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DATE: April 6, 2007

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SPECIAL MASTER'S FINAL REPORT

The Honorable Marco Rubio
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 155 - Representative Seiler
Relief of Claudia and Jeffrey Kautz v. Palm Beach County School Board

THIS IS AN EQUITABLE CLAIM PURSUED PURSUANT TO A SETTLEMENT AGREEMENT SEEKING AN ADDITIONAL $900,000 FOR NEGLIGENCE AGAINST THE PALM BEACH COUNTY SCHOOL BOARD RESULTING IN THE DEATH OF DIANA KAUTZ.

FINDINGS OF FACT:

Issues:

Was the Palm Beach County school bus driver negligent in failing to stop at a stop sign; and if so, to what degree was the 15 year-old victim comparatively negligent in failing to wear her seatbelt?

Facts:

On November 11, 2004, at 3:19 p.m., 15 year-old Diana Kautz was ejected from a school bus when the driver, an agent for the Palm Beach County School Board, failed to stop at a stop sign and collided with an oncoming vehicle. The bus driver admitted to "fainting" prior to the accident. (Deposition of Maria Abrahantes, Dec. 8, 2005 59:25- 60:1). The victim, Diana Kautz, was ejected and suffered multiple blunt force injuries resulting in her death. The driver was also ejected but did not sustain fatal injuries. The remaining eight minors were either treated on the scene or transported to the hospital. The bus was equipped with seatbelts, however, none of the occupants were wearing their seatbelts.

PROCEDURAL BACKGROUND OF CASE:

Suit was filed on June 22, 2005. The case was settled Oct. 9. 2006 for an initial award of $200,000. As part of the settlement the defendant agreed not to oppose or contest the Claims Bill requesting the additional $900,000. (Document book, hereinafter, "D.B.," tab 5). However, the agreement not to

oppose such a bill does not negate the otherwise meritorious defenses. The evidence for consideration was submitted in the form of a joint document book by the attorney's for both parties. Both parties agreed at the claims hearing to the admissibility of the documents contained therein.

CONCLUSIONS OF LAW:

House Rule 5.6 provides for the Speaker of the House to appoint a Special Master to conduct a hearing for the requested claim. Pursuant to the aforementioned authority, guidelines have been promulgated that state a claims hearing requires the same burden as a trial, (plaintiff must prove claim by a preponderance of the evidence). The Special Master is to draw upon evidence received pursuant to the Florida Rules of Evidence and make findings of fact and conclusions of law.

Both parties have stipulated to the admissibility and consideration of the police reports. From a review confined to the evidence admitted for consideration, there is sufficient evidence to conclude the bus driver negligently failed to stop at a posted stop sign that led to the collision. However, there is also sufficient evidence to conclude that victim Kautz was negligent for failing to wear her seat belt.

Negligence

In a case alleging negligence, the plaintiffs must prove the defendant breached a legal duty that caused injury. Turlington v. Tampa Electric Co., 62 Fla. 398, 403-404 (Fla. 1911). A school bus driver has a duty to operate the vehicle in a reasonable manner to ensure the safe transportation of the passengers. Burnett v. Allen, 114 Fla. 489, 497 (Fla. 1934).

Maria Abrahantes's failure to stop at the stop sign was a breach of her duty to safely operate the vehicle. See Burentt, at 497. The resulting accident led to the demise of Ms. Kautz and the injuries of the other passengers.

Comparative Negligence

The state, county, agent, or employee of a school district is not liable in an action for personal injury by a school bus passenger solely because the injured party was not wearing a safety belt when such buses are equipped with safety belts. §316.6145(2), F.S. (2006). However, failure to wear a seat-belt may only be used for the issue of determining comparative negligence. Ridley v. Safety Kleen Corp., 693 So.2d 934, 941 (Fla. 1996). Fla. Stat. §768.81(2) (2006) provides that any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

The defense can meet its burden by showing seat-belts were contained in the vehicle and could have been used. Zurline v. Levesque, 642 So. 2d 1169, 1170 (4th DCA 1994). The burden then shifts to the plaintiff to present contrary evidence as to the

belt's operability. Id.

