



THE FLORIDA SENATE
SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
11/27/02	SM	Fav/1 amendment
	CJ	Fav/1 amendment
	FT	

February 20, 2003

The Honorable James E. "Jim" King, Jr.
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 46 (2003)** – Senator Walter G. "Skip" Campbell
Relief of Denise Yahraus, individually and as
Personal Representative of the Estate of Michael Yahraus

SPECIAL MASTER'S FINAL REPORT

THIS IS AN EQUITABLE CLAIM FOR \$1,050,000 BASED ON A CONSENT FINAL JUDGMENT SUPPORTED BY A SETTLEMENT AGREEMENT IN WHICH THE SARASOTA COUNTY SCHOOL BOARD AGREED TO COMPENSATE THE CLAIMANT FOR THE WRONGFUL DEATH OF HER HUSBAND DURING AN INCIDENT OF NEGLIGENCE AT THE SARASOTA COUNTY CRIMINAL JUSTICE ACADEMY.

FINDINGS OF FACT:

The Accident

In September of 2000, Michael Yahraus, a paramedic employed by Sarasota County, began a 16-week course of specialized law enforcement training at the Sarasota County Criminal Justice Academy, hereinafter referred to as the "academy." The academy is a program within the Sarasota County Technical Institute, which is governed by the Sarasota County School Board (SCSB). Mr. Yahraus's training was paid for by the Sarasota County Police Department in order to qualify him to participate in the department's Special Weapons and Tactics (SWAT) team activities.

On September 11, 2000, at approximately 6:00 p.m., Mr. Yahraus, as part of his coursework, participated in a traffic stop exercise at the academy. The instructors for the exercise were Chuck Pinkney, a sheriff's deputy and an academy instructor for approximately 4½ years, and Aldon Doane, a sheriff's deputy and an academy instructor for approximately 12 years.

During the exercise, a shotgun, two handguns, and blanks, a form of simulated ammunition, were used. The shotgun belonged to Instructor Doane and the two handguns belonged to the academy. One of the handguns had been plugged by hammering a lead projectile from a bullet into its barrel. The other handgun was unplugged.

Prior to the training exercise, Instructor Doane had obtained the two handguns and blanks from the academy's locked storage cabinet. Instructor Doane had gained access to this cabinet by requesting that Joyce Haney, the secretary to the academy's director, unlock the cabinet. When Instructor Doane initially acquired the handguns he inspected the chambers to determine if they were loaded, but did not inspect the barrels to determine if either of the guns were plugged or otherwise blocked.

During the training exercise, Instructor Doane played the role of the "bad guy" to be pursued by the students. Instructor Doane began the exercise by yelling at the students, firing a blank from his shotgun, and fleeing in his car. Mr. Yahraus and other students pursued the instructor in two academy cars.

After a short pursuit, Instructor Doane stopped his car. Likewise, the pursuit cars stopped and the students began exiting the cars in order to assume their positions for executing a felony stop. Instructor Doane fired a blank from the plugged handgun toward the direction of the pursuit cars. Mr. Yahraus was located behind the open driver's door of his car at the time of the shot. The firing of the blank forced a piece of lead to discharge from the gun's barrel. The piece of lead ricocheted off of Mr. Yahraus's vehicle and entered Mr. Yahraus's head through his left eye.

Paramedics were immediately called to the scene, and at approximately 6:27 p.m., Mr. Yahraus was taken to the

Bayfront Medical Center by helicopter. At the hospital, physicians discovered a projectile lodged in Mr. Yahraus's brain. Physicians declared Mr. Yahraus brain dead at 9:00 a.m. on September 12, 2000.

At the time of his death, Mr. Yahraus was 32 years of age. He is survived by his wife, Denise Yahraus, and his three children. Mr. and Mrs. Yahraus had been married since 1997, and are the natural parents of Michael Yahraus, who was born on November 21, 1997, and Jonathan Yahraus, who was born on May 2, 2000. Mr. Yahraus was also the natural father of Nadia Yahraus, who was born on July 2, 1993. Nadia's natural mother is Carolin Yahraus, who was divorced from Mr. Yahraus in 1995.

