislator who voted in favor of his claim bill. Mr.

Gizzi answered "no, not at all" and then asked the Senate Special Master if her question included: ". . . criminal convictions and things of that nature," to which the Senate Special Master responded "right." Mr. Gizzi then answered the question again as "no."

In a post-hearing submittal, the City provided a copy of an arrest report dated August 17th, 1999, which indicates that 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 sporting goods 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, and is therefore not entitled to any award.

According to law enforcement personnel in Miami-Dade County who checked on the disposition of Mr. Gizzi's charge, 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, 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.

In addition, the City raises the issue of whether Mr. Gizzi stole golf clubs because he plays golf, which may raise issues regarding the degree and permanency of his ankle injury, and the cause of his continuing ankle pain.

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.

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.

CONCLUSIONS OF LAW:

LIABILITY: I find that the jury finding of 100% liability against the City is supported by sufficient credible evidence.

DAMAGES:

Past Medical Expenses: As a contested element of damages, the record supports the \$74,971.17 figure awarded by the jury. 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. However, the City has failed to show that these costs are not a consequence of the accident or resulting treatment of the injuries suffered by Mr. Gizzi.

Subsequent to trial and prior to the Special Master's hearing, Mr. Gizzi settled a lien for these outstanding medical expenses for the amount of \$47,000, a reduction of nearly \$28,000. Further, while Mr. Gizzi's HMO has denied coverage of his orthopedic treatment and surgeries, it did cover some \$2,000 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 find that 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;
- there is a likelihood of additional scar tissue in his ankle;
- he will likely have problems with ankle instability and arthritis in the future, and;
- he will "possibly or most probably" need future arthroscopic surgery.

However, the record before the jury contained no further 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 based on an examination shortly before the Special Master Hearing concluded 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 greatly exceed the

expenses for the treatment he has received to date (about \$75,000).

An additional consideration is the position of HIP, Mr. Gizzi's HMO. 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 of 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 related to his ankle injury.

Accordingly, I recommend reducing the future medical expense component of damages from \$120,000 to \$80,000, 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 damages and \$15,000 for future damages. 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 House Bill 535 be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

Phillip B. Miller
House Special Master

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cc: Representative Anthony C. "Tony" Hill, Sr.
Senator Kendrick Meek
John Phelps, Clerk of House
Janet Bowman, Senate Special Master