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DATE: March 7, 2001

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SPECIAL MASTER'S FINAL REPORT

The Honorable Tom Feeney
Speaker, The Florida House of Representatives
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: HB 709 - Representative Ryan
Relief of Jose Peña and Johammes Peña

THIS IS AN AGGRESSIVELY PRESENTED AND VIGOROUSLY CONTESTED, VERDICT-BASED EXCESS JUDGMENT CLAIM FOR \$1,101,061 IN FUNDS OF THE CITY OF HIALEAH TO COMPENSATE JOSE PEÑA AND JOHAMMES PEÑA FOR THE DEATH OF CARMEN MATOS DE PEÑA, KATHERINE PEÑA, AND RICHARD PEÑA, AS A RESULT OF THE OPERATIONAL LEVEL NEGLIGENCE OF THE CITY IN MAINTAINING THE SHOULDER OF A CITY ROAD. THE CITY HAS ALREADY PAID THE UNDERLYING \$200,000 WAIVER LIMIT SPECIFIED BY LAW.

FINDING OF FACT:

1. THE CRASH. Just after dusk on Sunday, October 21, 1990, Carmen Matos de Peña was driving a 1981 Mercury west on West 68th Street in Hialeah. She had a valid Florida learner's permit. Riding in the front seat of the vehicle was Jose Peña, her former husband, who was the registered owner of the vehicle. Their three children, Johammes Peña, age 16; Richard Peña, age 12; and Katherine Peña, age 6, were riding in the back seat. Everyone was wearing a seat belt. According to the crash report, the evening was cloudy, the asphalt road was dry, and the area was not lit by street lights.

Near the intersection of West 68th Street and West 26th Drive, for some unknown reason, the car drifted off the right (north) edge of the pavement. At least the two right tires of the car left the paved portion of the roadway. Carmen apparently attempted to steer the vehicle back onto the roadway. It is unclear whether both right tires ever returned

to the pavement.

The posted speed limit was 35 m.p.h. The City of Hialeah Police Traffic Investigator concluded on his official crash report that Carmen was not exceeding the posted speed limit.

During these maneuvers, the right rear tire was punctured and blew out. The vehicle veered sharply to the right and crossed a 35-foot wide shoulder and dirt embankment area that dropped steeply to the water-filled east/west canal that ran parallel to the north side of West 68th Street. The vehicle plunged in and sank upright with doors shut and windows up.

Jose and Johannes survived and sustained minor physical injuries. Although Carmen, Richard and Katherine also were extracted from the vehicle, hospitalized, and placed on life support, none of them survived. Carmen died 8 days after the crash at age 38. Katherine died after 11 days at age 6, and Richard lingered the longest and died after 66 days at age 13.

2. ROADWAY AND SHOULDER: Along the roadway in the vicinity of the scene of the crash there was a 3 to 4 inch drop-off between the paved surface of the roadway and the shoulder area. The city owned, maintained, and controlled the roadway and the shoulder. Even though the city had no formal program for inspecting and maintaining the road shoulders, city personnel were generally aware of this unrepaired drop-off. The city had posted no signs in the area to warn of the drop-off.

There were no pre-existing mechanical defects found in the car and no evidence of intoxication or physical impairment of the driver. The traffic homicide investigating officer concluded that the drop-off contributed to the accident, causing the right rear tire to blow out. He identified a scratch mark on the pavement wall where the car attempted to get back on the road and the blowout occurred.

BATTLE OF EXPERTS: Claimants' expert was of the opinion that the city had not properly maintained the shoulder. Contrary to the Florida Department of Transportation Manual of Uniform Minimum Standards for Design, Construction, and Maintenance for Streets and Highways, commonly called the "Green Book," the city had allowed a 3 to 4 inch difference to develop between the surface of the roadway and the shoulder. Irrespective of the Green Book, the claimants' expert was of the opinion the shoulder drop-off was hazardous under reasonable and general engineering principles. According to this expert, the drop-off, in conjunction with the jagged edge, was the most probable cause for the blowout. According to him,

this was a typical drop-off collision in which the right tires of the vehicle go off the roadway and an overcorrection is made to the left as the driver tries to get the two wheels back onto the pavement. His scenario was that the right rear tire scrubbed along the pavement edge and blew out. The blowout aggravated the situation and forced the car to go back to the right, along with the driver's natural tendency to steer to the right so as not to go into the lane of the oncoming traffic.

