THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
12/1/01	SM	Favorable
	FT	

December 1, 2001

The Honorable John M. McKay
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 56 (2002)** – Senator Ron Silver
HB 301 – Representative Stan Mayfield
Relief of Joseph Arvay

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNCONTESTED CLAIM BASED ON A CONSENT FINAL JUDGMENT, ADOPTING AN UNLIQUIDATED, STRUCTURED SETTLEMENT TO COMPENSATE JOSEPH ARVAY FOR INJURIES HE SUSTAINED AS A RESULT OF A COLLISION BETWEEN AN UNMARKED POLICE VEHICLE OWNED BY THE CITY OF VERO BEACH AND DRIVEN BY A POLICEMAN EMPLOYED BY THE CITY OF VERO BEACH AND A CAR DRIVEN BY JOSEPH ARVAY.

FINDINGS OF FACT:

On February 25, 1994, a City of Vero Beach (city) policeman, David Winslow, was operating a vehicle owned by the city at a municipal parking lot located at the intersection of 11th Avenue and 20th Place in the city of Vero Beach, Indian River County. Mr. Arvay was driving westbound on 20th Place. At approximately 9:20 p.m., Mr. Winslow pulled out of the municipal parking lot and into the roadway of 20th Place turning towards the east. Twentieth Place is a four-lane road where all four lanes are for westbound traffic only. According to Officer Winslow, when attempting to leave the parking lot, he stopped at the sidewalk, looked left, right, and then left again. Officer Winslow testified at deposition and the claim bill hearing that bushes planted along the edge of the parking lot obscured

his view of the left lane. Officer Winslow then pulled out onto 20th Place where he observed a gray vehicle pass directly in front of him. Officer Winslow was traveling approximately 15 miles per hour when his vehicle hit Mr. Arvay's vehicle on the driver's side of the car.

According to the testimony of a witness to the accident, Bonnie Rezmer, Mr. Arvay was driving within the posted speed limit of 40 mph in the far left lane, while she was traveling in the second lane from the left. Mr. Arvay's vehicle was slightly ahead of the witness's vehicle. The witness looked towards her left and noticed a white vehicle, whose headlights were facing in her direction exit the parking lot. The vehicle was turning east towards the witness' vehicle and Mr. Arvay's vehicle. At that instant, Mr. Arvay's car turned in and attempted to avoid the collision. The two cars collided and Mr. Arvay's vehicle lost control and slid into a large oak tree in front of the Vero Beach City Hall on 20th Place.

The vehicle driven by Mr. Arvay hit the tree on the right passenger side of the vehicle and pushed the right side of the vehicle into the interior of the vehicle. Mr. Arvay was wearing a seatbelt. After the accident, Officer Winslow left his vehicle to render assistance to Mr. Arvay.

Police Officer Winslow was given an intoxilyzer test and a blood alcohol test after the accident, the results of which were .0000 percent. According to a police report prepared by the Vero Beach Police Department, Mr. Arvay's blood alcohol level was obtained from the medical records of Mr. Arvay, and reported as .05 percent, which is within the range where there is a presumption that the person is not under the influence of alcoholic beverages. At the claim bill hearing, the witness to the accident testified that Mr. Arvay was in control of the vehicle and not driving erratically prior to the accident.

Two additional factors may have contributed to the accident. First, Officer Winslow reported that bushes lining the parking lot obstructed his view of the left lane of 20th Place. These bushes are located on property owned by the City of Vero Beach. Second, fatigue may have contributed to the accident. Officer Winslow had worked a 12-13 hour workday in addition to 3 ½hours he spent socializing with colleagues

at a restaurant called Frank's Place. However, Officer Winslow denies that fatigue played a part in the accident.

Officer Winslow was charged with failing to yield the right of way. He pleaded no contest to the charge of failing to yield the right of way, to which adjudication was withheld. Officer Winslow was required to attend driver's safety school. In addition, a letter regarding the accident was placed in Officer Winslow's personnel file.

Officer Winslow's Day

At the time of the accident, Officer Winslow was working for an interagency law enforcement task force called MACE, Multiple County Criminal Enforcement, which is a drug-related agency that has countywide jurisdiction. He was loaned by the city of Vero Beach to MACE for a year and was working for MACE the day of the accident. The day of the accident, February 24, 1994, Officer Winslow started his workday at 4:30 in the morning and finished his normal workday at approximately 4:30 in the afternoon. During the course of the workday, Officer Winslow participated in a successful undercover drug operation.

