THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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November 16, 2000

SPECIAL MASTER'S FINAL REPORT	DATE	COMM	ACTION
President of the Senate	11/16/00	SM	Fav/1 amend.
Suite 409, The Capitol	04/10/01	CA	Fav/1 amend.
Tallahassee, Florida 32399-1100	04/18/01	FT	Favorable

Re: SB 54 – Senator Walter "Skip" Campbell
Relief of Helene Rippe

THIS IS AN EXCESS JUDGMENT CLAIM FOR $30,000 BASED UPON A $130,000 FINAL JUDGMENT IN FAVOR OF THE CLAIMANT TO COMPENSATE HER FOR DAMAGES RESULTING FROM BEING STRUCK IN THE FACE WITH A BASEBALL WHILE ATTENDING A LITTLE LEAGUE BASEBALL GAME AT A PARK OWNED BY THE CITY OF CORAL SPRINGS.

FINDINGS OF FACT: Findings of fact must be supported by a preponderance of evidence, although the Special Master is not bound by formal rules of evidence or civil procedure. The Special Master may collect, consider, and include in the record any reasonably believable information found to be relevant or persuasive.

Relating to Liability: On May 6, 1994, the claimant, Helene Rippe, and her husband attended a little league baseball game in which their son was playing at Mullins Park, which is owned by the City of Coral Springs. The game was being played on a baseball field erected by staff of the park for use during the months of March through the middle of June. Chain-link fencing was used to separate spectators from the field of play and to designate the field of play. The fencing included 8-foot high sections used to create a backstop behind home plate. There also was fencing atop the backstop, creating, in essence, an overhang in the direction of home plate. The backstop fencing was adjoined on each end by two 8-foot high by 10-

foot wide sections of fencing starting down the first- and third-base lines, respectively. Adjoining the 8-foot high fencing on each end were sections of 4-foot high fencing continuing along the first- and third-base lines of the baseball field. A set of bleachers for spectator seating was placed behind the 8-foot high sections of fencing moving toward the first-base line, and a set was placed behind the 8-foot high sections of fencing moving toward the third-base line. A bench for players was placed behind the 4-foot high fencing along the first-base line.

Ms. Rippe originally was seated on the bleachers near the first-base line, but she moved from the bleachers to join her husband, who was standing at the 4-foot high fencing along the first-base line. Mr. and Mrs. Rippe were standing at a spot approximately between home plate and first base. Ms. Rippe testified that she moved from the bleachers principally to get a better view of the game and her son, who was playing on second base. She testified that there were other people standing or sitting in the same general area along the 4-foot high fencing. Almost immediately after moving to, and while standing behind, the 4-foot high fencing, Ms. Rippe was struck in the face by a foul ball hit by a batter from home plate.

Relating to Damages: The impact from the baseball knocked Ms. Rippe unconscious, and she was transported to a trauma hospital in Broward County. At the hospital, X-rays and CAT scans revealed multiple injuries to the nose and the presence of blood in both maxillary sinuses, which are in the upper jaw area. On May 9, 1994, Ms. Rippe underwent surgery to repair the injuries to her nose. The surgery revealed multiple fractures of the nasal pyramid, multiple fractures of the septum, and also sinus obstruction due to bleeding, particularly in the right maxillary sinus. Ms. Rippe was in the hospital for approximately 9 days as part of this initial admission. Ms. Rippe experienced dizziness and suffered from headaches and occasional fainting spells in the aftermath of being stuck by the ball and the reconstructive surgery to her nose.

A few months following the injury, examinations indicated that Ms. Rippe had a soft tissue mass in the right maxillary sinus associated with chronic sinusitis. As a result, in August 1994 Ms. Rippe underwent a second surgical

procedure that involved correcting a deviated septum, trimming tissue and bony material in the nose, and draining the sinus. Deposition testimony of two treating physicians supports a finding that the deviated septum and tissue mass likely stemmed from the initial injury to the nose. Following this second hospital procedure, Ms. Rippe experienced difficulty swallowing, which a physician attributed to an irritation on the soft palate caused by the insertion of a tube in Ms. Rippe's mouth during the surgery. The physician determined that Ms. Rippe was dehydrated and readmitted her to the hospital to receive fluids through the vein.

