THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/1/03	SM	Fav/1 amendment
	NR	
	CP	
	FT	

December 1, 2003

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

Re: **SB 12 (2004)** – Senator Charlie Clary
Relief of Brian Daiagi

SPECIAL MASTER'S FINAL REPORT

THIS IS AN EXCESS JUDGMENT CLAIM FOR $4,008,616.63 BASED UPON A JURY VERDICT AGAINST THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT TO COMPENSATE THE CLAIMANT FOR INJURIES HE SUFFERED IN A DIRT BIKE ACCIDENT AT A DRAINAGE CULVERT LOCATED ON PROPERTY OWNED AND MAINTAINED BY THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT.

FINDINGS OF FACT:

The Accident

On August 10, 1992, then 20-year old Mr. Daiagi was traveling on a dirt bike on property owned and maintained by the South Florida Water Management District (SFWMD). Mr. Daiagi was wearing a helmet and full protective gear traveling at about 25 mph, when he drove his dirt bike into a drainage ditch near 178th Avenue and Griffin Road in Broward County. As a result of the accident, Mr. Daiagi is completely paralyzed from the waist down, is confined to a wheelchair, has a non-functioning bladder which requires 24-hour catheterization, has bowel dysfunction, and has complete sexual impotence.

Legal Proceedings

In 1996, Mr. Daiagi filed suit against BellSouth Telecommunications, Inc. (as the owners of buried cable pipes that cross over the culvert in question), and the South Florida Water Management District. Prior to trial, Mr. Daiagi settled with BellSouth Telecommunications, Inc., for $200,000. BellSouth has subsequently paid the $200,000, and has been released from all further claims.

Prior to trial, the SFWMD moved for summary judgment, labeling the claimant as an uninvited licensee and/or a known trespasser to which no duty was owed, and stating that the provisions of §373.1395, F.S., provide absolute immunity for SFWMD land that has been provided for outdoor recreational use, or for land that the public has been allowed to access for public use. The court denied the motion for summary judgment, finding that there were issues of fact as to whether the SFWMD knew of the dangerous condition and whether that condition was open to ordinary observation. The court further held that whether the land in question was open for public use (thus providing absolute immunity to the SFWMD under §373.1395, F.S.) remained an issue of fact.

A jury trial was held to determine the liability of the South Florida Water Management District. On September 29, 2000, the jury specifically found the land in question was not open to the public nor had the SFWMD allowed access across the land (making §373.1395, F.S., not applicable). The jury further determined Mr. Daiagi to be 20 percent negligent and the South Florida Water Management District to be 80 percent negligent. The jury awarded $750,000 for past damages sustained as a result of medical expenses and lost earnings or lost earnings capacity; $2,680,000 for future damages to be sustained as a result of medical expenses and lost earnings or lost earnings capacity; $500,000 for past damages for pain and suffering; and $1,500,000 for future damages for pain and suffering. The total jury verdict was $5,430,000, which when decreased by Mr. Daiagi's 20 percent negligence equaled $4,344,000. The Amended Final Judgment of $4,008,616.63 reflects the setoff of insurance benefits and collateral sources.

Motions to set aside the verdict and for a new trial were denied.

The Amended Final Judgment was affirmed on appeal in July 2002, and the South Florida Water Management District's motion for rehearing was denied.

Additional Sources of Income
In addition to the $200,000 mentioned above, Mr. Daiagi has received $100,000 from SFWMD. Mr. Daiagi also receives Social Security disability payments of $620 per month.

CONCLUSIONS OF LAW:

Rather than the subjective, time-worn "shock the conscience" standard used by courts, for purposes of a claim bill, a respondent that assails a jury verdict as being excessive should have the burden of showing the Legislature the verdict was unsupported by sufficient credible evidence; it was influenced by corruption, passion, prejudice, or other improper motives; it has no reasonable relation to the damages shown; it imposes an overwhelming hardship on the respondent out of proportion to the injuries suffered; it obviously and grossly exceeds the maximum limit of a reasonable range within which a jury may properly operate; or there are post-judgment considerations that were not known at the time of the jury verdict.

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 in the matter under inquiry. At the Special Master's level, each claimant has the burden of proof on each required element. However, in the final analysis, this is a legislative measure that, once the Special Master's report and recommendation are filed, can be lobbied in the Legislature, just as any other measure can be. Objections to the Special Master's findings, conclusions, and recommendations can be addressed by either party directly to the members of the Legislature, either individually or in committee, as the parties choose.

