THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
3/25/09	SM	Unfavorable
4/21/09	CJ	Favorable

March 25, 2009

The Honorable Jeff Atwater
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 524 (2009)** – Senator Christopher Smith
HB 1543 (2009) – Representative Julio Robaina
Relief of Joseph Fatta, Jr., and Josephine Fatta

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNOPPOSED EQUITABLE CLAIM FOR $1.8 MILLION AGAINST THE SHERIFF OF BROWARD COUNTY ARISING FROM THE DEATH OF DEPUTY TODD FATTA, WHO WAS KILLED IN THE LINE OF DUTY WHILE ATTEMPTING TO ARREST AN ARMED AND DANGEROUS SUSPECT.

FINDINGS OF FACT:

On August 19, 2004, Broward County Sheriff's Deputy Todd Fatta, 33, was shot and killed upon entering a home in Fort Lauderdale as part of a law enforcement team whose mission was to serve federal arrest and search warrants on Kenneth Wilk, who had been indicted on charges relating to child pornography. Soon after fatally wounding Deputy Fatta, Wilk surrendered and was taken into custody. He would later be tried and convicted for murdering Deputy Fatta and is currently serving a sentence of life imprisonment in a federal penitentiary.

The material historical facts concerning the events leading up to Deputy Fatta's murder are not disputed. (As will be seen, however, there are some unanswered questions of material fact.) In 2004, personnel from the Broward Sheriff's

Office (BSO) were involved in a joint federal-state task force known as LEACH (Law Enforcement Against Child Harm), which was investigating child pornography-related crimes. Wilk and his partner, Kelly Jones, became targets of a LEACH investigation.

BSO knew that Wilk and Jones had criminal histories, possessed firearms, and were potentially dangerous. Jones had been arrested in 2001 on federal charges arising from his alleged use of the internet to entice a child to have sexual relations, as well as possession, distribution, and transmission of child pornography. He had been convicted of those crimes and, in 2002, sentenced to prison, where he remained until his release in June 2003. In connection with the criminal proceedings against Jones, Wilk had communicated a number of specific threats against law enforcement personnel, the gist of which being that he intended to hunt down and kill cops in retaliation for the prosecution and imprisonment of Jones. In November 2001, Wilk had been arrested for making such threats.

Wilk's threats had been credible, for he was a skilled marksman. He had participated in shooting contests throughout the state in 2001. That same year, he had bought a .45 caliber Ruger firearm (his second) and a 9 millimeter Smith and Wesson pistol; in 2003 he had added a 12 gauge shotgun and a Winchester 30-30 rifle to his arsenal.

In July 2004, Jones was indicted on charges of possessing and transmitting child pornography. Responsibility for executing the warrant for his arrest, together with a search warrant covering the house in which Jones and Wilk lived, fell to BSO, which accordingly exercised operational control over the mission. Aware of Wilk's history of threatening behavior, the presence of firearms in the home, and the fact that both men were HIV positive, BSO deployed its SWAT Team pursuant to written procedures requiring the use of such specially trained and equipped officers when executing "high risk" search and arrest warrants. On July 15, 2004, Jones was arrested without incident at the home in Fort Lauderdale where he and Wilk lived.

After his arrest, Jones was taken to the St. Lucie County jail, where he was incarcerated pending trial. In telephone

conversations with Jones, which were monitored and recorded, Wilk expressed his belief that the police would return to their home with another search warrant and probably arrest him, too. Wilk proved to be correct. On August 18, 2004, a U.S. Magistrate signed one warrant authorizing the search of the Jones/Wilk residence, and another warrant for the arrest of Wilk, on charges relating to child pornography and witness tampering.

BSO was again in charge of serving the warrants. The detectives planning the mission, believing (with good reason) that Wilk was armed and dangerous, requested the SWAT Team. This request was denied. The evidence presented at hearing does not specifically identify the individual(s) who made this crucial decision. There is also no persuasive evidence as to *why*, contrary to established policies and procedures, which clearly and unambiguously indicated that only specially trained and equipped officers should be sent into such a high risk situation, it was decided not to use the SWAT Team for the arrest of Wilk.

On the evening of August 18, 2004, a briefing was held concerning the execution of the warrants, which was planned to take place the following day. The participants in the meeting were the higher ranking officers involved in the mission. Deputy Fatta and others designated to serve on the "entry team" were not invited to the briefing. There is no persuasive evidence as to why the entry team was not included in the briefing. During the briefing, a detailed discussion of the dangers associated with entering the Jones/Wilk residence was had.