Respondent's expert was of the opinion that the damage to the right rear tire illustrated a "rim nip" condition that occurred when the lip of the wheel rim cut through the tire. According to him, for the rim nip to occur the tire had to be almost flat. He found no tire scrubbing, which would indicate there was no contact with a drop-off. He also pointed out that there was "browning" on the tire, which was indicative of running the tire while under inflated. Given the length of the rim nip, damage adjacent to the tread, damage adjacent to the tire body, and damage to the rim, he concluded the tire ran over something two inches long while in a deflated condition. It was his opinion that the scratch observed by the traffic homicide investigation officer could not have been caused by the right rear tire. It was further his opinion that the road drop-off did not cause the rim nip in this case. At trial, on cross-examination, Respondent's expert ultimately admitted that he had no opinion as to what caused the crash.

3. JOSE PEÑA'S CREDIBILITY. The city has vigorously sought to discredit Jose Peña by introducing evidence of his marital and immigration status.
 - a. Carmen Peña As Jose Peña's "Wife". The following chronology will assist in summarizing this evidence:

<u>DATE</u>	<u>EVENT</u>
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11/10/73	Jose married Carmen in Dominican Republic.
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1/13/88	Jose divorced Carmen in Dominican Republic.
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1/29/88	Jose "married" Patsy Ann Hall in Dade County.
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11/25/89	Jose filed a Petition for Dissolution of Marriage to Patsy Ann Hall in Dade County.
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10/01/90	Final Judgment entered dissolving marriage of Jose and Patsy Ann Hall in Dade County.
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10/21/90	Crash occurred.
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10/29/90 Carmen died.

4/23/96 Jose obtained United States citizenship.

At the jury trial, the city proved that Jose Peña:

- Had filed a notice of claim for life insurance proceeds on the death of Carmen Peña indicating Carmen was his spouse, even though he was not married to her at the time of her death.
 - Had claimed Carmen as his wife on his 1989 federal income tax return, even though he was not married to her at that time, and he had misstated on a marriage license application his number of previous marriages.
- b. Jose Peña's Immigration. Mr. Peña admitted that his subsequent marriage to Patsy Ann Hall was a sham. He had never met her, and there was no marriage ceremony. He also admitted that he was attempting to obtain legal residency in the United States; that he paid someone \$2,000 to arrange and document a "marriage" and a work permit; and when he went back to find the person to whom he had given the money, the individual was gone and so was Peña's \$2,000.

Mr. Peña testified he did not get his permanent residency through the marriage to Patsy Ann Hall, but that he qualified for permanent residency through an amnesty program.

STANDARDS FOR FINDINGS OF FACT:

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, each claimant has the burden of proof on each required element. However, once the Special Master's report and recommendation are filed, a claim bill can be lobbied in the Legislature, just as any other measure. Objections to the Special Master's findings, conclusions, and recommendations can be addressed by either party directly to the members of the House of Representatives, either in committee, or individually, as the parties choose.

LEGAL PROCEEDINGS:

On July 15, 1991, the claimants filed a complaint for damages against the City of Hialeah in the circuit court in Dade County. The action was for the wrongful death of Carmen, Richard, and Katherine Peña. The case was brought by Jose Peña as Personal Representative and Administrator of the Estates of Carmen, Richard, and Katherine; and Jose Peña individually

and as the father of Johammes. On July 13, 1993, Letters of Administration for the estates of Carmen, Richard, and Katherine were issued to Jose Peña. The complaint alleged Jose Peña was the lawful husband of Carmen at the time of the crash.

Several months before trial, respondent's attorneys discovered that Jose was not married to Carmen at the time of the crash, or at the time of her death. Confronted with these facts, Jose Peña, on advice of his counsel, formally waived any claim he had as legal spouse of Carmen, and also waived his claim for his own bodily injuries, as did Johammes Peña.

The jury's verdict found negligence on the part of the City of Hialeah that was the legal cause of death of Carmen and the two children. However, the jury compared the negligence of the city with that of Carmen and assigned 75 percent of the liability to the city, 25 percent to Carmen, and none to Jose.

The city appealed to the Third District Court of Appeal, which affirmed the case, without opinion.