Officer Winslow left MACE headquarters in his unmarked car, drove the car several blocks to pick up his laundry, then drove to the First Union Bank, which is located adjacent to the City of Vero Beach Municipal Parking Lot. Officer Winslow parked his unmarked vehicle in the municipal parking lot. Officer Winslow then walked across the street to a restaurant called Frank's Place. At Frank's Place he met other members of the MACE unit who allegedly were holding a debriefing of the days drug operation. According to the testimony of Officer Winslow, the debriefing portion of the meeting took approximately an hour with the remainder of his time at the restaurant spent socializing with coworkers.

During the course of the evening, most of the officers were drinking alcohol, with the exception of Officer Winslow who was drinking O'Doul's, a nonalcoholic beer. Because he was sober, Officer Winslow was requested by his lieutenant to:

1. drive one of the other officers police vehicle back to MACE headquarters; and

2. be on call until the next morning because the other officers had been drinking and therefore were ineligible for on-call duty.

At approximately 9:00 p.m., Officer Winslow walked across the street to the municipal parking lot to get into his unmarked vehicle.

Once in the vehicle, he called the Sheriff's Office to report that he was going to be on call for the MACE unit until the next morning. Officer Winslow testified that he was on his way home when the accident occurred.

Facts Regarding On-Call Status

To satisfy the requirements of on-call or standby duty, for a MACE officer, the officer may not leave the county, must wear a beeper, and may not consume alcohol. However, according to the testimony of Officer Winslow, on-call officers were free to go about their personal life as long as they have their beeper and were able to respond if called out. For example, it would be acceptable to spend 3 hours in a shopping mall while on-call but not while on duty.

It would appear that Officer Winslow was not paid for his on-call status on the evening of February 25, 1994 or the morning of February 26, 1994. While working for the MACE unit, the interagency agreement between the Indian River Sheriff's Department, the Vero Beach Police Department and the Sebastian Police Department provided that each individual city or county would pay their own officers, including payment of overtime. Because MACE sheriff officers were not entitled to on-call time, Officer Winslow was also not paid for such time even though the City of Vero Beach pays one hour at time and a half for every 24 hours of overtime on call worked. In addition, the City of Vero Beach grants any officer that responds to an on-call actual call a minimum of 2 hours of time at time and a half. Officer Winslow testified at the claim bill hearing that, because he waived his right to compensation for on-call status, he was allowed to take time off as an offset for that duty. The record is silent as to whether he actually applied an offset for his on-call duty on the day of the accident.

The record is clear, however, that between the time Officer Winslow entered the unmarked vehicle and the time of the

accident, he was not asked to respond to a call or an incident on behalf of the MACE unit, the City of Vero Beach or the Sheriff of Indian River County. Nor did Officer Winslow witness any crime in progress, traffic infraction or other incident to which he attempted to respond prior to the accident at issue.

CLAIMANT'S BACKGROUND: Mr. Arvay is now 64 years old. At the time of the accident he was 57 years old and employed as a cook at a restaurant in Vero Beach, Florida. He is divorced and has three adult daughters. He currently resides at an assisted living facility called Elders-In-Touch which is located in Vero Beach.

Mr. Arvay's Injuries

Mr. Arvay sustained serious injuries, including permanent injuries. As the result of the accident, he suffered severe traumatic brain injury, including loss of consciousness, coma, subdural hematoma and brain contusion. Other injuries included, broken ribs, broken right clavicle, fracture of the right scapula, and laceration of the liver.

Mr. Arvay suffers from permanent organic brain injury, including a moderate cognitive decline, balance impairment and double vision. A neuropsychological screening test concluded that Mr. Arvay was severely impaired for memory, moderately impaired for mental calculations, and borderline for orientation and language comprehension. Mr. Arvay also suffers from moderate depression.

He is paralyzed on the right side of his body with significant impairment to his right arm. He is right-handed. Mr. Arvay has difficulty speaking and swallowing due to vocal cord paralysis. He is unable to work or to drive a motor vehicle.

Mr. Arvay was hospitalized for approximately 4 months and spent an additional 2 months in outpatient rehabilitation. Since the accident, Mr. Arvay has lived at Elders in Touch, an assisted living facility. Mr. Arvay requires 24-hour-a-day care.

