



## THE FLORIDA SENATE

### SPECIAL MASTER ON CLAIM BILLS

**Location**

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DATE	COMM	ACTION
2/1/11	SM	Fav/1 amendment
4/26/11	RC	Fav/CS

February 1, 2011

The Honorable Mike Haridopolos  
President, The Florida Senate  
Suite 409, The Capitol  
Tallahassee, Florida 32399-1100

Re: **CS/SB 54 (2011)** – Rules Committee and Senator Storms  
Relief of Melvin and Alma Colindres

### SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED CLAIM FOR \$2,550,000 BASED ON A FINAL JUDGMENT, ENTERED FOLLOWING A NON-BINDING ARBITRATION, FOR MELVIN AND ALMA CONLINDRES AND THE ESTATE OF THEIR SON, KEVIN COLINDRES, AGAINST THE CITY OF MIAMI TO COMPENSATE CLAIMANTS FOR THE DEATH OF KEVIN COLINDRES, WHICH OCCURRED WHILE IN POLICE CUSTODY.

#### FINDINGS OF FACT:

##### **Background**

This matter arises out of the death of Kevin Colindres, a mentally retarded and severely autistic 18-year-old. Due to his disabilities, Kevin's mental capacity was comparable with that of a four-year-old child. Similar to many four-year-olds, Kevin would occasionally throw temper tantrums. However, as Kevin stood 5'9 and weighed approximately 210 pounds, the family members with whom he resided (his mother, father, and three siblings) sometimes required the assistance of law enforcement to control his behavior.

##### **Evening of December 12, 2006**

On December 12, 2006, Mrs. Alma Colindres, Kevin's mother, asked Kevin to get dressed. When Kevin would not comply, Alma told Kevin that she would take him to school,

which he hated, unless he cooperated with her. In response to Alma's mention of school, Kevin became violent and struck Alma in the face, put his hands around her neck, and threw a chair at her. These actions prompted Nerania Colindres, Kevin's sister, to call 911 at approximately 6:45 p.m. While waiting for police assistance, Abner Colindres, Kevin's younger brother, held Kevin in a bear hug for approximately 15 minutes.

Kimberly Pile was the first law enforcement officer to respond to the 911 call. Upon Officer Pile's arrival at the Colindres residence, Kevin had calmed down and was no longer engaged in violent behavior. Officer Pile attempted to further calm Kevin by telling him that she was there to help. These efforts were successful, and Kevin sat down on the couch next to Alma.

Although Alma suggested that Officer Pile could leave, Nerania asked her to stay because Kevin had not seen a doctor in over a year. Officer Pile remained on scene and several backup officers arrived at the home a short time later. Although Kevin initially remained calm, he again became agitated when Nerania mentioned that he should be taken to the hospital to treat his ear, which was infected. At that point, Kevin stood up and began to run in the direction of his bedroom. As he did so, Kevin tripped and fell to the floor, which resulted in a laceration to his head. Due to Kevin's injury, Officer Pile radioed for medical assistance at 7:15 p.m. However, due to a miscommunication between the police department and fire rescue dispatchers, "cut to the head" was misinterpreted as "cut to the hand," which resulted in the call being assigned an "Alpha response," the slowest response level with the least priority.

While Kevin was still on the floor, the backup officers immediately handcuffed Kevin's wrists behind his back and removed him from the residence. Unfortunately, Kevin was flailing his arms and otherwise struggling against the officers' efforts, which resulted in the officers placing Kevin face-down on the asphalt. Several officers then proceeded to attach a hobble restraint device to Kevin's ankles.

The undersigned finds that up to this point, the actions of the City of Miami Police Officers were appropriate. However, as detailed below, the events of December 12, 2006, took a

tragic turn for the worse after multiple officers held Kevin face-down for a prolonged period of time.

### **Continued Restraint in Prone Position**

With his wrists handcuffed behind his back and his ankles hobbled, Kevin remained face-down in a prone position while being held in place by Officers Hernandez, Rodriguez, and Sanchez. This was contrary to the procedures of the Miami Police Department, which provide that handcuffed and hobbled subjects should be moved to a sitting position as quickly as possible to avoid the risk of asphyxiation. Although positional asphyxiation and the procedures regarding the proper use of a hobble device are subjects that the Miami Police Department includes as part of officer training, the policy was not learned by Officers Hernandez, Rodriguez, and Sanchez. Indeed, later deposition testimony of the three officers reveals that they were completely unaware of the relevant procedures regarding the hobble device and the positioning of subjects in custody.