The operation to serve the warrants began as scheduled on the morning of August 19, 2004. The entry team was briefed after assembling at the staging area. Deputy Fatta was ordered to be the "point man"—the first in line as the entry team approached the house. As they advanced, the officers observed that the front window had been covered with reflective tape, which meant that they could not see into the residence—but the occupant(s) could see them. The team knocked on the front door and announced its presence. There was no response. The team forced its way in. Deputy Fatta, who was the first one through the door, was immediately struck in the chest with a rifle round, which pierced his protective vest and mortally wounded him.

Another officer was also shot and wounded, though his injuries were not fatal. As mentioned above, the shooter, Wilk, thereafter surrendered without further incident.

The historical facts set forth above are not in dispute. There are, however, several determinations of ultimate fact that the undersigned must make, and they follow.

First, the evidence is insufficient to prove, clearly and convincingly, that BSO knew that using regular officers (as opposed to the SWAT Team) to serve the warrants on Wilk was virtually certain to result in Deputy Fatta's or another officer's injury or death.

Second, the evidence is insufficient to prove, clearly and convincingly, that Deputy Fatta was unaware of the risks involved in serving the warrants. While there is persuasive evidence that Deputy Fatta was probably not told all the details of Wilk's history known to BSO, he likely was informed that the suspect was believed to be armed and dangerous, and in any event surely would have appreciated that an inherently dangerous business is afoot whenever law enforcement personnel forcibly enter a residence, with weapons drawn, to arrest the occupant at gunpoint. In short, the danger was apparent.

Finally, the evidence is insufficient to prove, clearly and convincingly, that BSO deliberately concealed or misrepresented the danger for the purpose of preventing Deputy Fatta or anyone else on the entry team from exercising informed judgment about whether to execute the warrants. While there is, to repeat, persuasive evidence that Deputy Fatta was probably not told all the details of Wilk's history known to BSO, there is no persuasive (much less clear and convincing) evidence that BSO intentionally withheld such information in order to deprive Deputy Fatta of the facts upon which he might base a decision whether or not to obey his orders to arrest Wilk.

In sum, the evidence persuasively, convincingly, establishes that BSO's decision not to use the SWAT Team for this operation, which decision contravened agency policy respecting the service of warrants in high risk situations, was negligent, even grossly negligent. BSO's negligence, moreover, was a causal factor in the chain of events leading

to Deputy Fatta's murder. Nevertheless, as inexplicable, inexcusable, and blameworthy as BSO's conduct was in this instance, BSO did not commit an intentional tort that caused Deputy Fatta's death. Rather, it was Wilk who deliberately committed the intentional act of shooting Deputy Fatta.

LEGAL PROCEEDINGS: In 2004, Deputy Fatta's parents, Joseph and Josephine Fatta, brought a wrongful death action against the Sheriff of Broward County. The action was filed in the Seventeenth Judicial Circuit Court, in Broward County.

In September 2008, BSO settled the case with the Fattas. Under the Settlement Agreement, BSO agreed, in exchange for a release of further liability, to the entry of a Consent Final Judgment in the plaintiffs' favor, and against BSO, in the sum of $2 million. Upon entry of the judgment, BSO promptly paid the Fattas $200,000, satisfying the full extent of its liability under sovereign immunity. BSO further agreed to support the passage of a claim bill for the excess of $1.8 million.

CLAIMANT'S AND BSO'S POSITION: The Fattas and BSO agree and submit that BSO knew or should have known that the failure to use the SWAT Team to arrest Wilk would result in great bodily injury or death and thus that, under the unique circumstances of this matter, BSO's action constituted negligent conduct certain to cause injury or death. Both sides urge the enactment of the instant claim bill.

CONCLUSIONS OF LAW: As provided in Section 768.28, Florida Statutes (2008), sovereign immunity shields BSO against tort liability in excess of $200,000 per occurrence.

Because Deputy Fatta was an employee of BSO who was killed while performing the duties of his employment, BSO is protected in this instance not only by sovereign immunity, but also by workers' compensation immunity. The applicable statute provides in relevant part as follows:

> (1) The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability, including vicarious liability, of such employer to any third-party tortfeasor and to the

employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except as follows:

* * *

(b) When an employer commits an intentional tort that causes the injury or death of the employee. For purposes of this paragraph, an employer's actions shall be deemed to constitute an intentional tort and not an accident only when the employee proves, by clear and convincing evidence, that:

1. The employer deliberately intended to injure the employee; or

2. [i] The employer engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee, and [ii] the employee was not aware of the risk because [*first*] the danger was not apparent and [*second*] the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work.

Section 440.11(1), Fla. Stat. (2008) (emphasis and bracketed material added).