Damages

1. Medical Expenses—Mr. Arvay incurred medical expenses totaling $620,275.58. This figure reflects medical expenses incurred through 1997. In addition, $88,191 of the $620,275.58 represents the cost of Mr. Arvay's residence at Elders in Touch from September 1995 to February 2000. Mr. Arvay had no medical insurance and there are no collateral sources of coverage.

2. Lost Wages—At the time of the accident, Mr. Arvay was employed as a pantry chef at the Ruddy Duck Restaurant in Vero Beach, Florida. Mr. Arvay worked 40-50 hours per week at an hourly wage of $6.50/hour. The claimant's economist, Merle Dimbath, estimates the value of Mr. Arvay's lost earning capacity to be $137, 407, with a present value of $135,032.

Life Care Plan Expenses

A life care plan was prepared by experts for both the claimant and the City of Vero Beach in order to estimate the expenses associated with providing Mr. Arvay with 24-hour assisted care, and the provision of future medical care. In addition, the Life Care Plan includes expenses for occupational, physical and speech therapy, psychological counseling, adaptive equipment. The future expense of satisfying the life care plan is estimated by Mr. Dimbath to be $1,719, 487 with a present value of $1,180,141.

PROCEDURAL BACKGROUND OF THE CASE:

The parties settled this case through the entry of a Consent Final Judgment dated July 3, 2000. Prior to the settlement, the critical issue regarding the potential liability of the City of Vero Beach was whether Officer Winslow was acting within the course and scope of his employment at the time of the accident. In its initial answer to Mr. Arvay's Complaint, the City of Vero Beach's attorney represented both the city and Officer Winslow and admitted that Officer Winslow was acting within the course and scope of his employment at the time of the accident. Subsequently, the city took the position that Officer Winslow was not acting within the course and scope of his employment and filed an amended answer to the complaint. The city then filed a Motion for Summary Judgment arguing that, as a matter of law, Officer Winslow was not acting within the course and scope of his

employment at the time of the accident. The court denied the City of Vero Beach's Motion for Summary Judgment on July 7, 1996, finding that "pursuant to the standards set out in *Sussman* and *Craft,* that Defendant, Winslow, was acting within the course and scope of his employment at the time of the accident." At the same time, the court entered summary judgment in favor of Officer Winslow, thereby granting him immunity from liability pursuant to §768.28(9)(a), F.S.

The City of Vero Beach appealed the circuit court order denying its Motion for Summary Judgment to the Fourth District Court of Appeal. On October 22, 1997, the Fourth District Court of Appeal in *City of Vero Beach v. Joseph Arvay and David Calvin Winslow*, 701 So.2d 880, (Fla. 4th DCA 1997), issued a *per curium* decision affirming the circuit court denial of the City of Vero Beach's Motion for Summary Judgment.

Neither the circuit court opinion denying the City of Vero Beach's Motion for Summary Judgment nor the Fourth District Court of Appeal decision apply the applicable law on course and scope of employment to the facts of the case, so it is difficult to ascertain why the courts decided the way they did. However, the circuit court order cites as the governing law on the issue, the cases of *Sussman v. Florida East Coast Properties*, 557 So.2d 74 (Fla. 3rd DCA 1990) and *Craft v. John Sirounis and Sons, Inc*., 575 So.2d 795 (Fla. 4th DCA 1991), and also concludes that workers' compensation statutes and case law are not applicable to the determination of the course and scope of employment in this case.

CONCLUSIONS OF LAW: Claimant argues that Officer Winslow's negligent operation of an undercover vehicle owned by the City of Vero Beach, within the course and scope of his employment, was the proximate cause of Mr. Arvay's injuries. Officer Winslow failed to yield the right-of-way to Mr. Arvay, thereby striking Mr. Arvay's vehicle and causing serious injuries, including permanent mental impairment, paralysis, loss of sight in his right eye and paralyzed vocal cords.

For a governmental entity in Florida to be liable to a third party for the negligent acts of its employees under §768.28, F.S., the employee must be within the course and scope of employment and the action must not have been taken in bad

faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The courts have held that the state has not waived sovereign immunity for purposes of the dangerous instrumentality doctrine or for purposes of cars issued 24 hours a day to a government employee unless the person operating the vehicle was within the course and scope of employment at the time the injury occurred.