Ms. Kautz is comparatively negligent for failing to use the available seatbelt. See Ridely, at 941. She would not have been ejected from the vehicle and sustained the fatal injuries had she been wearing her seatbelt. At the most, the evidence suggests she may have suffered less substantial injuries related to the impact of the collision with the oncoming vehicle, (i.e. whiplash, cuts, etc). The structure of the bus maintained its integrity with the exception of the door coming ajar. There was no evidence presented that the seat dislodged or that the seatbelts would not have restrained the flight of the victim from the seat.

Additionally, there was sufficient proof that seatbelts were contained in the vehicle and could have been used, further proof of comparative negligence for failure to wear a seatbelt. See Zurline, at 1170. Both parties submitted the document book and stipulated to the admissibility of the contents which included the "Vehicle Homicide Investigation Report" authored by Ofc. Matthew King. The documents stated, "the school bus was equipped with lap belts for all passengers and had ten emergency exits throughout [the bus], which functioned properly during a post crash inspection". (D.B. tab 7 "Investigation Report" p. 1).

Acknowledging the compound nature of the officer's statement, it is of no consequence if the officer tested the safety belts or not. The presence of available seatbelts is prima facie evidence that seat belts were operational. See Bulldog Leasing Co. v Curtis, 630 So. 2d 1060, 1066 (Fla. 1994).

The officer supplemented his report with notes from his interviews with the other passengers. (D.B. tab 7 "Investigation Report" pp. 10-14). Most of the other eight children acknowledged that they were aware that the seatbelts were available and chose not to wear them. Id. There is sufficient evidence for this fact finder to conclude that seat belts were operable. Once such a conclusion is reached, it is incumbent on the plaintiff to prove the seatbelts in-operability. See Zurline, at 1170. The plaintiffs' attorney failed to present any evidence the seatbelts did not operate properly. Because Ms. Kautz could have worn her seatbelt and prevented her death, she is comparatively negligent.

Sufficiency of the Evidence

Whether contributory negligence appears by direct testimony or fair inference from the evidence…, is a question for the jury, [fact finder] to determine. Pendarvis v. Pfeifer, 132 Fla. 724, 735 (Fla. 1938).

Competent evidence is required to prove that the failure to use an available and operational seat belt produced or contributed substantially to producing at least a portion of the plaintiffs' damages. Insurance Co. of North America v. Pasakarnis, 451

So. 2d 447, 454 (Fla. 1984). The District Courts are unclear as to what constitutes "competent evidence". However, the courts are consistent in their application where the injured party is thrown from the seat or ejected from the vehicle, expert testimony is not required and a determination as to contribution of damages for failure to wear a seat-belt is within the province of the jury, [the finder of fact]. Burns v. Smith, 476 So. 2d 278 (2nd DCA 1985); State Farm v. Smith, 565 So. 2d 751 (5th DCA 1990); Zurline v. Levesque, 642 So. 2d 1169 (4th DCA 1994).

Applying the holdings in Pendarvis, Burns, State Farm, and Zurline, it is concluded, by fair inference, that Ms. Kautz would not have been thrown from her seat and ejected had she been restrained with a seat-belt. See Pendarvis, at 735; Burns, at 278 (2nd DCA 1985); State Farm, at 753; Zurline, at 1171.

The other children were treated on the scene or transported to the hospital. The defense responded he was not aware of any documents related to any of the seatbelts not functioning, (i.e work requests pending, complaints filed, etc.) The plaintiff stated he knew of none either.

Plaintiff argued that he did not have the opportunity to inspect the seatbelts because the police dismantled the interior of the bus as part of their homicide investigation. This argument lacks merit. Plaintiff cites Public Health Trust of Dade Co. v. Valcin, 507 So.2d 596, 599 (Fla. 1987) to support his position. The Supreme Court discussed the applicability of establishing a presumption when evidence is deliberately lost, destroyed, or not created. Id., at 599. The court's holding applies only when "essential medical records are unavailable due to the adverse parties' negligence." Id.

Expanding the holding to an application in this case is without precedent and would nevertheless be inapplicable. Public Health Trust involves a dispute among two parties without a law enforcement investigation. The defendant had a duty to maintain records and make available the peculiar evidence because presumably there was no other way to establish a prima facie case without the disputed records. Id. at 599-600.

