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April 14, 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 443 - Representative Coley
Relief of Relief/Marissa Amora/DCFS

THIS IS AN EXCESS JUDGMENT CLAIM FOR \$26,849,849 AND \$102,837 IN COSTS, BASED ON A JURY VERDICT THAT AWARDED MARISSA AMORA DAMAGES FOR INJURIES THAT SHE SUFFERED DUE TO THE NEGLIGENCE OF EMPLOYEES OF THE FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES (HEREINAFTER REFERRED TO AS DCF). THE DEPARTMENT HAS ALREADY PAID THE \$100,000 CAP AS PROVIDED IN SECTION 768.28, F.S.

FINDING OF FACT:

The Initial Hospitalization: On November 8, 2000, Marissa Amora (fka Moesha Sylencieux) was brought by her natural mother to the emergency room of Bethesda Memorial Hospital in Boynton Beach complaining that Marissa (who was almost two years old) had fallen and couldn't walk. An MRI showed an unexplained mass around the area of her spine, and thereafter she was transferred to Miami Children's Hospital for further testing.

On November 11, 2000, Marissa was admitted to Miami Children's Hospital and over the course of the next month was evaluated for the possibility of a tumor. All of the tests came back normal and a biopsy of the mass came back benign. Hospital notes showed that Marissa was improving during her month-long admission.

Various hospital staff also documented incidents that gave rise to concern, primarily focused on the natural mother's lack of involvement and bonding. The natural mother, Guerlande Pierre Louis, seldom came to the hospital to visit Marissa, was observed spanking Marissa while in her hospital bed, and failed to come to the hospital when asked to do so in order to sign necessary consent forms. Nurses noted that Marissa cried whenever her mother was near, and would stop upon her mother's leaving. On December 9th, 2000, the natural mother failed to pick up Marissa upon her discharge from the hospital, because she instead chose to help her live-in boyfriend get out of jail. This prompted hospital employees to call the DCF abuse hotline to report a special needs case due to the natural mother's apparent lack of resources and interest.

The DCF Investigation: On December 9, 2000, the District 11 (Miami-Dade County) office of DCF assigned an investigator who noted several concerns for Marissa's safety, including that on the few occasions when the natural mother came to the hospital Marissa would cry, that hospital staff had concerns that the natural mother did not appear bonded to Marissa, that x-ray results showed an unexplained clavicle fracture, and that the natural mother had a live-in boyfriend. Due to these concerns, the investigator met with the natural mother and Dr. Biehler, the head of the child advocacy team at Miami Children's Hospital on December 11, 2000, who advised that the child shouldn't be released until a homestudy was completed. The meeting concluded with the DCF investigator suspicious of physical abuse.

Because Marissa was a resident of Lake Worth in Palm Beach County, the District 11 DCF office believed that they lacked jurisdiction over Marissa, and contacted the Palm Beach office in District 9. The Palm Beach office believed that the Miami office merely asked for an 'out of town inquiry' or 'OTI'. Uncomfortable with the response that they were getting from the Miami DCF office, upper-level hospital staff contacted a DCF supervisor in the Miami office, who advised that the case should be staffed with DCF's legal department.

DCF's legal counsel advised the Miami investigator that in order for the child to be sent home from the hospital, the following four tasks must be completed: 1) contact the natural father in New Jersey; 2) run criminal background checks on the natural mother and boyfriend; 3) staff the case with the Child Protection Team; and 4) complete a home study. Of these four requirements, only the background check was completed.

The Palm Beach County DCF investigator did go to the natural mother's apartment on December 13, 2000, and found that there

was no evidence that a child lived there: no crib, no toys, no baby clothes. She advised the natural mother to buy a crib, and told her that she would be back in three days to check. The DCF investigator never returned to check.

Dr. Miller, an expert retained by DCF, testified that had a Child Protection Team review been conducted, the Team would have reviewed all of the then-existing medical records which would have shown that Marissa was the victim of abusively-inflicted injuries.

Despite DCF's failure to contact the natural father, staff the case with the Child Protection Team, to complete a home study, or to ensure that the natural mother had a crib ready, on December 15, 2000, Marissa was discharged from the hospital to the dismay of hospital employees, who begged DCF to reconsider, with several employees offering to adopt Marissa.