Subsequent to Mr. Yahraus's injury, police statements and depositions were obtained from witnesses and other employees of the academy. In a deposition, Randolph Gonzalez, the academy's director since 1999, explained that all firearms and simulated ammunition at the academy were stored in a locked cabinet, and that he and his secretary, Ms. Haney, kept the keys to that cabinet.

According to Director Gonzalez, the following academy procedures for use of firearms and simulated ammunition were in place around the time of the accident:

1. Instructors were required to obtain the director's permission prior to using a firearm or simulated ammunition during a training exercise.
2. Only plastic, hollow primer caps were permitted to be used in the academy's plugged handgun. Blanks, which emit a gas that causes more pressure than primer caps, could not be used because the blank could potentially cause the cylinder of the gun to crack and/or discharge fragments.

Director Gonzalez stated that these procedures were not in writing; rather, they were orally conveyed to the instructors when the instructors were given their initial orientation of the academy. Director Gonzalez stated that neither Instructor Doane, nor any other instructor, obtained his permission to use the academy's firearms or simulated ammunition during the September 11, 2000, training exercise.

Finally, Director Gonzalez stated, regarding use of any gun, that all guns: (1) are to be treated as loaded weapons; (2) should be pointed down and away from people; and (3) should be inspected before and after use, and that the inspection should include a check of the barrel to determine whether it is free of impediments. According to Director Gonzalez, these procedures are taught to law enforcement officers during their academy training.

Mrs. Haney stated in a deposition that Instructor Doane came into her office on September 11, 2000, at approximately 4:30 p.m. just after Director Gonzalez had left for the day, and asked if the director had left the guns out for him. Mrs. Haney replied that she was unaware of any arrangements for the guns. Mrs. Haney stated that Instructor Doane told her that he had spoken to the director and that the director was supposed to leave the guns out. Instructor Doane then began, according to Mrs. Haney, looking around the academy for the guns. Instructor Doane returned to her office several times while looking for the guns, and finally he asked if she would open the cabinet containing the guns. Mrs. Haney stated that she opened the cabinet and allowed Instructor Doane to take the handguns. Mrs. Haney did not remember asking Instructor Doane if he had the director's permission to use the guns; rather, she said she assumed from their conversation that he had received the director's permission.

Both Instructors Pinkney and Doane stated in depositions that they were unaware of any academy firearm and simulated ammunition check-out procedures. Additionally, both indicated that they were unaware that blanks should not be used with the academy's plugged handgun. Instructor Doane stated that he learned only after the accident that blanks should not be used when he did independent research on the subject of plugged handgun usage.

Another academy instructor, Corporal Doug Glazer, was interviewed by police. Corporal Glazer stated that plugged guns had been used in past academy training and that he was not aware of a check-out procedure for the guns. Further, Corporal Glazer stated that he never received any training from the academy regarding the type of simulated ammunition to use in the plugged handgun, and that he

would not have thought it was problematic to use blanks in the plugged handgun.

The Sarasota County Sheriff's Office investigated the death of Mr. Yahraus. In its investigative report, the Sheriff's Office concluded that the shooting of Mr. Yahraus was accidental and without criminal intent. By letter dated October 2, 2000, the State Attorney's Office concurred in the Sheriff's Office finding.

Legal Proceedings

On December 6, 2000, Denise Yahraus filed suit, on behalf of herself and as personal representative of Mr. Yahraus's estate, against the SCSB. Prior to trial, the parties entered into a settlement agreement, which provided for a total of \$1.25 million in compensation to Mrs. Yahraus and Mr. Yahraus's three children, Michael, Nadia, and Jonathan.

Specifically, the agreement, dated November 20, 2001, provided that the SCSB would pay the claimants \$200,000 within 30 days after entry of the stipulated final judgment, and \$1,050,000 within 30 days following the first July 1st after the passage of a claim bill by the Legislature.