In *Rabideau v. State*, 409 So.2d 1045, (Fla. 1982), the Florida Supreme Court held that section 768.28, F.S., does extend to the state accepting vicarious liability under the dangerous instrumentality doctrine for acts committed outside of an employee's scope of employment. Accordingly, the 24-hour assignment of a government vehicle to a government employee does not enlarge liability under §768.28, F.S., to include acts committed outside the employee's scope of employment.

Therefore, where the negligent operation of a vehicle owned by a governmental entity covered by §768.28, F.S., is concerned, the issue is whether the negligent act was committed within the employee's scope of employment.

Scope and Course of Employment Test

In denying the City of Vero Beach's Motion for Summary Judgment, the circuit court judge cited as controlling law on the issue of course and scope of employment the cases of *Sussman v. Florida East Coast Properties*, 557 So. 2d 74 (Fla. 3rd DCA 1990) and *Craft v. John Sirounis and Sons, Inc.*, 575 So. 2d 795 (Fla. 4th DCA 1991). In *Sussman*, a fitness instructor at a health spa owned by Florida East Coast Properties received a telephone call fom her boss asking her to pick up a birthday cake on her way to work. En route to work after picking up the cake at the grocery store, the fitness instructor hit the car driven by Mr. Sussman. The court held, as a matter of law, the employee was not acting within the scope of her employment. In reaching this conclusion, the court defined the following test:

> The conduct of an employee is within the scope of his employment, for the purpose of determining the employer's vicarious liability to third persons injured by the employee, only if: 1) the conduct is of the kind the employee is hired to perform; 2) the

> conduct occurs substantially within the time and space limits authorized or required by the work to be performed; and 3) the conduct is activated at least in part by a purpose to serve the master. Sussman at p. 76.

In the *Craft* case, this test was applied to the fact situation of an off-duty police officer who had been drinking and got into a bar room brawl with four off-duty police officers. None of the officers were in uniform, carrying a gun or wearing a badge. Craft was injured in the fight and sued the cities of Fort Lauderdale and Deerfield Beach, the employers of the police officers. Each of the police officers asserted that they were on duty 24 hours a day. The Fourth District Court of Appeal applied the *Sussman* test to conclude that the conduct of the officers was not within the scope of their employment "nor was their action in the interest of the cities." *Craft* at p. 11.

Application of the *Sussman* test is particularly difficult to factual situations involving police officers who are either on call or off-duty where the behavior at issue does not involve bad faith, malicious purpose, or wanton and willful disregard of human rights, safety or property.

The Special Master specifically requested that the parties to this claim bill submit a memorandum of law applying the *Sussman* test to the facts of this case, specifically with respect to Officer Winslow's employment status at the time of the accident. The Special Master provided the parties with the following analysis of the *Sussman* test and asked for their response:

1. *The conduct is of the kind the employee is hired to perform*—At the time of the accident, the relevant conduct of Officer Winslow was that he was driving home from work. Driving to and from work is not the specific type of conduct that a police officer is hired to perform.

2. *The conduct occurs substantially within the time and space limits authorized or required by the work to be performed*—The time and space limits of Officer Winslow's employment allowed him to drive to and from home, and on personal errands, in an unmarked city vehicle while on call. Hence, this prong of the test is met

by the facts of this case.

3. *The conduct is activated at least in part by a purpose to serve the master*—Officer Winslow's conduct of driving home was not activated by a purpose to serve the master, but rather, to serve a personal purpose, that of going home to his family.

The memorandum provided by the parties applies the *Sussman* Test as follows:

1. *The conduct is of the kind the employee is hired to perform*—"In Mr. Arvay's case, the undisputed facts show that Sergeant Winslow was satisfying his duty as an official standby MACE officer, on call, and thus acting within the interests of his employer, Vero Beach, at the time of the incident, and paid for that duty. The MACE unit must have an officer on call and ready to respond to an urgent situation. Winslow was carrying a pager on his person to keep in constant communication with MACE headquarters. He was required to have immediate access to his city vehicle. The act of traveling to his home in that vehicle fell within the scope of his employment as contemplated by the city and the other joint agency members."

2. *The conduct occurs substantially within the time and space limits authorized or required by the work to be performed*—"Standby status or on-call status required that Winslow be readily available at a moment's notice until the next officers' shift commenced. He was on call, and on duty. Winslow at no time left the confines of the MACE jurisdiction of Vero Beach or Indian River County. Therefore, he was within the geographic "space limits" authorized and required for his work. He had not even left the parking lot when the accident occurred."