The claimant testified that shortly after the incident in Mullins Park she began experiencing a pronounced increased in epileptic seizures, including having a seizure at the hospital following the accident. Ms. Rippe testified that she was diagnosed with epilepsy following the occurrence of a petit mal seizure at age 9. At age 16, Ms. Rippe testified, she suffered her first grand mal seizure. Ms. Rippe reported that she was on seizure medicine (except for most of her pregnancy) and suffered only two grand mal seizures in her life prior to being struck by the baseball. Ms. Rippe further testified that, following the accident in Mullins Park, she began experiencing multiple grand mal seizures on a daily basis, and that she continues to experience grand mal or petit mal seizures on at least a weekly basis today. It is the position of the claimant that, in addition to damaging her nose, the strike from the baseball aggravated this previously existing epilepsy. Additionally, in the period after being struck by the baseball, Ms. Rippe sought medical treatment for trouble hearing and for asthma or trouble breathing. (*See* "Conclusions of Law – Relating to Damages," below.)

At the time of the accident, Ms. Rippe was employed as a manager at a fast-food restaurant, where she earned $480 per week, plus bonuses. In November 1994, Ms. Rippe's employer terminated her employment after she exhausted the 26 weeks leave and payment through short-term disability available under the employer's policy. In 1995, Ms. Rippe secured a new job but stopped working after approximately 1 or 2 months because of regular seizures. In September 1996, the U.S. Social Security Administration found Ms. Rippe to be disabled since May 30, 1994, based upon her seizures. The claimant is not currently employed. In her testimony, Ms. Rippe attributes her inability to work

and her disability to the occurrence of seizures. [From the documentation submitted by the claimant, it appears that she currently receives approximately $560 per month (net) in Social Security benefits.]

PROCEDURAL HISTORY: Ms. Rippe and her husband filed a civil action against the City of Coral Springs alleging that the city was negligent, among other things, for failing to maintain the premises with sufficient safety devices and safeguards, for failing to maintain adequate fencing, and for failing to warn onlookers of the danger of being struck by a baseball. In addition to seeking damages for Ms. Rippe's injuries, the complaint sought damages on behalf of Mr. Rippe for loss of consortium. The parties entered into a pre-trial joint stipulation, in which they agreed that the plaintiffs were alleging that the city negligently designed and erected the fencing so that it did not provide adequate protection to Ms. Rippe, and that the city failed to warn of the danger.

The case was tried before a jury in November 1997. The principal evidence submitted at trial included live testimony of Ms. Rippe, live testimony of Mr. Rippe, deposition testimony of the city's parks and recreation business manager, a summary statement of medical bills as well as copies of medical bills, and the medical records of one physician who treated Ms. Rippe in connection with her epilepsy. The trial court refused the city's effort to admit deposition testimony of four of the physicians who treated Ms. Rippe, on the grounds that they were not specifically identified as experts in witness lists submitted prior to trial. The counsel for the city did proffer such deposition testimony into the trial transcript outside the presence of the jury. The trial court also refused the claimant's effort to admit the testimony of a safety consultant, on the grounds that the testimony would not present specialized knowledge to assist the trier of fact.

The jury apportioned negligence at 40 percent for the City of Coral Springs and 60 percent for Ms. Rippe. The jury assessed damages totaling $325,000 ($125,000 for medical expenses and lost earnings or earning ability in the past, and $200,000 for pain and suffering, disability, physical impairment, mental anguish, aggravation of a disease, or other non-economic damages in the past). The jury did not award any damages in connection with Mr. Rippe's claim for

loss of consortium. In addition, the court entered a directed verdict in favor of the city on the issue of future economic and non-economic damages sustained by the Rippes. A judgment was entered on behalf of Ms. Rippe for $130,000, reflecting a reduction in the total damages based upon her share of the negligence. In entering the judgment, the trial court retained jurisdiction to award costs to the plaintiff.

The City of Coral Springs appealed the decision to the Fourth District Court of Appeal, alleging, among other arguments, that the trial court erred in finding that sovereign immunity did not attach to the city's decisions regarding use, maintenance, and operation of the baseball field and in denying the city's motion for a directed verdict in the city's favor based upon the contention that the Rippes submitted insufficient evidence to support their claim. In August 1999, the District Court of Appeal affirmed the trial court judgment in favor of Ms. Rippe. (*City of Coral Springs v. Rippe*, 743 So.2d 61 (Fla. App. 4th Dist. 1999).) The city filed, but ultimately withdrew, a notice of appeal to the Florida Supreme Court. (*City of Coral Springs*, 751 So.2d 1250 (Fla. 2000), *rev. dism.*) Following these appellate actions, the city paid the claimant $100,000 under the statutory authority of §768.28, F.S.