A Guardian Ad Litem (GAL) reviewed the settlement agreement, and issued a report on December 21, 2001. In his report, the GAL found that even though this case may have resulted in a \$3 to \$5 million jury verdict against the SCSB had it proceeded to litigation, that the likelihood of collecting such a large verdict through the claim bill process was questionable. Accordingly, the GAL found the \$1.25 million settlement to be in the best interest of Mr. Yahraus's children, as it was agreed to by the SCSB and thus, may have a greater chance of passage by the Legislature. Further, the GAL recommended that the proceeds of the \$1.25 million settlement, after payment of a Worker's Compensation lien, attorney's fees and costs, and medical expenses arising from the claimants' grief therapy sessions, be disbursed in the amount of 50 percent to Mrs. Yahraus and 50 percent, divided into three equal shares, to Mr. Yahraus's three children.

On January 14, 2002, the Circuit Court in Sarasota County entered a consent judgment approving the settlement agreement. Subsequently on February 22, 2002, the court

entered an order specifying that the proceeds of the initial \$200,000 payment, after payment of court approved expenses, should be disbursed in the manner recommended by the GAL. The following expenses were approved by the court: (a) \$5,283.40 to Sarasota County, which represented 10 percent of the then \$52,834 Workers' Compensation lien; (b) \$50,000 for attorney's fees for the wrongful death suit; (c) \$8,151 for costs for the wrongful death suit; (d) \$2,500 for advance costs for a claim bill lobbyist; (e) \$1,000 for GAL fees; (f) \$4,312.08 in attorney's fees and costs for probate estate administration; and (g) \$998.25 for medical expenses for grief counseling. These expenses totaled \$72,244.73. Of the remaining \$127,755.27, \$63,877.63 was disbursed to Mrs. Yahraus and \$21,292.54 was disbursed to each of Mr. Yahraus's three children.

Court records also reflect the establishment of restricted guardianship accounts for each of Mr. Yahraus's three children. The named guardian for Michael and Jonathan Yahraus's accounts is their natural mother, Mrs. Yahraus. The named guardian for Nadia Yahraus's account is her natural mother, Carolin Yahraus. The court is required to approve all withdrawals from these accounts, and must receive an annual accounting of the accounts.

CONCLUSIONS OF LAW:

Liability

Notwithstanding a settlement agreement, as there is here, every claim bill must be based upon facts sufficient to meet the preponderance of the evidence standard. In order for the claimant in this case to prevail, it must be shown that Mr. Yahraus's death was proximately caused by academy employee negligence occurring while the employees were acting within the course and scope of their employment.

In this case, there is no question that Mr. Yahraus's death was proximately caused by negligent firearm usage. The evidence demonstrated that blanks should never have been used in the academy's plugged handgun, as a foreseeable risk of doing so is that the blank may cause the handgun to explode or, as in this case, may cause the plug to discharge from the handgun and injure an unintended victim.

Further, employees of the academy were responsible for the negligent firearm usage. It is a common law duty of all persons when using weapons or when making weapons

available to others to exercise the highest degree of care. See *Kitchen v. K-Mart Corp.*, 697 So.2d 1200, 1207 (Fla. 1997) (holding that it is a well established principle of common law negligence that a firearm is a dangerous instrumentality and that the highest degree of care is necessary when using firearms). In this case, a jury could have reasonably found that this duty was breached under any or a combination of the following theories, depending upon the jury's witness credibility findings.

First, a jury may have found that Instructor Doane violated the duty to exercise the highest degree of care by failing to: (1) follow the academy procedure requiring the director's permission prior to instructor's use of the guns; (2) follow the academy procedure requiring only primer cap usage in the plugged handgun; (3) check the barrel of the gun prior to use; and (4) fire the handgun in a direction clearly away from the students. Evidence supporting each of these four findings was presented by the claimant. Further, the evidence demonstrated that Instructor Doane was acting within the scope of duties at the time he fired the plugged handgun.