Injuries Suffered Subsequent to Discharge from the Hospital: Less than one month after Marissa's discharge from Miami Children's Hospital, on January 11, 2001, Marissa suffered catastrophic brain injuries as a result of abuse inflicted by the natural mother's boyfriend. It is believed that Marissa's injuries were likely due to being swung by her arms and legs and smashed into a wall or the floor. Marissa remained in the hospital for months and required numerous surgeries, including brain surgery and abdominal surgery. Marissa is now permanently and profoundly brain damaged. Now 9 years old, she requires total care, cannot walk without assistance, cannot swallow properly, is fed through a feeding tube, cannot toilet herself, and has the developmental ability of a 3 year old. It is expected that she will need further surgery on her spine, and to release the contractures in her hips and legs.

Both the claimant and DCF had life care plans prepared. The claimant's expert, Larry Forman, with Comprehensive Rehabilitation Consultants, Inc., testified that to fund Marissa's care over her lifetime would range between \$23,226,052 - \$23,394,302. The lower number assumes that Marissa will live in a group home. The expert retained by DCF, Sharon Griffin of Sharon Griffin & Associates, Inc., Professional Rehabilitation Consultants, estimated that to care for Marissa over her lifetime it would cost \$19,767,897. Both experts testified at the Special Masters' hearing and agreed that their life care plans were strikingly similar, with the major difference being that DCF's plan relied on Medicaid for services.

Medicaid: While Marissa is eligible for Medicaid funding, Marissa's mother testified that Medicaid has cut off her funding at least six times without reason, including denying nursing care, medications,

and feeding formula. Each time Marissa is cut off from funding, she has to reapply; no Medicaid services are offered until she re-qualifies. Mrs. Amora also reported that Medicaid took so long to approve a wheelchair for Marissa (9 months) that her scoliosis degenerated which will likely necessitate surgery to put rods in her back.

Beth Kidder, Chief of Florida's Bureau of Medicaid Services, testified at the Special Master hearing that to date, \$348,354 has been paid by Medicaid on Marissa's behalf, and that \$514,175 has been billed. She also testified that Medicaid services are subject to legislative change, and that being eligible for Medicaid is no guarantee that Medicaid will pay for services.

Currently, Florida Medicaid has a lien against future recovery of \$366,700.306, and the Florida Department of Health has a lien of \$7,119.02. Both of these amounts would be paid out of any award made pursuant to this claim bill.

The Subsequent Adoption: For many years prior to this incident, Dawn and Ric Amora owned and operated a home for children with special needs in Loxahatchee, Florida called the Kid's Sanctuary. They came to know about Marissa through their ongoing contact with DCF and from news coverage, which highlighted DCF's intent to put Marissa into a long-term facility. Desirous of providing a loving home for Marissa, she was placed with the Amoras who are qualified medical foster care providers. Subsequent to the placement, both of Marissa's natural parents' parental rights were terminated, and the Amoras adopted her. They have since moved Marissa and her 6 siblings to Marianna, where they own two small restaurants (Mr. Amora is a chef).

Dawn Amora has been appointed as the guardian over person and property of Marissa. Marissa's funds have been placed in a restricted account which requires court authorization for withdrawals.

The Grand Jury Report: The Palm Beach County Grand Jury was convened to review testimony and evidence as to the Department of Children and Families' handling of the cases of three children who lived in Broward, Palm Beach, and Dade Counties, one of which is Marissa Amora. The other two children died while DCF had open cases alleging physical abuse. The Grand Jury issued a highly critical report of the way Marissa's case was handled by DCF, stating that, "the decision by Department of Children and Families to release [Marissa] was extremely poor and nearly fatal to [Marissa]. This decision was not logical based upon the evidence before District

11.”¹ The report went on to make nine pages of specific recommendations to ensure that “our children must never be re-victimized and further exposed to violence, neglect, or maltreatment by District 9’s [Palm Beach County DCF’s] negligence, misfeasance, or incompetence.”²

The Grand Jury also recommended that the Lake Worth Police Department actively investigate the natural mother for neglect pursuant to s. 827.03(3)(a), F.S. However, the natural mother was neither charged nor suspected of criminal wrongdoing, as she was at work when Marissa sustained the injuries of January 11, 2001. Nor was she charged with neglect. The natural mother’s boyfriend, Jobert Culceus was the lone suspect according to the Lake Worth Police Department, who later dropped the investigation because they believed that the cause of Marissa’s injuries were undetermined. Jobert Culceus is believed to have fled the evening of the incident, and his whereabouts are now unknown.