CLAIMANT'S MAIN ARGUMENTS:

- Mrs. Peña steered off the right side of the roadway for an unknown reason, perhaps to pass cars stopped in her lane, and waiting to turn left into a residential subdivision. The shoulder area is designed for vehicles to use in such circumstances. This crash scene had a dangerously steep and jagged drop-off that she could not overcome in attempting to return to the road. Her right rear tire blew, the vehicle veered right, she lost control, and the vehicle veered toward and into the canal that resulted in her death and the deaths of her two young children.
- City admitted knowing the area was dangerous and not in compliance with the "Green Book" standards. The Superintendent of the Street Division of the City of Hialeah acknowledged at trial:
 1. That drivers on West 68th Street, a 2-lane road, would come up to the intersection in question. At rush hour, rather than wait for vehicles to turn left off of West 68th Street, westbound drivers were using the right shoulder area to pass to the right of vehicles waiting to turn left;
 2. That the Hialeah Street Division was aware of that circumstance; and
 3. That the use of the shoulder at this location as a driving lane by impatient drivers is what caused the 3 to 4 inch drop-off between the westbound lane and the shoulder area.
- The jury has already "punished" the Peña family by attributing 25 percent of the responsibility for this crash to

Carmen Peña, the driver.

- The Peñas have been through the court system, including winning the appeal brought by the City of Hialeah.
- The city is seeking to discredit Jose Peña by introducing evidence of his marital and immigration status. Even if it is assumed that he intentionally lied about his marital status, it would have no effect on whether or not the city was liable.

CITY'S MAIN ARGUMENTS:

- The city agreed that Mrs. Peña drove off the roadway for an unknown reason. It could have been through carelessness when turning around to discipline her children; it could have been an overreaction response to a "phantom vehicle"; or it could have been an illegal and even reckless passing on the right. In any case, she had the last clear chance to avoid the impact into the canal by steering away from it, and she was obviously exceeding the speed limit because she was airborne on her way down the embankment.
- Mr. Peña, the supervising driver, was also at fault--he could have grabbed the wheel and steered the car to safety. Furthermore, he had under-inflated and worn tires on his car that made blowouts more likely.
- Mr. Peña's testimony (as a surviving eye witness to the collision) is not worthy of belief because he has a history of lying under oath. He admitted to an arrogant subversion of the immigration laws of the United States; he submitted a falsely notarized sham marriage license application; he filed a sham divorce; he filed false federal income tax returns; he filed false insurance claims; etc.
- Days after the crash, Mr. Peña returned to the scene, and as an afterthought, while looking for something to blame the collision on, discovered the road-to-shoulder differential and seized it as an excuse to avoid his wife's own responsibility for causing the crash.

CONCLUSION OF LAW:

Some see the Legislature's role in claim bills against government agencies as merely rubber stamping and "passing through" for payment those jury verdicts that have been reduced to judgment and survived appeal, as this one has. Others see the Legislature's role as a *de novo* responsibility to review, evaluate, and weigh the total circumstances and type of the public entity's liability, and to consider those factors that might not have been perceived by or introduced to the jury or court.

Whichever of these two views each lawmaker holds, at the Special Master's level every claim bill, whether based on a jury verdict or not, must be measured anew against the four standard elements of negligence.

The Florida Supreme Court has determined that in cases like

this one, the City of Hialeah had legal responsibility for injuries proximately resulting from dangerous drop-offs at the shoulders of its roads, Manning v. State Department of Transportation, 288 So.2d 289 (Fla.2d DCA, 1974); cert. denied, 295 So.2d 307 (Fla. 1974). Although a city cannot and should not be held liable for highly unusual, extraordinary, or bizarre consequences resulting from a breach of its duty to protect motorists from dangerous conditions, it is my opinion that there was nothing highly unusual, extraordinary, or bizarre about Mrs. Peña's maneuver. Furthermore, this is not the first reported case where the City of Hialeah has contested a jury award of money to the family of a driver who ended up in a partially obscured canal where the allegations were that the City of Hialeah had failed to erect barricades or otherwise sufficiently warn motorists of the existence of a partially obstructed canal. In City of Hialeah v. Revels, 123 So.2d 400 (Fla. App. 1960), the Third District Court of Appeal upheld a verdict and a wrongful death Final Judgment based on it against the city's claim that it was excessive.

LIABILITY From my review of the law and the evidence, I find the city had a duty to maintain the roadway/shoulder area near the scene of the crash. The city breached that duty and that breach was a proximate cause of the crash that resulted in the deaths of claimants' decedents.

