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March 3, 2008

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 201 - Representative Mayfield
Relief of Laura Laporte/DOACS

THIS IS A CONTESTED, VERDICT-BASED EXCESS JUDGMENT CLAIM FOR \$5,500,647.81 ON FUNDS OF THE DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES TO COMPENSATE LAURA LAPORTE FOR DAMAGES SHE SUSTAINED IN A MOTOR VEHICLE ACCIDENT IN WHICH HER VEHICLE WAS STRUCK BY A VEHICLE DRIVEN BY AN EMPLOYEE OF THE DEPARTMENT. THE DEPARTMENT HAS PAID \$100,000 PURSUANT TO THE SOVEREIGN IMMUNITY CAP SPECIFIED BY LAW.

FINDING OF FACT:

On October 9, 1999, Sandra Jackson was driving a four-wheel drive truck within the course and scope of her employment with the Department of Agriculture and Consumer Services (hereinafter referred to as the 'Department') as a grove inspector. She was traveling south on 66th Avenue in Indian River County, a straight two-lane road west of Vero Beach. At the same time, Laura Laporte was driving north on 66th Avenue in a safe and lawful manner. Ms. Jackson attempted to turn left in front of Ms. Laporte onto 65th Street and pulled directly into her path, striking her nearly head-on and causing extensive damage to both vehicles. Ms. Jackson was

cited for violation of the right of way.

The Department admitted liability for the crash.

As a result of the accident Ms. Laporte suffered fractures to her left femur, her right ankle, and to her pubic bone. She suffered a puncture wound to her left knee and also received a gash on her left heel and sprain to her left ankle. Ms. Laporte has undergone four surgeries to try to repair her legs. The first surgery attempted to repair her broken femur by the insertion of a metal rod in the bone. Due to hardware failure, a second attempt was made to remove the broken hardware and to realign her femur. This required the surgeon to re-break the bone. The hardware failed again, and Ms. Laporte required a third surgery to reset the femur. The fourth surgery fused her right ankle to her leg bone. The ankle surgery resulted in an infection that was successfully treated with antibiotics.

Ms. Laporte's injuries have left her with a permanent deformity in her left leg which will require a knee replacement and an additional femur surgery in order to repair bowing. She will also require further corrective surgery to her right ankle, which will involve cutting and repositioning of the heel bone for added stability. She currently experiences significant pain, decreased mobility, and walks with a waddling gait. She is unable to get up on her own when she falls.

Ms. Laporte's injuries are more significant because of a diagnosis of muscular dystrophy, first made in 1978. The type of muscular dystrophy affecting Ms. Laporte mainly diminished her upper body strength. Since 1990, Ms. Laporte has received social security disability due to her muscular dystrophy; however the jury was properly precluded from hearing evidence of Ms. Laporte's social security disability payments. Ms. Laporte was 42 years old at the time of the accident. She was active as the owner of a mobile petting zoo, an avid horsewoman, and the director of numerous summer and after-school programs for children. Since the accident, Ms. Laporte is increasingly immobile and is not able to care for her animals.

STANDARDS FOR FINDINGS OF FACT:

Findings of fact must be supported by a preponderance of the evidence, although the Special Master is not bound by the formal rules of evidence or procedure applicable in the trial of civil cases. The claimant has the burden of proof on each required element.

LEGAL PROCEEDINGS:

Ms. Laporte filed suit against the Department on December, 6, 2000 in the Circuit Court of the 19th Judicial Circuit in and for Indian River County, Case No. 00-0738-CA-10. The Department admitted liability, but contended Ms. Laporte's muscular dystrophy was responsible for some of her injuries.

The claimant requested compensation for past and future medical expenses, and for past and future pain and suffering. No claim was made for past or future lost wages.

The jury returned the following verdict:

• Past medical expenses:	\$ 160,536.82
• Future medical expenses reduced to present value:	422,240.00
• Past pain & suffering:	500,000.00
• Future pain & suffering:	4,500,000.00
• TOTAL DAMAGES	\$ 5,582,776.82

A final judgment was entered in the amount of \$5,600,647.81, which included \$17,870.99 in costs. The Department's motions for remittitur and for a new trial were denied. No appeal was filed.