Unfortunately, as Kevin attempted to reposition himself so he could breathe, his behavior was misinterpreted by the officers as resistance. As such, the three officers improperly continued to hold Kevin in a prone position. To make matters worse, at least one of the three officers holding Kevin, Officer Rodriguez, made breathing even more difficult by applying pressure to Kevin's back.

After being improperly held in the prone position for 10 to 12 minutes, Kevin stopped breathing. The officers did not notice, however, as they again violated department procedures by neglecting to adequately monitor Kevin. Concerned, Kevin's mother advised the officers that she did not believe that Kevin was breathing. In response, one of the officers placed an ammonia tube in Kevin's nose, with no effect.

Notwithstanding the obvious fact that Kevin was no longer moving and in distress, the officers did not update fire rescue concerning his condition. Instead, contrary to department procedures, the officers kept Kevin in the prone position until the arrival of the paramedics at 7:30 p.m. By that time, Kevin had been face-down for a total of 15 minutes, and had not been breathing for approximately three to five minutes.

Jose Siut, one of the responding paramedics, instructed the officers to remove Kevin from the prone position. Paramedic Siut quickly examined Kevin and discovered that his pupils were fixed, his facial complexion was blue, and he was not breathing. Although Kevin initially exhibited an idioventricular rhythm of 30 beats per minute, he went "flatline" moments later. CPR was then administered for the first time, and Kevin was transported to the hospital. Tragically, the prolonged period of respiratory arrest resulted in anoxic encephalopathy (brain death), and Kevin subsequently passed away at Coral Gables Hospital on January 5, 2007.

#### **Cause of Death**

In a report dated February 27, 2007, the Miami-Dade County Medical Examiner concluded that the use of the prone restraint position contributed to Kevin's cardiorespiratory arrest, which in turn caused Kevin's brain death. Specifically, the Medical Examiner found that the "prone restraint position, and any position that restricts abdominal excursion, will interfere with breathing." The report identified Kevin's agitated emotional state as an additional factor contributing to his death.

Notwithstanding the plain language of the Medical Examiner's report, the Respondent argues that Kevin's cardiorespiratory arrest resulted not from positional asphyxia (i.e., suffocation caused by the prone position), but rather from "excited delirium." However, the undersigned is not persuaded by the opinions of Respondent's expert witnesses, Drs. Dimaio and Mash, and instead credits the conclusions of Dr. Werner Spitz, the Claimant's expert. Dr. Spitz opined that Kevin's brain death was the result of cardiac arrest initiated by compression of the chest, which in turn was caused by the use of the prone position and the application of force to Kevin's back.

Kevin is survived by his mother, father, and three siblings.

#### **LITIGATION HISTORY:**

On May 7, 2007, Alma and Melvin Colindres, as the personal representatives of Kevin's estate, filed a wrongful death action against the City of Miami. Count one of the complaint alleged, in relevant part, that the City of Miami: negligently failed to monitor Kevin's vital signs while he was restrained; negligently failed to timely call paramedics; and negligently failed to provide CPR. Count two of the complaint asserted

that the City of Miami negligently trained its officers with respect to the proper use of the hobble device and the monitoring of vital signs.

Following extensive discovery, non-binding arbitration was held on March 25, 2010, before Murray Greenberg, a former city attorney for the City of Miami. In his April 28, 2010, Arbitration Award, Mr. Greenberg found that if "the City of Miami Police Officers had been more attentive to Kevin Colindres after they restrained him, there is a strong likelihood that he would be alive today." Based upon this finding, Mr. Greenberg concluded that the City of Miami was negligent in its treatment of Kevin. Acknowledging that it was difficult to assess the appropriate amount of damages to compensate parents for the pain and suffering associated with the loss of a child, Mr. Greenberg determined that a judgment of \$2.75 million was warranted. Mr. Greenberg also rejected the City of Miami's various legal defenses, which included an argument that Kevin's estate was barred from recovery by section 776.085, Florida Statutes.

The City of Miami was not bound by Mr. Greenberg's findings, and could have proceeded with a de novo jury trial. Instead, the City of Miami decided to limit further litigation costs by agreeing to the entry of a final judgment for \$2.75 million, with the intention of vigorously opposing a claim bill.