The foregoing statute, which the Legislature enacted in 2003, codified, *and substantially modified*, a judicially created, "intentional tort" exception to workers' compensation immunity. Under the judicially created exception, known as the Turner doctrine based on the Florida Supreme Court case from which it arose, workers' compensation immunity could be overcome by a showing that the employer's conduct, evaluated *objectively* (i.e. from the standpoint of a reasonable person), was substantially certain to result in injury. See, e.g., Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000); Pendergrass v. R.D. Michaels, Inc., 936 So. 2d 684, 689 (Fla. 4th DCA 2006). In contrast, the statutory exception requires clear proof of *subjective* bad intent—and more—before the employer can be held liable in tort for damages. In short, the statutory exception, which applies to incidents occurring after the statute's effective date, as Deputy Fatta's murder did, is much stricter than the Turner doctrine and was plainly intended to strengthen workers' compensation immunity. See Bakerman v. The Bombay Co., Inc., 961 So. 2d 259, 262 n.2 (Fla. 2007)(statue enacted in 2003, which codified the "intentional tort" exception and "heightened the standard needed to fall within the exception," is not retroactive).

A brief examination of the statute will elucidate the preceding conclusion. To begin, the statute unambiguously provides that, to overcome the immunity, the employee must present *clear and convincing* evidence of the employer's wrongdoing. "Clear and convincing evidence" is a demanding standard of proof which requires that the persuasive force of the evidence exceed the "greater weight" mark, so as to give the fact-finder a high level of confidence in the truth of the matter being proved. To meet the "clear and convincing" standard, the "evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

Next, under Section 440.11(1)(b), Florida Statutes, the employer's actual intent is controlling. The statute requires clear proof that the employer's conscious object was to injure

the employee (which is practically a criminal intent), or alternatively that employer knowingly exposed an employee to an extreme (but latent) danger about which the employer deceived the employee. Under the alternative theory, which is the one the Fattas assert is applicable here, the employer's conscious object need not have been to harm the employee, necessarily, but rather can be characterized as a conscious desire to see a dangerous job accomplished regardless of the "butcher's bill" that will very probably have to be paid with the employee's life or limb. To be clear, though, under either theory, it is the employer's subjective intent that controls.

Finally, it must be stressed that, to defeat workers' compensation immunity under the alternative "intentional tort" theory set forth in Section 440.11(1)(b)2., Florida Statutes, proving "merely" that the employer adopted a "damn the torpedoes" approach to a dangerous assignment is necessary but not sufficient. Rather, all five of the following elements must be clearly proved:

- The employer actually knew that its employee was virtually certain to be killed or injured performing the assigned work.

- The employer's actual knowledge of the extreme danger was based on particular, objective facts: either prior similar accidents or explicit, specific warnings.

- The employee was unaware of the extreme danger *not only* because the danger was latent, *but also because*

- The employer deliberately concealed or misrepresented the danger.

- The employer deliberately deceived the employee about the nature or magnitude of the risk for the purpose of depriving the employee of sufficient truthful information upon which to base an informed decision regarding whether to proceed with the work.

In this case, the evidence simply fails to establish, according to the requisite standard of proof, the existence of all of the foregoing elements.

LEGISLATIVE HISTORY:

This is the first year that this claim has been presented to the legislature.

ATTORNEYS' FEES AND LOBBYIST'S FEES:

Section 768.28(8), Florida Statutes, provides that "[n]o attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement." The instant claim bill provides that the "total amount paid for attorney's fees, lobbying fees, costs, and other similar expenses relating to the adoption of this act may not exceed 25 percent of the total amount awarded under this act." The Fattas' attorneys, Grossman Roth, P.A, are prepared to abide by these limitations.

It should be mentioned, however, that attorney's fees and costs have been paid out of previous recoveries. The Fattas recovered $300,000 from Bankers Insurance Company (Wilk's insurer) and from these proceeds paid their attorneys $120,000 (or 40%) plus approximately $2,600 in costs, which left a net sum of $177,383.54 for the Fattas. Upon receipt of the $200,000 payment from BSO under the Settlement Agreement, the Fattas paid approximately $120,000 in litigation expenses, but no attorney's fees, recovering a net sum just short of $80,000. Consequently, the unpaid litigation expenses total but a few hundred dollars at this point.

OTHER ISSUES:

In addition to the recoveries mentioned above, the Fattas have received, from multiple sources, death benefits totaling nearly $500,000.

In the criminal case against Wilk, the federal district court entered a Restitution Order directing Wilk to pay Deputy Fatta's estate approximately $2.5 million. There is little reason to believe that Wilk, who is currently incarcerated, will satisfy any meaningful portion of this obligation.

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 524 (2009) be reported UNFAVORABLY.

Respectfully submitted,

John G. Van Laningham, Esq.
Senate Special Master

cc: Senator Christopher Smith
Philip Twogood, Secretary of the Senate
Counsel of Record