CLAIMANT'S POSITION:

- Ms. Laporte's muscular dystrophy did not significantly affect her quality of life prior to the accident; however, the combination of her injuries and the muscular dystrophy will likely lead to the premature loss of her ability to function independently.

- The jury verdict was completely reasonable considering the extent of Ms. Laporte's injuries.

RESPONDENT'S POSITION:

- Ms. Laporte's pre-existing muscular dystrophy is the cause of much of her damages.
- The Department was unable to introduce social security records, which would have showed that Ms. Laporte misrepresented certain business activities in order to collect disability payments. If the claimant's social security records had been considered by the jury, her credibility would have been called into question.
- Evidence of the claimant's inability to maintain her petting zoo was not due to the accident, but instead due to property division inherent in her dissolution of marriage.
- Ms. Laporte aggravated her injuries by riding her horse prematurely, not following her physical therapy regime, and quitting therapy prematurely.
- The claim bill amount is clearly excessive and more than the claimant's attorney requested in closing arguments.

CONCLUSION OF LAW:

As discussed earlier, the Respondent admits liability in this case. Nevertheless, the Claimant has the burden of proof on liability and damages. As discussed below, I find that the Claimant has met that burden.

Liability: Evidence presented at the Special Master's hearing indicated that Ms. Jackson turned left within an intersection directly in the path of Ms. Laporte's vehicle, which was close enough to constitute an immediate hazard. Section 316.122, F.S., requires a left-turning driver to yield the right-of-way under such circumstance. Therefore, I find that Ms. Jackson had the duty to yield to Ms. Laporte's vehicle, and that the breach of this duty was the proximate cause of the claimant's damages.

Damages: A respondent that assails a jury verdict as being excessive should have the burden of showing the Legislature that the verdict was unsupported by sufficient 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 an overwhelming hardship on the Respondent

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. The portion of damages most at issue is the amount for pain and suffering. I find that the Department did not present evidence sufficient to overturn the jury verdict in this case.

- **Pre-Existing Muscular Dystrophy:** Ms. Laporte was diagnosed in 1978 with fascioscapulohumeral muscular dystrophy (FSHMD). The evidence indicated that FSHMD has primarily affected Ms. Laporte's upper extremities. Ms. Laporte has difficulty raising her arms above her head, and her face muscles droop slightly. Medical records indicated that FSHMD has had some affect upon Ms. Laporte's legs. She admitted that prior to the accident she had good days and bad days and would fall down from time to time. In times of great stress, Ms. Laporte had greater trouble with her legs than usual. During the twenty years up to the accident, however, the disease progressed slowly, owing in part to Ms. Laporte's attempts to remain as physically active as possible. Based upon video taped evidence of Ms. Laporte just prior to the accident, it appeared that she functioned like a healthy, average person.

Ms. Laporte's neurologist, Dr. James Shafer, testified that with FSHMD a percentage of the patient's muscles remain healthy. He indicated that by keeping those muscles active, it was possible to maintain relatively normal function. He indicated that Ms. Laporte's injuries "significantly forever altered the natural course of the disease." He testified that Ms. Laporte's disease would likely progress at a faster rate, because the injuries would limit her mobility.

- **Social Security Disability:** Prior to 1991, Ms. Laporte worked as a clerk for a newspaper company. In November of 1990, she was diagnosed as 100% disabled due to FSHMD. Ms. Laporte began collecting social security disability payments in 1991. Ms. Laporte receives an average of \$10,000 per year.

Subsequent to receiving disability payments, Ms. Laporte started a mobile petting zoo and numerous summer and

after-school horseback-riding programs for children under the name of Laporte Farms. One of Ms. Laporte's claims at trial was that the injuries sustained from her accident incapacitated her to the point where she could no longer care for animals or run her programs. At trial, the Department attempted to characterize Ms. Laporte's petting zoo and programs as an income-generating business and that she was untruthful in claiming social security payments during that time.

The Department argues that for social security purposes the Claimant was 100% disabled, yet for purposes of the trial, she was an active woman for whom FSHMD was only a "minor inconvenience." It alleges that had it been allowed to introduce the social security records into evidence, Ms. Laporte's credibility may have been called into question, and the jury may have awarded a lesser verdict.