In the case of Ms. Kautz, there are other means for plaintiff to establish the elements he seeks to prove. Plaintiff had the opportunity to depose and investigate all witnesses that handled the seatbelts. Also distinguishable from the facts of Public Health Trust, the police, a third party, did the alleged "destroying" of evidence, not the School Board. The School Board had no role in how the homicide investigation was conducted and therefore is not responsible for any actions of the police.

Finally, plaintiff did not present any evidence in the form of work orders or testimony that there was ever a problem with the seatbelts or that the evidence was intentionally destroyed or lost to prevent further investigation. Applying plaintiff's logic,

police would have to halt every homicide investigation until all plaintiffs obtain attorneys to inspect the vehicle and its contents before collecting evidence. Such a position is not practicable and is without precedent.

CONCLUSION

Had the victim been wearing her seatbelt she would not have sustained the fatal injuries. Her fate was a combination of not wearing her seatbelt and the proximity to the door that was compromised as a result of the collision. While there is no question the bus driver is at fault for the collision, she is not completely responsible for the victim's injuries that resulted in her death. Further, because failure to wear a seatbelt may only serve as evidence of comparative negligence, the school board is not completely relieved of liability.

The plaintiffs' attorney remarked that once the parties reached a settlement, discovery and investigation regarding the incident ceased. Had the plaintiffs submitted medical testimony or other credible expert testimony stating the victim would have suffered the same fate had she been restrained by a seat-belt the conclusion may have been different. However, this fact finder is confined to apply the evidence to the aforementioned law. Therefore I find the defendant 30% at fault for the injuries sustained, and the victim responsible for the balance.

According to the defendant, settlements have been reached in each of the other victim's claims ranging from $14,000-$50,000. While damages vary according to the facts and evidence of each specific case, an award in the amount requested of $900,000 (total) is not unreasonable to compensate the victim's family for the 30% liability of the school board resulting in the death of a fifteen-year old.

ATTORNEYS FEES: The claimant's attorney has submitted an affidavit indicating that the attorney's fee will be limited to 25% of any recovery as required by s. 768.28, F.S. To date he has received $50,000 from the $200,000 received from the county.

Attorney costs submitted on 12/22/06 total $26,410.67.

Therefore the balance owed to the victims is $123,589.33 or 61% of the total thus far.

Should the additional $900,000 be approved: The attorney stands to receive $301,410.67, ($275,000+$26,410.67 in costs) leaving a balance of $798,589.40; (72% of the total award).

SOURCE OF FUNDS: The Palm Beach County School Board General Fund; currently operating at a $5,000,000 deficit. A total of $402,999 has been allocated in settlements from 7 actions arising from this incident. There remains a total of $17,001 in available funds. Paying the claim will involve operational cuts.

COLLATERAL AWARDS: $50,000 settlement with V2 for truck involved in accident, referred to as "zealous representation" by the plaintiff's attorney.

$10,000 from Kautz policy from State Farm for uninsured/ underinsured motorist liability coverage.

Without Claims Bill passage:

Description	**Credit**	**Debit**	**Balance**
SI Limit	$200,000		$200,000
Attorney fee		$50,000	$150,000
Atty. Costs		$26,410.67	$123,589.33
Recovery from V2	$50,000		$173,589.33
Atty fee 33 1/3%		$16,665	$156,924.33
Recovery from St.Frm	$10,000		$166,924.33
Atty fee from St. Frm.		$3,333	$163,591.33
Total	**260,000.**	**$96,408.67**	**$163,591.33**

$163,591.33 represents 62% of the total amount received thus far.

If the Claims Bill is passed:

Description	**Credit**	**Debit**	**Balance**
Claim Bill	$900,000		$900,000
Atty Fee		$225,000	$675,000
Total from previous 200K and Collateral Sources	$260,000	$96,408.67	$838,591.33
Total	**$1,160,000**	**$321,408.67**	**$838,591.33**

$838,591.33 represents 72% of the total award.

RECOMMENDATIONS: Because I find that 1.1 million dollars is excessive for the given the degree of negligence of the victim, I recommend reduction of the claim bill by $200,000 and the claim be recommended favorably in a reduced amount.

Respectfully submitted,

Matthew E. Ladd
House Special Master

cc: Rep. Seiler, House Sponsor
Sen. Aronberg, Senate Sponsor
T. Kent Wetherell, Senate Special Master
Stephen D. Kahn, Senate General Master
Constitution and Civil Law Committee