3. *The conduct is activated at least in part by a purpose to serve the master*—"Winslow's conduct was activated at least in part by a purpose to serve the employer. Winslow fulfilled the City of Vero Beach's responsibility to provide law enforcement personnel to the MACE unit at the ready according to the terms of the Participating Agency Agreement."

In order to find that, as a matter of law, Officer Winslow was acting within the scope of his employment, the circuit judge and Fourth District Court of Appeals judges implicitly determined that being on-call by itself essentially satisfies the *Sussman* test. I believe that in making this determination, the courts made a policy decision extending the waiver of sovereign immunity that is not clearly authorized by §768.28, F.S., or case law.

WORKERS' COMPENSATION LAW:

Historically, the general rule of law applied to whether injuries sustained by coming to or returning from work was that injuries sustained by employees when going to or returning from their regular place of work were not deemed to arise out of and in the course of their employment, *Sweat v. Allen*, 200 So.348 (Fla. 1941). Prior to 1982, the workers' compensation law applied the rule that a police officer was always within the course and scope of employment because police officers were viewed as being on duty 24 hours a day. In *Sweat v. Allen, supra*, the court reasoned that law enforcement officers should be treated differently than regular employees because:

> …for by the very nature of the service the claimant performed, he was continuously entrusted with certain duties, namely, to protect the peace and safety of the community and apprehend those guilty of its violation. His personal life was subservient at all times to call of official service… *Sweat* at p. 350.

This broad protection for law enforcement officers was narrowed by statute in 1982 to provide that a law enforcement officer is acting within the scope of his employment only when he is discharging his primary law enforcement responsibilities. Pursuant to s. 440.091, F.S., a law enforcement officer is acting within the course of his employment where the employee:

1. Is elected, appointed, or employed full time by a municipality, the state, or employed full time by a municipality, the state, or any political subdivision and is vested with authority to bear arms and make arrests and the employee's primary responsibility is the prevention or detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state.

2. Was discharging that primary responsibility within the state in a place and under circumstances reasonably consistent with that primary responsibility; and

3. Was not engaged in services for which he or she was paid by a private employer, and the employee and his or her public employer had no agreement providing for workers' compensation coverage for that private employment.

In *City of Fort Lauderdale v. Abrams*, 561 So.2d 1294 (Fla. 1st DCA 1990) and *Palm Beach County Sheriff's Office v. Ginn*, 570 So. 2d 1059 (Fla. 1st DCA 1990), the court concluded that, pursuant to s. 440.091, F.S., an off-duty officer who is not carrying out his primary responsibilities is not acting within the course of his employment for workers' compensation purposes.

The facts in *Ginn*, involved a Palm Beach County deputy sheriff who was off duty and on a personal errand when he was injured in an automobile accident. He was driving a sheriff's office vehicle that he was allowed to use on personal business. Prior to the accident, he had been monitoring the police radio in the vehicle in case he might be called on duty to assist with a law enforcement matter. In addition, he was a member of the sheriff's office emergency field force which required him to wear a beeper at all times.

In denying the sheriff officer workers' compensation benefits, the court reasoned that:

> The fact that a law enforcement officer is on call for duty and has a police radio and other indicia of his authority in his possession is not dispositive in determining whether an off-duty officer is acting within the course of his employment. Rather, the issue, pursuant to the provisions of Section 440.091, F.S., is whether the officer is carrying out his primary responsibility, which is the "prevention or detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state." *Ginn* at p. 1060.

In the Arvay case, the circuit court expressly stated that he did not find workers' compensation statutes and case law to be applicable to the determination of the course and scope

of employment issue presented in the Arvay case. However, the *Sussman* case relied upon by the judge, points out that workers' compensation policy considerations generally allow a broader interpretation of whether an employer is legally responsible for an injury resulting from the conduct of an employee than is the case under principles of respondeat superior for injuries caused by an employee. *Sussman* at. p. 75. It is also important to point out that the negligent employee in the *Sussman* case was not a law enforcement officer.