The Department's argument remains speculative. The greater weight of the evidence indicates that Laporte Farms was a means by which Ms. Laporte could remain physically active, enjoy life, and feel productive. Social security records indicate that Ms. Laporte did report the existence of Laporte farms to the Social Security Administration. Records indicated that her income from Laporte Farms was applied to its expenses. Ms. Laporte made no claim at trial for lost wages, and the jury specifically received that instruction. Therefore, the social security benefits are immaterial, and the trial court properly ruled to exclude them. Case law holds that social security payments should not be withheld from a verdict where the benefits are for a disability that is not the subject of the lawsuit. *Morales v. Scherer*, 528 So. 2d 1 (Fla. 4th DCA 1988), *aff'd in part, quashed in part* {on other grounds} *sub nom. Florida Patient's Compensation Fund v. Scherer*, 558 So.2d 411 (Fla. 1990).

Furthermore, the Department did have the opportunity to use the social security records when questioning Ro Baltayan, a rehabilitative counselor hired by the Ms. Laporte's attorney to assess her future needs, to attempt to show inconsistencies in Ms. Laporte's statements. Ms. Baltayan testified that there was no inconsistency; that she was never lead to believe that the Farm was anything

other than a hobby. She stated that, "It was something that allows her to feel good about herself, give her something to do, be productive, give to the community. It was not something that generated an income." Ms. Baltayan also testified that she did not include any costs of running Laporte Farms into her calculation for future needs.

- Petting Zoo: The Department also argues that Ms. Laporte's inability to maintain her petting zoo resulted from a property division in a divorce settlement, not the accident.

The evidence shows that a final dissolution of marriage between David and Laura Laporte was entered on July 31, 2002. However, the mediation agreement attached to the judgment indicates that Ms. Laporte would retain sole ownership of Laporte Farms.

- Aggravation of Injuries: The Department asserts that Ms. Laporte aggravated her injuries by attempting to ride horseback too soon following her initial femur surgery, and by failing to attend prescribed physical therapy sessions. The Department specifically cites an accident on April 13, 2000, when Ms. Laporte fell while attempting to ride a horse.

Ms. Laporte's initial femur surgery was performed by Dr. O'Brien immediately after her accident in October of 1999. In February of 2000, Dr. O'Brien examined Ms. Laporte and indicated that she could resume normal activities as the pain would allow. Sometime during the following month, Ms. Laporte heard a "popping" sound in her leg. On April 13, 2000, Ms. Laporte attempted to ride a horse for the first time since the accident. She attempted to climb onto the horse from the back of a truck, but the horse shifted, and Ms. Laporte fell to the ground. Records from Sebastian River Medical Center indicate that Ms. Laporte fell on her "butt." She was diagnosed with lumbar strain, but there was nothing to suggest that she reinjured her femur.

Subsequent to the incident with the horse, Ms. Laporte's husband mentioned to an acquaintance, Dr. Cynthia Crawford, that Ms. Laporte was experiencing pain in her

left leg. Dr. Crawford examined Ms. Laporte and prescribed physical therapy. Evidence indicates that Ms. Laporte attempted physical therapy. At times she did not attend, because her insurance company did not cover certain care providers. Ms. Laporte testified that at other times, the pain was too great. In September of 2000, Dr. O'Brien examined Ms. Laporte and determined that her femur had not properly healed. He referred Ms. Laporte to an orthopedic surgeon, Dr. Cole, who determined that Ms. Laporte's problem resulted from broken surgical hardware. Dr. Cole broke and reset the bone in November of 2000; however, the hardware failed again, and another surgery was performed in January of 2001.

The Department's medical expert testified that the failure of the femur to properly heal could have resulted despite the best medical care. He indicated that the assertion that Ms. Laporte's failure to follow therapy caused the hardware failure was speculative. He indicated that hardware failure could occur in a "perfectly compliant patient." Further, neither orthopedic surgeon – Dr. O'Brien or Dr. Cole – prescribed physical therapy. Additionally, there is no evidence to establish that hardware failure resulted from a horseback-riding accident.