Legal Proceedings: On September 20, 2002, Dawn and Rick Amora, as parents of Marissa Amora, filed a negligence proceeding against the Department of Children and Family Services in the 15th Judicial Circuit in and for Palm Beach County, Florida. After a two-week trial, the jury determined that DCF was negligent and that such negligence was a legal cause of injury to Marissa Amora. In addition, the jury found that Guerlande Pierre Louis (the natural mother) and employees of the Miami Children’s Hospital were also negligent and assessed 5% of the fault to Guerlande Pierre Louis, 20% of the fault to the employees of the Miami Children’s Hospital, and 75% of the fault to the DCF. The jury determined total damages to be \$35,133,132. On June 13th, 2005, a final judgment of \$26,849,849 was entered against DCF.

The DCF filed a Motion for New Trial, a Motion for Remittitur, and a Renewed Motion for a Directed Verdict, all of which were denied. The DCF then appealed the judgment to the Fourth District Court of Appeal, alleging that the plaintiffs failed to establish that DCF’s negligence was the legal or proximate cause of Marissa’s injuries. The 4th DCA affirmed the judgment, and specifically opined that, “there is competent substantial evidence in the record to support a finding that DCF’s failure to adequately and reasonably investigate the matters involving Marissa foreseeably and substantially caused the injuries sustained by her. The plaintiffs presented evidence that there is a natural, direct, and continuous sequence between DCF’s

¹ Unanimous Report of the Grand Jury Concerning the Department of Children and Families, Florida 15th Judicial Circuit, Fall Term 2000, issued March 2, 2001.

² *Id.* at p. 43.

negligence and Marissa's injuries such that it can reasonably be said that but for DCF's negligence, the abuse to Marissa would not have occurred."³

The DCF's motion for rehearing and/or clarification, rehearing en banc, and motion for certification was denied on January 10, 2007. No further appeals have been taken and the time for review has expired.

CONCLUSION OF LAW:

Some see the Legislature's role in claim bills against the State of Florida as merely rubber stamping and "passing through" for payment those jury verdicts that have been reduced to judgment and survived appeal, if any. Others see the Legislature's role as a de novo responsibility to review, evaluate, and weigh the total circumstances and type of the state's liability in the case, and to consider those factors that might not have been perceived by or introduced to the jury or court.

Whichever of these two views each lawmaker holds, at the Special Master's level every claim bill, whether based on a jury verdict or not, must be measured anew against the four standard elements of negligence.

DUTY - The Florida Department of Children and Family Services had a duty to prevent further harm to children when reports of child abuse are received.⁴ In 2000, the statutory mission and purpose of DCF was "to work in partnership with local communities to ensure the safety, well-being, and self-sufficiency of the people served."⁵ The DCF also had a statutory duty, to the extent practical, to conduct protective investigations by a single individual (or supervised by a single individual), in order for there to be a broad knowledge and understanding of the child's history.⁶ For each report of abuse it received, the DCF had a statutory duty to investigate the allegations and determine the protective, treatment, and ameliorative services necessary to safeguard and ensure the child's safety and well-being and development, and cause the delivery of those services through the early intervention of the department or its agent.⁷ In short, duty was clear.

BREACH OF DUTY - The DCF employees in both District 9 and District

³ State of Florida, Department of Children and Family Services v. Amora, 944 So.2d 431 at 436 (Fla. 4th DCA 2006).

⁴ Department of HRS v. Yamuni, 529 So.2d 258 (Fla. 1988).

⁵ Section 20.19(1)(a), Florida Statutes (2000).

⁶ Section 39.301(4), Florida Statutes (2000).

⁷ Section 39.301(9), Florida Statutes (2000).

11 admitted that they made critical errors and that DCF procedures were not followed. The investigation was not completed by, nor supervised by, a single individual; the child's safety and well-being was not protected; no homestudy was completed; the investigation was not properly completed as the Child Protection Team was not consulted; and a thorough background check was not completed. The Department of Children and Families' duty to Marissa was breached.