It appears that both the circuit court and Fourth District Court of Appeal reasoned that the status of being "on call" while driving a vehicle owned by a law enforcement agency, places any negligent act caused by the law enforcement officer during that on call status within the course and scope of employment for purposes of tort law. Hence, the courts are implicitly extending the state's waiver of sovereign immunity to injuries from traffic accidents caused by on call police officers driving a vehicle owned by the government employer, even when the police officer is engaged in personal errands, or driving to and from work, during the period in which the police officer is "on call."

This conclusion goes beyond what is directly supported by existing case law and appears to require the court to make a policy decision. As the decision-maker in this case, the Legislature has the prerogative to agree or disagree with this policy.

It should be pointed out that §768.28(9)(a), F.S., clearly states that where a government employee acts in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety and property such action takes the employee out of the protection against personally liability afforded by the section and takes the actions of the employee out of his course and scope of employment. In the Arvay case, it is very clear that Officer Winslow was not acting in bad faith, with malicious purpose or with willful and wanton disregard for human rights, safety and property.

However, unlike the case of workers' compensation law, the Legislature has not specifically defined what acting within the course of employment means as applied to law

enforcement officers. Under the specific facts of this case, I believe it is appropriate to apply a policy extending the waiver of sovereign immunity to the case of negligence committed while a police officer is operating a vehicle assigned to him by the law enforcement agency where the use of the vehicle is consistent with the policies and procedures of the employer law enforcement agency.

CONCLUSIONS ON SETTLEMENT AGREEMENT:

Mr. Arvay and the City of Vero Beach reached a settlement agreement that was entered by the court as a Consent Final Judgment (CFJ) on July 3, 2000. The Consent Final Judgment is somewhat unconventional in that it does not include a figure liquidating the value of the damages to be paid Mr. Arvay by the City of Vero Beach. The CFJ requires the City of Vero Beach to pay the following:

1. Immediately pay Mr. Arvay $100,000. The City of Vero Beach has already paid Mr. Arvay this amount.

2. Pay all of Mr. Arvay's past medical expenses from the date of the accident until the date a claim bill becomes law. The city is given the authority to negotiate down past medical bills on Mr. Arvay's behalf. As of the date of the claim bill hearing, the city had yet to negotiate these bills.

3. The city will pay Mr. Arvay's life care, medical and housing expenses up to $100,000 annually. Mr. Arvay will access Medicare for his medical expenses. The city will pay for those medical costs not covered by Medicare or Medicare Supplemental Insurance.

4. The city will provide Mr. Arvay with Medicare Supplemental Insurance for Life. The approximate monthly premium for Medicare Supplemental Insurance is $212.00 per month.

5. The City of Vero Beach will pay Mr. Arvay $45,000 annually from the date of his accident (February 25, 1994) for life. Fifty percent of the total past amount owed (50 percent of $315,000 or $157,000) is due within 30 days of the claim bill becoming law ($157,500) with the remainder due on December 15th of that year ($157,500).

6. Upon Mr. Arvay's death, the city will pay each of his surviving three daughters $25,000 each. (Total of $75,000.)

7. Upon the claim bill becoming law, the city is to pay Mr. Arvay $908,568.90 in two installments. This figure represents attorneys' fees calculated as 25 percent of $3,634,275.58.

8. Upon the claim bill becoming law, the city is to pay Mr. Arvay $30,000. This figure is apparently intended to represent Mr. Arvay's legal costs, not including attorneys' fees.

9. In the event Mr. Arvay dies before the claim bill becomes law, the City of Vero Beach would still pay the initial $100,000, past medical expenses of $620,275.58, $25,000/daughter inheritance, $30,000 representing legal costs, and $603,437.50 (instead of the $315,000 of paragraph 5 and the $908,568.90 of paragraph 7).

For the purposes of calculating attorneys' fees, the parties calculated the gross value of the settlement agreement as $3,634,275.58. This calculation assumes that Mr. Arvay had a life expectancy of 17.5 years. Based on the $3,634,275.58 figure, a 25 percent attorney's fee was calculated as $908,568.00.

Because they are sometimes entered into for reasons that may not be directly related to the merits of a claim or the validity of a defense, stipulations or settlement agreements between the parties to a claim bill are not necessarily binding on the Legislature or its committees, or on the Special Master assigned to the case by the Senate President. However, all such agreements must be evaluated.