- Excessive Jury Award: A major contention in this case is the \$5,000,000 award for pain and suffering. The Department states that the amount is clearly excessive when compared with other cases, and the award exceeded the amount requested by Ms. Laporte's attorney during his closing argument at trial.

Both parties provided numerous jury award summaries from other cases. The Department provided samples of multiple -fracture cases where the injured party was awarded far less than \$5,000,000. The Claimant's attorney provided cases involving partial paralysis or amputation. Neither side could point to an identical scenario to the case at hand, and the samples provided did not include extensive details regarding the actual facts of each case. With regard to the amount requested by Ms. Laporte's attorney, the trial transcript indicates that he recommended a minimum figure of \$500,000 for past pain and suffering and \$100,000 a year for life, for future pain and suffering to the jury.

I find that the greater weight of the evidence supports the pain and suffering award in this case. The Claimant has demonstrated that Ms. Laporte suffered a devastating injury, which has left her in great pain, has significantly affected her ability to walk, will require additional painful surgery and recovery, and will likely result in her continued health deterioration. Additionally, Ms. Laporte has suffered a loss to her capacity for enjoyment of life due to her inability to maintain her animals and to conduct children's programs. I therefore find that the jury properly evaluated the evidence in making its decision, and the amount awarded is reasonable under the circumstances.

Collateral sources: Mrs. Laporte has received \$10,000 in PIP benefits from her automobile insurer; and \$25,000 from the driver's insurance. Deductions of both of these collateral sources should be made pursuant to section 768.76, Florida Statutes. Medicare has been reimbursed a total of \$16,378.23. A balance of \$26,135.75 remains to be paid to Medicare, but it is unknown how much Medicare will demand as reimbursement. Medicare benefits are not considered collateral sources under Florida law. \$100,000 was paid by Ms. Laporte's insurance company (USAA) for uninsured motorist coverage. As USAA has a right to subrogation for any amount paid by a tortfeasor, this amount is not considered a collateral source pursuant to s. 768.76, F.S.

LEGISLATIVE HISTORY:

This bill has been filed since 2003, but had not received a committee hearing in either chamber until 2006. A Special Master hearing was conducted in 2003 by both House and Senate Special Masters.

In 2006, HB 1159 was filed by Rep. Mayfield and died in the Claims Committee. SB 50 (2006) was filed by Sen. Clary and died in the Rules and Calendar committee. In anticipation of the 2007 legislation, both parties were given the opportunity to update the record.

In 2007, HB 189 was filed by Rep. Mayfield. CS/CS/HB 189 passed the House by a vote of 117-0 but died in Senate Messages. SB 30 was filed by Sen. Lawton and

died in the Committee on The Special Master on Claim Bills.

The claimant reports that her muscular dystrophy has remained stable, but her injuries are progressing to the point where her ability to live alone is in jeopardy. In December, 2004 she suffered a fall outside of her house and was found unconscious in her driveway. In August of 2005, Ms. Laporte underwent tendon transfer surgery with Dr. Cole. In 2006, Ms. Laporte fell and broke the tendons that were previously transferred to her damaged ankle and required another surgery. Whole Laporte Farms was under contract in 2005, the buyer is reported to have backed out. Ms. Laporte is left caring for several animals and additional debt. Her home has been on the market for over two years.

ATTORNEY'S/
LOBBYING FEES:

Claimant's attorney has acknowledged and verified in writing that any recovery of fees will be limited to 25% of any award received by the claimant in this matter. There are outstanding costs in the amount of \$27,205.78. The lobbyist reports that his fees will not exceed 6% of the award, to be paid **in addition to** the 25% attorney's fees.

RECOMMENDATIONS:

I recommend that the amount of the award not be reduced by the \$35,000 collateral payments made to Ms. Laporte as that amount was subsumed by the Legislature's award, which reduced the jury award by more than \$1.5 million. Based upon the findings herein, I respectfully recommend HB 201 FAVORABLY.

Respectfully submitted,

Michael Kliner, House Special Master

cc: Rep. Mayfield, House Sponsor
Senator Lawson, Senate Sponsor
Judge Bram Canter, Senate Special Master
Jason Vail, Senate Special Counsel