Second, a jury may have found that academy officials breached the duty to exercise the highest degree of care by failing to insure that instructors with access to the academy's handguns had sufficient knowledge of the academy's firearm procedures that prohibited use of blanks in the plugged handgun. See *Foster v. Arthur*, 519 So.2d 1092 (Fla. 1st DCA 1988) (holding that a person may be liable for making a gun accessible to another if he or she knew or should have known that harm to another was likely to result). The evidence demonstrated that the academy's director knew that: (1) it was dangerous to use blanks in the plugged handgun; (2) both blank and primer cap ammunition were kept in the cabinet along with the plugged handgun; (3) others had access to the academy gun cabinet, i.e., his secretary, Mrs. Haney, possessed a key to the cabinet; and (4) the academy had not affirmatively insured in writing or otherwise that each instructor had been made aware of the academy firearm procedures. Further, testimony from three academy instructors indicated that they were unaware of academy procedures that required handguns and ammunition to be checked out, and prohibited the use of blanks in the plugged handgun. From this evidence, a jury

could have found that the academy director knew or should have known when maintaining handguns and blanks at the academy that harm was likely to result in the event an instructor, as occurred in this case, used the academy's plugged handgun with the blank ammunition.

Accordingly, each element of liability has been proven to the Special Master's satisfaction.

Damages

The claimants introduced the expert testimony of a Certified Public Accountant indicating that the estate's economic loss was a total of \$1,355,312. This amount was calculated by subtracting \$204,227, the amount of Mr. Yahraus's expected lifetime consumption, from the total of the following losses: (a) \$1,095,520, the present value of Mr. Yahraus's lost earnings and benefits; (b) \$255,528, the present value of Mr. Yahraus's lost household services; and (c) \$208,491, the present value of Mr. Yahraus's lost retirement.

Additionally, as permitted by s. 768.21, F.S., Mr. Yahraus's estate claimed damages for the loss of Mr. Yahraus's: (1) spousal companionship and protection, (2) parental companionship, instruction, and guidance; and (3) mental pain and suffering.

Numerous collateral sources provided compensation in this case. The following sets forth these sources for Mrs. Yahraus and each of Mr. Yahraus's three children:

Mrs. Yahraus's benefits

Nonrecurring benefits:

Social Security	\$ 250
Federal death benefits	75,000
State death benefits	6,250
Life and auto insurance policies	72,000
Community donations	<u>17,000</u>
TOTAL	\$170,500

Recurring benefits:

Annual pension benefits	\$ 30,156
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Children's benefits:

Non-recurring benefits for Michael and Nadia Yahraus:

Life insurance policy	\$146,000 each
Federal death benefits	25,000 each
State death benefits	6,250 each
Community donations	<u>2,666 each</u>
TOTAL	\$179,916 each

Non-recurring benefits for Jonathan Yahraus:

Federal death benefits	\$25,000
State death benefits	6,250
Community donations	<u>2,666</u>
TOTAL	\$33,916

Recurring benefits for Michael, Nadia, and Jonathan Yahraus

Annual Social Security	\$4,056 each
Annual pension benefits	<u>2,206 each</u>
TOTAL	\$6,262 each

The aforementioned federal death benefits were provided pursuant to Department of Justice regulation 28 CFR Part 32, which grants a \$150,000 death benefit to the beneficiaries of a public safety officer killed in the line of duty. Of this amount, \$75,000 was paid to Mrs. Yahraus, while the remaining \$75,000 was divided equally among Mr. Yahraus's three children. Additionally, s. 112.191, F.S., provided for \$25,000 in state death benefits to the beneficiaries of a firefighter who is accidentally killed in the line of duty. This payment was divided equally among Mrs. Yahraus and Mr. Yahraus's three children. Finally, community donations were raised by several benefits held by the Firemen's Benevolent Fund and Germain Toyota. The proceeds from these benefits were donated to Mrs. Yahraus and Mr. Yahraus's three children.