The Arvay settlement agreement is unconventional for a number of reasons. First, the settlement agreement is basically a structured settlement whereby the city agrees to make payments to Mr. Arvay every year for the rest of his life. Typically, in these types of cases where payments are made over a long period of time, an annuity is purchased that pays the desired stream of income over the estimated lifespan of the claimant. In this case, the City of Vero Beach

is essentially taking on the role of the banker or insurance company that administers an annuity. Under the terms of the agreement, the City of Vero Beach will have a continuing obligation to make a yearly payment to Mr. Arvay of up to $145,000 per year, out of their general revenue fund, for years to come.

Second, the total amount of damages that the City of Vero Beach must pay Mr. Arvay is unliquidated. Indeed, SB 22 does not include a specific dollar amount that the Legislature would be authorizing the City of Vero Beach to pay Mr. Arvay. Instead, the bill would authorize the city to compensate Mr. Arvay pursuant to the terms of the Consent Final Judgment.

Third, the settlement agreement requires the City of Vero Beach to pay an inheritance of $25,000 to each of Mr. Arvay's surviving daughters upon his death, or potentially $75,000. Mr. Arvay's daughters are all adults in their 30s and 40s. Mr. Arvay's daughters have no legal claim to damages based upon Mr. Arvay's negligence lawsuit damages.

Fourth, the economic damage figures used in the settlement agreement are a mix of present value and future value figures. For example, the $100,000 per year for life to fund Mr. Arvay's Life Care Plan and pay for Medicare Supplemental Insurance (estimated to be worth $1,781,500) was not calculated to include a cost of living increase. In contrast, the compensation of $45,000 per year for life (estimated to be $1,132,500) was calculated based on future dollars.

At the claim bill hearing, the attorneys for both Mr. Arvay and the City of Vero Beach represented that, in structuring the settlement agreement, the parties, assumed that the absence of a cost of living multiplier in the calculation of Life Care expenses more than offset the use of a discount factor for the calculation of economic damages offset. More importantly, the parties stressed that discounting the gross settlement calculation of $4,572,843.48 to present value terms would not correctly represent the settlement arrived to by the parties.

While I find that generally the gross figures on which the settlement pay out is based are reasonable, I believe several aspects of the agreement need to be changed.

1. I believe it is inappropriate to authorize the City of Vero Beach to pay up to $75,000 in inheritance to Mr. Arvay's adult daughters as there is no legal basis for doing so. Hence, this element of damages should be deleted from the agreement, and the attorneys' fees should be adjusted accordingly.

2. For purposes of the claim bill, the estimated value of the settlement should be stated in the bill. This figure should not include the $100,000 that has already been paid to Mr. Arvay.

Prior to receiving cash payments as provided by the settlement agreement, I recommend that a guardian of the property be appointed on Mr. Arvay's behalf, a provision that is not in the terms of the settlement agreement.

The terms of SB 56 incorporate these recommendations by providing that the settlement agreement be amended to:

1. Condition any payments to Mr. Arvay on the prior appointment of a guardian of the property by the Circuit Court;

2. Delete the requirement of paragraph 6 of the Consent Final Judgment granting an inheritance to Mr. Arvay's daughters of up to $75,000; and

3. Reduce the attorney's fees payable under paragraph 7 of the Consent Final Judgment by $18,750 from $908,568.90 to $889,818.90 to reflect the subtraction of $175,000 from the amount of gross damages.

ATTORNEYS FEES: The attorney for the claimant has provided an affidavit stating that the attorney fees in this case are limited to 25 percent of the recovery in accordance with §768.28, F.S. However, it is important to point out that while Mr. Arvay's damages are paid out over the remainder of his lifetime, the gross value of the settlement is greatly reduced if he dies prior to that time. In contrast, the attorney is paid upfront

based on the gross award, whether or not Mr. Arvay ultimately recovers the full award.

LEGISLATIVE HISTORY: SB 22 (2001) was reported favorably by the Senate Committees on Comprehensive Planning, Local & Military Affairs and Finance & Taxation and was passed by the Senate on May 4, 2001. The bill died in messages. The companion House Bill 883 (2001) died in the House Committee on Claims.

RECOMMENDATIONS: Accordingly, I recommend that Senate Bill 56 be reported FAVORABLY.

Respectfully submitted,

Janet Bowman
Senate Special Master

cc: Senator Ron Silver
Representative Stan Mayfield
Faye Blanton, Secretary of the Senate
David Greenbaum, House Special Master