CONCLUSIONS OF LAW:

Relating to Liability: A threshold issue to determining liability in this case is assessing whether sovereign immunity attaches to the city's actions. It is the position of the respondent that the city's design of the baseball field where Ms. Rippe was injured was a planning-level function protected by the application of sovereign immunity. The claimant, on the other hand, maintains that once the city elected to erect the temporary baseball field it had a duty to maintain the field in a safe manner and that the failure of the city to warn spectators of the danger of being injured by a baseball amounted to a negligent omission at the operational level, to which sovereign immunity does not apply. If the city's actions are not protected by sovereign immunity, the analysis must address the proper standard of care to which the city was bound.

As noted above, the Fourth District Court of Appeal affirmed the jury's finding of liability against the City of Coral Springs in this case. The Court of Appeal began its analysis by reasoning that "if the planning-level decision of a

governmental entity creates a known dangerous condition, the governmental entity then has an operational-level duty to either warn of or correct the danger." (*City of Coral Springs*, 743 So.2d 61, 63, citing *Department of Transp. v. Neilson*, 419 So.2d 1071, 1078 (Fla. 1982); *City of St. Petersburg v. Collom*, 419 So.2d 1082, 1086 (Fla. 1982).) Without significant additional analysis of the application of sovereign immunity to this case, the appellate court focused on whether the Rippes presented sufficient evidence for the jury to determine that the city had failed to warn of or correct a known dangerous condition. The court stated that the city could be liable if the city should have anticipated spectator injury despite the obviousness of the danger. The court concluded that the jury could have inferred that the city had knowledge of the dangerous condition based upon the deposition testimony of the city's parks and recreation business manager. He stated that park staff likely would not have cautioned spectators against standing behind the 4-foot high fence because it is assumed such spectators are watching the game and assuming some risk.

Although certainly respectful of the Court of Appeal's decision, the Special Master does find that legal minds could reasonably disagree on whether there is liability by the city in this case. Based upon a review of Florida case law, it appears that the operational-level duty from creating a known dangerous condition arises when the hazard is so inconspicuous that it amounts virtually to a trap not readily apparent to a foreseeable plaintiff. (*See Romano v. Palm Beach County*, 715 So.2d 315, 316 (Fla. App. 4th Dist. 1998).) From the evidence in the record, it is not apparent that the city had such knowledge or that the hazard was so inconspicuous. Ms. Rippe testified that it was her first time attending a baseball game at this park, that she was unfamiliar with the sport, and that she did not anticipate any danger in standing by the 4-foot high fence. Applying a reasonable person standard, however, the hazard of a foul ball leaving the field of play likely would have been obvious and conspicuous. There was no evidence presented of prior similar incidents occurring along the 4-foot high fencing which would give the city knowledge superior to that of the claimant. As part of its argument, the claimant notes that the city has fencing higher than 4 feet along the first-base line at other baseball fields within Mullins Park.

Aside from the issue of whether sovereign immunity applies to the city's design of the baseball field, the respondent argues that it fulfilled its duty to spectators. There is not a significant amount of Florida case law governing the duty of a ballpark operator to a spectator. The city asked the Special Master to consider the decision of a California court, which concluded that the management of a baseball stadium was not required to screen all seats but rather was under a duty to provide protected seats "for as many as may be reasonably expected to call for them on any ordinary occasion." [*Brown v. San Francisco Ball Club, Inc.*, 222 P. 2d 19, 21 (Calif. App. 1st Dist. 1950).] A search of case law provided examples of similar holdings in some other states. [S*ee, e.g., Bellezzo v. State of Arizona and Arizona Board of Regents*, 851 P. 2d 847 (Ariz. App. Div. 1 1992); *Akins v. Glens Falls City School Dist.*, 424 N.E. 2d 531 (N.Y. Ct. App. 1981); and *Friedman v. Houston Sports Ass'n*, 731 S.W. 2d 572 (Tex. App. – Houston (1st Dist.) 1987).]