Liability
In certain circumstances, a governmental entity has a duty to warn or correct as set forth in *City of St. Petersburg v. Collom*, 419 So.2d 1082 (Fla. 1982), wherein the Supreme Court of the State of Florida explained: "A governmental

entity may not create a known hazard or trap and then claim immunity from suit for injuries resulting from that hazard on the grounds that it arose from a judgmental, planning level decision. When such a condition is knowingly created by a governmental entity, then it reasonably follows that the governmental entity has the responsibility to protect the public from that condition, and the failure to so protect cannot logically be labeled a judgmental, planning-level decision. We find it unreasonable to presume that a governmental entity, as a matter of policy in making a judgmental, planning-level decision, would knowingly create a trap or a dangerous condition and intentionally fail to warn or protect the users of that improvement from the risk. In our opinion, it is only logical and reasonable to treat the failure to warn or correct a known danger created by government as negligence at the operational level."

A duty to warn under *Collom* arises with respect to a "known hazard so serious and so inconspicuous to a foreseeable plaintiff that it virtually constitutes a trap." See *Department of Transportation v. Konney*, 587 So.2d 1292 (Fla. 1991). If the danger is open, notorious, and readily apparent to the public, there is no duty to warn. *Barrera v. Department of Transportation*, 470 So.2d 750 (Fla. 3d DCA), rev. denied, 480 So.2d 1293 (Fla. 1985).

While this case presents a close call as to whether the drainage ditch was a known hazard so serious and so inconspicuous to a foreseeable plaintiff that it virtually constitutes a trap (thus triggering the SFWMD's duty to warn), and as to whether the ditch was open, notorious and readily apparent to the public so that there is no duty to warn, I find no evidence sufficient to overturn the jury's finding of liability.

Immunity

Section 373.1395, F.S. (1991), is referred to as the recreational use immunity statute and generally protects water districts from liability for injuries occurring on land where the district "provides the public with a park area or other land for outdoor recreational purposes, or allows access over district lands for recreational purposes." Should the immunity statute apply to this case, then the SFWMD is absolutely immune, has no duty to warn of any hazardous conditions, and would not be liable.

At the trial in the present claim, testimony conflicted regarding whether the South Florida Water Management District made the land available to the public or allowed access over the land for recreational use. There was testimony that all South Florida Water Management District land is open to the public unless otherwise posted. Mr. Daiagi brought in a photograph of a no trespassing sign further west on the same canal that he testified was there prior to his accident. The District countered with testimony that the sign did not apply to the portion of the canal where the accident occurred and further testified the sign was not there in 1992.

The jury made a specific finding of fact that the property on which Mr. Daiagi was injured was not made available either as land, a water area or park area and open to the public for outdoor recreation purposes or otherwise land the South Florida Water Management District allowed access over for recreational purposes.

I find that the SFWMD has not presented evidence sufficient to overturn the jury verdict in regards to the application of §373.1395, F.S.

Proximate Cause
There is sufficient evidence in the record to find that the claimant's damages were caused by the negligence of the SFWMD.

Damages
As a result of the dirt bike accident, Mr. Daiagi sustained a T10-T11 fracture with complete paraplegia below the belly button, comminuted fracture of the vertebrae at T11, multiple fractures of the spine at L1, L2, L3, and L4, post-traumatic stress disorder, depression, pain secondary to the spinal cord injury, bowel dysfunction, non-functioning bladder which requires 24-hour catheterization, and complete sexual impotence.

Mr. Daiagi's past medical expenses total approximately $474,677.68 to date. Of these medical expenses, $209,888.57 is subject to a reimbursement lien.

Evidence was presented that Mr. Daiagi's life expectancy is 75 years. The projected lifetime medical care is estimated to be $3,987,120.58. In addition, his lost earning capacity is estimated to range from $921,040 to $1,241,333.30.

I find the damages in this case are supported by credible evidence sufficient to affirm the jury verdict. The respondent did not present sufficient evidence to overturn the jury verdict.

LEGISLATIVE HISTORY

The subject matter of this claim bill was considered during the 2003 Legislative Session as SB 16. The bill died in the Senate's Committee on Rules and Calendar. Upon filing of SB 12 for the 2004 Legislative Session, the parties were given the opportunity to supplement the previous record.

ATTORNEYS FEES:

Claimant's attorney has submitted an affidavit confirming that the attorney's fees in this case are capped at 25 percent of any recovery, pursuant to §768.28, F.S.

RECOMMENDATIONS:

I recommend an amendment which incorporates the following:

- The amount of the claim should be amended to reflect the SFWMD's payment of the initial $100,000 as allowed by §768.28, F.S.
- The bill should be amended on p. 4, lines 21 and 22, to reflect funds are appropriated and SFWMD is authorized and directed to expend the funds (not the county).
- The bill should be amended to require four annual payments of $977,154.15 ($3,908,616.63 divided by 4).

Based upon the foregoing, I recommend that Senate Bill 12 (2004) be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

Reynold Meyer
Senate Special Master

cc: Senator Charlie Clary
Faye Blanton, Secretary of the Senate
House Subcommittee on Claims