PROXIMATE CAUSE - The evidence points to the conclusion that the natural mother's paramour swung Marissa by the feet and slammed her head into a wall on January 11, 2001. He was, and continues to be, the direct cause of Marissa's profoundly disabled condition. Nevertheless, DCF employees had a clear chance to break the chain of events that resulted in Marissa's injuries, but failed to do so. In hindsight, DCF would have been able to prevent Marissa's injuries if it had properly investigated and intervened. The Fourth District Court of Appeal found that "there is competent substantial evidence in the record to support a finding that DCF's failure to adequately and reasonably investigate the matters involving Marissa foreseeably and substantially caused the injuries sustained by her...that there was a natural, direct, and continuous sequence between DCF's negligence and Marissa's injuries such that it can reasonably be said that but for DCF's negligence, the abuse to Marissa would not have occurred."⁸ No evidence has been presented sufficient to negate the court's findings regarding proximate causation.

DAMAGES – The jury found DCF to be 75% at fault for Marissa's damages. The damage amounts (not reduced to reflect DCFS' proportionate share) are as follows:

Past Medical Expenses	\$ 313,132.08
Future Medical Expenses	\$ 20,600,000.00
Lost Earning Ability	\$ 470,000.00
Past Pain & Suffering	\$ 2,500,000.00
Future Pain & Suffering	<u>\$ 11,250,000.00</u>
TOTAL DAMAGES	\$ 35,133,132.08

Reduced to reflect DCF's proportionate share of liability, a final judgment was entered against DCF in the amount of \$26,849,849.

⁸ DCF v. Amora, at 436.

The judgment also awarded post-judgment interest at the rate of 7% per annum. However, since the DCF cannot pay this claim until the claim bill successfully becomes a law, it has been legislative policy not to award post-judgment interest.

LEGAL POLICY ISSUES:

In the year 2000, the applicable law relating to comparative fault provided that for any defendant who is more than 50% at fault (if the plaintiff is not at fault), joint and several liability shall not apply to that portion of economic damages in excess of \$2 million.⁹ The law also provided that the provisions relating to comparative fault did not apply to any action based on an intentional tort.¹⁰

This claim raises the applicability and retroactivity in the legislative forum of the concepts underlying s. 768.81, F.S., the statute that applies comparative fault in certain negligence cases. It also raises the applicability in the legislative claim bill forum of the concepts underlying *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993), that judgment should be entered against each "party" on the basis of that party's percentage of fault, regardless of whether they could have been joined as a defendant.¹¹ It also raises the question of whether, in the legislative claim bill forum, the Legislature should try to apply the concepts where, as here, the other "parties" (the paramour of Marissa's natural mother) committed intentional criminal actions, not negligence. Finally, it raises the question of whether, in the legislative claim bill forum, these principles should be made to apply to all damages awarded on the verdict, including economic damages.

These issues are ones of policy to be argued by the parties to the respective legislative committees that consider this claim bill.

ATTORNEYS FEES/LOBBYING FEES:

The claimant's attorneys have attested that their fees and those of the lawyers who handled the appeals, combined, will not exceed the 25% cap pursuant to s. 768.28(8), F.S. Costs to date total \$102,837.79. Lobbying fees are 6% of the final claim bill amount and are in addition to the lawyers' fees.

It should be noted that the claimant's lawyers deferred all of their fees and costs out of the first \$100,000 paid, so that Marissa would

⁹ Section 768.81(3)(b), F.S. (2000).

¹⁰ Section 768.81(4), F.S. (2000).

¹¹ Note that the current state of the law provides that the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability. Section 768.81(3), F.S. (2007).

have the immediate benefit of the full \$100,000.

GENERAL CONCLUSIONS:

I find that the claimant has proven that the Department had a duty to Marissa, which duty was breached by the Department's failure to properly investigate the abuse report; that such failure was one of several causes of the injuries sustained by Marissa; and that Marissa's injuries were and continue to be catastrophic.

The Legislature may choose to assign liability to Jobert Culceus, the natural mother's paramour, as the primary actor, and one who should bear the lion's share of responsibility for inflicting Marissa's injuries. Note that the jury was given no opportunity to assess damages to him.

Further, DCF is entitled to a credit for the \$100,000 it has already paid.

RECOMMENDATIONS:

Accordingly, I recommend that HB 443 be amended to pay \$26,749,849 into Marissa's restricted guardianship account.

Respectfully submitted,

Stephanie Birtman, Esq.
House Special Master

cc: Rep. Coley, House Sponsor
Sen. Lawson, Senate Sponsor
Judge Eleanor Hunter, Senate Special Master