Nonetheless, the Special Master defers to the Florida Court of Appeal's decision upholding the jury's finding of liability against the city. The Special Master concludes, however, that there is competent and substantial evidence in the record supporting the jury's verdict of shared liability. Ms. Rippe testified that there were available bleacher seats in the area protected by the higher fencing and that she freely left such protected seating to stand in an unprotected area. In addition, Ms. Rippe does not dispute that in standing by the lower fence her head clearly was above the top of the fence. The Special Master concludes that the claimant shoulders the substantial majority of the responsibility for the damages in this case.

Relating to Damages: There is competent and substantial evidence in the Special Master's record to conclude that Ms. Rippe suffered serious injuries to her nose as a direct result of being struck by the baseball in Mullins Park, with these injuries necessitating at least two hospital surgical procedures and a third hospitalization because of post-surgical complications. Such evidence also supports a conclusion that Ms. Rippe endured significant pain and suffering and other non-economic damages associated with the injuries to and surgeries on her nose, and that she was unable to work for a period during the recovery process.

The record, however, does not contain competent and substantial evidence to conclude that the increase in frequency and intensity of Ms. Rippe's epileptic seizures in the period following the accident in Mullins Park is attributable to being struck in the face with the baseball. The timing of the change in seizure activity suggests a connection. However, in the depositions submitted as part of the record associated with this claim bill, the physicians do not offer opinions within a reasonable degree of medical probability that being hit with a baseball caused Ms. Rippe's increased seizures. The Special Master is unable to conclude that the respondent is legally responsible for the claimant's condition relating to seizures or for her disability status. The record also does not support a conclusion that the city is legally responsible for any asthmatic condition or hearing problems suffered by the claimant. One treating physician stated in a deposition that it was unlikely a trauma to the nose could cause asthma. Another treating physician stated in a deposition that testing done shortly after Ms. Rippe's initial surgery on her nose indicated that her ears were normal. However, he did also state that there could have been "some correlation" between the initial trauma and a November 1994 bout with fluid in the left ear. (At the trial, the claimant submitted information relating to breathing and hearing problems; at the Special Master's hearing, she principally focused damages on the broken nose, the subsequent sinus problems, and the increase in seizures.)

At the time of the trial, the claimant submitted into evidence a summary statement estimating medical expenses at approximately $47,570.33. For the purposes of the Special Master's review of this claim bill, the claimant submitted an updated summary statement estimating medical expenses at approximately $118,191.42. Although it is difficult to determine precisely from either summary which expenses relate to which medical conditions suffered by the claimant, it is clear that a portion of the expenses are related to the claimant's seizures, breathing difficulties, or other conditions for which the Special Master concludes there is not competent evidence attributing causation to being hit with a baseball.

Relating to the Claim Overall: While giving deference to the Court of Appeal's conclusion that the City of Coral Springs is not protected by sovereign immunity and to the court's finding of sufficient evidence to support a liability judgment against the city, the Special Master concludes that there is an absence of substantial and competent evidence to support the jury's full damage award.

It is impossible to state with certainty how the jury calculated the economic and non-economic damages sustained by the claimant. A review of the trial transcript illustrates that the claimant testified to a number of conditions in relation to being struck with a baseball, including: the injuries to the nose; the increase in frequency and intensity of epileptic seizures; headaches and dizziness; hearing problems; breathing problems; and an inability to drive. It is reasonable to assume that the jury considered this testimony, particularly relating to the seizures, in calculating damages for medical expenses, lost wages, and pain and suffering and other non-economic damages. Because the Special Master concludes, however, that there is not sufficient evidence in the record to attribute the seizure activity or the breathing problems to being struck by a baseball, the Special Master concludes that they should not be part of the damage calculation. Considering the evidence relating to damages in a light favorable to the claimant, the Special Master concludes that the $100,000 paid to the claimant under the limits of §768.28, F.S., bears a reasonable relation to the amount of damages proved and the injuries suffered. This determination is supported in part by a consideration that the claimant's comparative negligence in this matter arguably is greater than the 60-percent level apportioned by the jury.