DAMAGES Damages as found by the jury and in the Amended Final Judgment were as follows:

Damages	Jury Award	Amended Final Judgment
Medical and Funeral Expenses: Carmen	\$46,093.38	\$34,570.34 (25% reduction-comparative negligence-Carmen Peña)
Katherine	\$104,527.78	\$78,395.84 (25% reduction-comparative negligence-Carmen Peña)
Richard	\$322,932.87	\$242,199.65 (25% reduction-comparative negligence-Carmen Peña)
Past and Future Loss of Parental Companionship, Instruction, and Guidance and Pain and Suffering by Johammes Peña	\$250,000.00	\$187,500.00 (25% reduction-comparative negligence-Carmen Peña)
Past and Future Pain and Suffering by Jose Peña for: Katherine Peña	\$500,000.00	} \$750,000.00 (25% reduction-comparative negligence- Carmen Peña)
Richard Peña	\$500,000.00	
TOTAL	\$1,723,554.00	\$1,292,665.83

In addition, the Amended Final Judgment taxed costs against the City in the amount of \$8,395.61. Thus, under the Amended Final Judgment, the total amount awarded to claimants was \$1,301,061.14. The City of Hialeah has paid the respondent \$200,000, pursuant to section 768.28, F.S., leaving an unpaid judgment of \$1,101,061.14.

CONCLUSION ON DAMAGES: The medical and funeral expense portion of the award is clearly supported; however, Cigna Healthcare with a \$424,215 subrogation lien will probably be asked by claimants to compromise its claim which means that claimants may net a "double recovery" to the extent of Cigna's discount.

Johannes Peña's \$187,500 claim for loss of his mother's companionship and his own pain and suffering is within reason.

Mr. Peña's \$750,000 claim for pain and suffering over the loss of his two children, Katherine and Richard, is the component of damages that is most under attack by the City of Hialeah. How should the Legislature measure it?

Rather than the subjective, time-worn "shock the conscience" standard used by courts, for purposes of claim bills a respondent who assails a jury verdict as being excessive should have the burden of showing the Legislature that the verdict was unsupported by any 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 a hardship on the defendant 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.

For decades, a company called Jury Verdict Research has collected, classified, and analyzed virtually all reported personal injury and wrongful death cases in the United States. Using a formula based on a regression coefficient derived from a correlation analysis of total medical expenses, wage loss, and verdicts which have demonstrated a reliable linear relationship, the JVR editors have calculated and reported a probability range of expected verdicts for the wrongful death of females having similar age, family, work history, length of unconscious survival prior to death, and loss of services, as that of Carmen Matos de Peña. Based on my review of their data, and allowing for additional subjective variance for the intangible factors that each case presents, the verdict in this case is well within the range of expected verdicts as reported by the JVR editors. The awards to Jose for the wrongful death of two of his minor children, adjusted for factors of their age, length of unconscious survival prior to death, and projected loss of services, are also well within the range of expected verdicts for similar cases.

It is my view that the amount of damage sought by the claimants and already adjusted downward by the trial court for Mrs. Peña's negligence as assessed by the jury, is within the above standards, and within the range of expected verdicts for this type of case.

HISTORY OF THIS CLAIM BILL: 1998 Session: This claim was filed as HB 3083 and SB 64. On March 11, 1998, the Committee on Civil Justice and Claims unanimously passed the committee substitute (CS).

The CS passed the House with 91 Yeas and 23 Nays.

On May 1, 1998, the CS died at the Senate committee level.

1999 Session: The claim was refiled as HB 525 (1999 Regular Session) and was considered and recommended favorably by the House Committee on Claims. It then went to the House Calendar where it died on April 30, 1999.

The Senate companion, SB 8 again received a favorable recommendation by a Senate Special Master, by the Committee on Comprehensive Planning, Local and Military Affairs, and by the Committee on Fiscal Resource. Senate Bill 8 (1999) went to the Special Order Calendar where the conforming amendment recommended by the Special Master and the two reviewing Senate committees was adopted. The bill was never revisited and died on third reading.

2000 Session: The claim was refiled as HB 353 (2000 Regular Session) and was referred to the House Committee on Claims. The bill died in committee on May 5, 2000.