Additional collateral source benefits included:

- \$52,834 in Worker's Compensation benefits. These benefits are limited to a maximum total of \$100,000 pursuant to s. 440.16, F.S. Further, pursuant to s. 440.39, F.S., Sarasota County, as the paying employer, has a statutory lien against any judgment or settlement proceeds received by Mr. Yahraus's beneficiaries from

a third party tortfeasor. Accordingly, at the time the court approved the settlement agreement at issue in this claim bill, it awarded \$5,283.40, 10 percent of the lien, to Sarasota County to be paid from the initial \$200,000 settlement payment. The court further ordered that Sarasota County could reduce the amount of any future payments by 10 percent, and that the county, if this claim bill is enacted into law, could seek further equitable distribution regarding future payments.

- Health insurance for Mrs. Yahraus until remarried, and health insurance for the three children until they reach the age of majority or until age 25 if the child is a dependent. These state benefits are provided pursuant to s. 112.191(2)(f), F.S.

Mrs. Yahraus has received approximately \$230,812 total in collateral source benefits to date. This figure represents the total of Mrs. Yahraus's non-recurring benefits plus the 2 years of pension benefits that accrued from the time of Mr. Yahraus's death through October 2002. Further, the present value of her future pension benefits, as calculated by the Division of Retirement within the Department of Management Services, is \$369,954. Mr. Yahraus's three children have received approximately \$431,320 in total collateral source benefits to date. This figure represents the total of the three children's non-recurring benefits plus 2 years of Social Security and pension benefits that accrued from the time of Mr. Yahraus's death through October 2002. The three children will also receive approximately \$238,998 in future Social Security and pension benefits. Finally, Mrs. Yahraus and the three children have collectively received \$52,834 in Worker's Compensation benefits, and may receive \$47,166 in future benefits. The total of these collateral source benefits for Mrs. Yahraus and the three children is \$1,371,084.

Pursuant to the settlement agreement with the SCSB, Mrs. Yahraus and the three children have received \$127,755.27, the balance remaining after deduction of court approved expenses from the initial \$200,000 settlement payment. If this claim bill is enacted into law they will receive an additional \$1,050,000 less attorney's fees and costs and any outstanding Worker's Compensation lien. The \$1,050,000 is to be paid by the SCSB from funds allotted to

the Workforce Development category of the SCSB's general fund. After deduction of the fees and lien from the \$1,050,000 payment, the balance remaining will be approximately \$740,334, before payment of costs. The total amount of costs is indeterminable as of the date of this report.

In summary, the estimated total of collateral source benefits, paid settlement proceeds, and claim bill settlement proceeds in this case is \$2,239,173.20.

Conclusion

Because settlement agreements are sometimes entered into for reasons that may have very little to do with the merits of a claim or the validity of a defense, stipulations or 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, and if found to be reasonable and based on equity, they may be given effect, at least at the Special Master's level of consideration.

I find that the settlement agreement between the SCSB and the claimant is both reasonable and equitable. The claimant has demonstrated liability and damages by a preponderance of the evidence, and the settlement amount of \$1,050,000 when combined with collateral sources will provide adequate reimbursement for the economic losses, as well as adequate compensation for the non-economic losses of spousal and parental companionship and protection, parental instruction and guidance, and mental pain and suffering. Further, the restricted guardianship accounts for each of Mr. Yahraus's three children will protect their funds from inappropriate use. Finally, it should be noted that the \$1,050,000 payment by the SCSB will not result in the elimination of any county program nor require a tax increase.

ATTORNEYS FEES:

The claimant's attorney has provided documentation indicating that attorney fees are capped at 25 percent in accordance with s. 768.28, F.S.

RECOMMENDATIONS:

I recommend that Senate Bill 46 be amended to specify that: (1) payment shall be made 30 days after the first July 1st following the effective date of the bill; and (2) after payment of statutory attorney's fees and costs and any outstanding Worker's Compensation liens, 50 percent of the balance shall be paid to Mrs. Yahraus and 50 percent of the balance shall be divided into three equal shares, with one share being paid into each of the three children's restricted guardianship accounts.

Accordingly, I recommend that Senate Bill 46 be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

Tina White
Senate Special Master

cc: Senator Walter G. "Skip" Campbell
Faye Blanton, Secretary of the Senate
House Subcommittee on Claims