ATTORNEY'S FEES: Ms. Rippe was represented by one attorney at the trial stage of her complaint against the City of Coral Springs. She was assisted by that trial attorney and by a second attorney during the appellate stage of the civil action. Although the attorney who represented Ms. Rippe during the trial initiated her representation in the claim bill process, he ceased his representation shortly thereafter. Consequently, the claimant represented herself throughout the vast majority of the Special Master's activities related to this claim bill, including the Special Master's hearing.

A settlement statement from the attorney who represented Ms. Rippe during the trial indicates that of the initial $100,000 paid to Ms. Rippe by the city as a result of the final judgment, $25,000 (25 percent) was paid to this attorney and $15,000 (15 percent) was paid to the second attorney, who assisted with representation during the appellate stages of the claim.

Section 768.28(8), F.S., limits attorney's fees to 25 percent of a claimant's total recovery by way of any judgment or settlement obtained pursuant to §768.28, F.S. Specifically, §768.28(8), F.S., provides that "[n]o attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement." If this provision is interpreted to mean no single attorney may receive fees exceeding 25 percent, then the attorney's fees in this matter appear to be consistent with the statute. If, however, the provision is interpreted to mean that total claimant attorney's fees associated with the claim against the city may not exceed 25 percent, then the attorney's fees in this matter ($40,000) do not appear to be consistent, unless the claimant ultimately receives total recovery of at least $160,000 (e.g., $100,000 under the statutory limit and $60,000 via the claim bill process), and pays no additional fees.

COSTS: The trial court entered its judgment in favor of Ms. Rippe on December 11, 1997. At that time, the court reserved jurisdiction for the taxing of costs. There is no evidence in the record of the Special Master demonstrating that the recovery of such costs was ever pursued. Although arguably a reasonable amount of time has passed for the prevailing party at trial to seek costs from the trial court, the Special Master recommends that, as a matter of equity, the Legislature award Ms. Rippe certain costs associated with this claim. In assessing costs in this matter, the Special Master consulted the "Statewide Uniform Guidelines for the Taxation of Costs in Civil Actions" and reviewed the evidence of costs presented by the claimant, including copies of bills and a statement of settlement from her former attorney. Not all of the costs incurred by the claimant would be taxable under the uniform guidelines; however, where costs not normally taxable were nonetheless determined to be reasonably related to materials used in the review of this claim bill, the Special Master recommends that such costs

be allowed. The Special Master estimates costs at approximately $2,800 to $3,000.

OVERALL CONCLUSIONS: A jury found that the City of Coral Springs was at least partly responsible for damages suffered by the claimant as a result of being struck by a baseball in a city-owned park. Although the city was within its rights in pursuing its appeal, and there is evidence that the city acted reasonably in doing so, the claimant's initial judgment of $130,000 was upheld.

The damages, however, in this matter are not well documented from a standpoint of causation, and there is a question as to whether the claimant is entitled to the full $30,000, which the excess-judgment claim bill would order the city to pay. The evidence in the Special Master's record supports a conclusion that the claimant sustained significant injuries as a direct result of being struck in the face by a baseball, including a severely broken nose and sinus problems, as well as the dizziness, headaches, and other pain and suffering associated with these injuries. There is also evidence in the record supporting a finding that the claimant indeed suffered from and continues to suffer from a variety of other medical conditions, including frequent grand mal seizures. There is evidence in the record demonstrating the existence of these conditions, including, for example, testimony that an electrocardiogram revealed some abnormality in brain activity. However, there is not sufficient evidence in the record to conclude that such other conditions, particularly the seizures, are caused by being struck by a baseball and are, therefore, attributable to any negligence by the city.

The Special Master recognizes, however, that a jury found the city partly liable, that the Court of Appeal upheld this finding, and that the claimant incurred additional expense and delay as a result of the appeals. The Special Master recommends that – as a matter of equity – the Legislature direct the city to pay $15,000, which represents a reduction in the damages owed by the city and which helps to offset a portion of the claimant's costs and attorney's fees in this matter.

RECOMMENDATION: Based upon the foregoing, I recommend that Senate Bill 54 be amended to $15,000 and be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

Eric W. Maclure
Senate Special Master

cc: Senator Walter "Skip" Campbell
Faye Blanton, Secretary of the Senate
House Claims Committee

Amendment:
#1 by Comprehensive Planning, Local and Military Affairs
This amendment reduces the award from $30,000to $15,000.