The Senate companion, SB 22, again received a favorable recommendation by a Senate Special Master, with one amendment. The bill was referred to the Committee on Comprehensive Planning, Local and Military Affairs, and the Committee on Fiscal Resource. On April 4, 2000, the bill was withdrawn from both committees and withdrawn from further consideration.

SUPPLEMENTAL
INFORMATION:

2001: On November 3, 2000, the City of Hialeah submitted a Supplement Response to the Claim Bill. Although titled "Supplemental Response" the document contain no additional or new information regarding this claim.

2000: The City of Hialeah argued essentially that the negligence of the city was, at worst, passive and not sufficient to breach the \$200,000 limitation on collectability contained in s. 768.28, F.S.; that the canal situation, common in Dade County, was an obvious, not hidden hazard that the Peñas were well aware of; that the area of the shoulder drop-off was "totally remote" from the point where the vehicle left the roadway thus breaking the proximate cause link to the crash;

that there was and is essentially an empty chair at the defense table, namely Metropolitan Dade County, that had maintenance responsibility for the canal itself and presumably for not building a barrier system along its edge; that the claimant's blow-out/over-steer scenario was "fictional" and "invented" by claimants' expert witness, totally opposed by credible, unbiased testimony of a pedestrian eye witness who testified that the Peña vehicle turned directly off the paved portion of the road and vaulted at an unswerving angle, some 50 feet across a 35-foot wide shoulder and directly into the canal; that the jury's award of damages was irresponsible, overly sympathetic, overly empathetic, and not based on the testimony and evidence presented to it; and finally, that claimant Jose Peña told a series of lies, was a documented perjurer, a sham pleader, a fraud perpetrator, a taker of the 5th Amendment, a total fabricator, and a tax cheat, who did not deserve legislative grace.

The claimant responded saying that Hialeah's submission contained nothing but the warmed-over arguments that had been made at trial, on appeal, and at the previous Special Master's hearing in 1997; that the Peña family was tagged by the jury with 25 percent of the fault; and that the courts have already reduced the claim to reflect Mrs. Peña's responsibility for the crash.

There is only one issue I wish to revisit and that is Hialeah's argument that the area of shoulder drop-off and the point where the physical evidence showed the vehicle left the paved portion of the roadway were "totally remote" thus breaking the required element of proximate causation.

The basis for my conclusion that there remains a sufficient nexus between these two locations (and thus a legally proximate relationship between them) was the testimony of Ernest Hortsly, City of Hialeah Traffic Engineer, who testified that his department knew generally about the drop-off "at that point" [of the accident]. Furthermore, Officer J.J. Samuelson, Hialeah Police Department Traffic Homicide Investigator, identified an area of a 4-inch drop-off where he "suspected the Peña vehicle came back on the roadway prior to going into the canal." His trial testimony identified between 400 and 500 linear feet of shoulder, generally straddling this intersection, that had eroded away between 3 and 4 inches deep.

The bottom line is that none of the witnesses could point out precisely the exact spot where the Peña's right front tire first dropped into the shoulder rut. The fresh rubber black mark may or may not have related to this crash, however, the sum of their testimony provides a sufficient connection between the resting place of the car in the water and the defective shoulder.

RESPONDENT'S ABILITY TO
PAY:

The most recent financial statements, including the combined Balance Sheet of the City of Hialeah, prepared by its auditors, Rachlin, Cohen & Holtz, as of September 30, 1999, shows a reserve of \$6,062,348 in the General Fund for "self-insurance claims payable." In their March 24, 1997, letter to the Mayor and City Council, the City Finance Director and City OMB Director had concluded that "the City feels that its current Risk Management staff, in a combined effort with the Finance and Law Department staff, using trend studies and history of claims analysis has properly estimated case reserves in the past and can continue to do so in the future." In short, the City of Hialeah has set aside sufficient reserves to pay this claim if ordered to do so, and Note 14 to its current Financial Statement contains this conclusion.

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 §768.28, F.S. Claimants' attorneys have acknowledged this limitation and verified in writing that nothing in excess of 25 percent of the gross recovery will be withheld or paid as attorneys' fees.

RECOMMENDATIONS:

I recommend that HB 709 (2001) be reported FAVORABLY.

Respectfully submitted,

Tonya Sue Chavis
House Special Master

Stephanie Birtman
Staff Director, Claims Committee

cc: Rep. Ryan, House Sponsor
Sen. Holzendorf, Senate Sponsor
Steve Kahn, Senate Special Master
House Claims Committee