The Respondent has paid \$200,000 against the final judgment, leaving a balance of \$2,550,000, which is the amount sought through this claim bill.

CLAIMANTS' ARGUMENTS:

- City of Miami Police Officers negligently restrained Kevin for 15 minutes in a prone position while handcuffed and hobbled, which was the proximate cause of his death.
- The City of Miami's policies regarding the use of the hobble device and the monitoring of vital signs, while adequate, were negligently imparted to the officers who responded to the Colindres residence.

RESPONDENT'S ARGUMENTS:

- The Respondent objects to any payment to the Claimants through a claim bill.

- The Claimants are barred from recovery by section 776.085, Florida Statutes, which provides that it is a defense to a personal injury or wrongful death action that the plaintiff's injury was sustained during the commission or attempted commission of a forcible felony.
- Kevin's death was the result of "excited delirium," and not from any negligence of the City of Miami or its police officers.
- The police officers were under no duty to perform CPR.
- Sovereign immunity bars the Claimant's negligent training claim.

CONCLUSIONS OF LAW:

It is well-settled that individuals in the custody or control of the police are owed a duty of care that arises under the common law of Florida. Kaisner v. Kolb, 543 So. 2d 732, 734 (Fla. 1989) ("[W]e find that petitioner was owed a duty of care by the police officers when he was directed to stop and thus was deprived of his normal opportunity for protection. Under our case law, our courts have found liability or entertained suits after law enforcement officers took persons into custody, otherwise detained them, deprived them of liberty or placed them in danger . . . . So long as petitioner was placed in some sort of 'custody' or detention, he is owed a common law duty of care"); Moore v. Fla. Fish & Wildlife Conservation Comm'n, 861 So. 2d 1251, 1253 (Fla. 1st DCA 2003) ("Thus, once appellant had been restrained of his liberty, he was in the 'foreseeable zone of risk' . . . . Therefore a duty of care was owed to the appellant"). The City of Miami police officers who responded to the Colindres residence breached their duty of care, as it should have been obvious to any reasonable person that restraining Kevin for 15 minutes while he was face-down, handcuffed, and hobbled, was dangerously and needlessly interfering with his ability to breathe. The officers further breached their duty of care when they failed to adequately monitor Kevin's breathing and update fire and rescue regarding the change in his condition. Consistent with the arbitrator's conclusion, the undersigned is convinced by the greater weight of the evidence that Kevin would be alive today had the officers not committed these breaches of duty. Accordingly, the

Claimants have demonstrated that the negligence of the officers was the proximate cause of Kevin's death.

Alternatively, liability in this matter was established by the failure of the City of Miami to adequately train its officers regarding the use of the hobble device. Contrary to the Respondent's contention, the Claimants are not challenging the content of the program, which was adequate. Indeed, the Miami Police Training Center materials concerning the hobble device expressly provide that officers should "never allow the subject to lie on their side, stomach or chest," must "allow [the] subject to lean back against a firm fixed object . . . to relieve stress on the diaphragm," and must "make certain that the subject is under constant supervision." Instead, the Claimants argue that the Respondent was negligent in the operation of its training (i.e., by failing to successfully impart the training content to the officers). See Mercado v. City of Orlando, 407 F.3d 1152, 1162 (11th Cir. 2005) (noting that to state a claim for negligent training, plaintiff must show that the government was negligent in the implementation or operation of the training program). In light of the fact that the three officers holding Kevin in place were completely unaware that it was dangerous or improper to do so, the undersigned concludes that Respondent was negligent in the operation of its hobble device training program. This negligence was the proximate cause of Kevin's asphyxiation and subsequent death.

The City of Miami, as the officers' employer, is liable for their negligence. Mercury Motors Express v. Smith, 393 So. 2d 545, 549 (Fla. 1981) (holding that an employer is vicariously liable for compensatory damages resulting from the negligent acts of employees committed within the scope of their employment).

The undersigned has considered the Respondent's argument that the Claimants are barred from recovery by section 776.085(1), Florida Statutes, which provides that it "shall be a defense to any action for damages for personal injury or wrongful death . . . that such action arose from injury sustained by a participant during the commission or attempted commission of a forcible felony." Although Kevin arguably committed a forcible felony, resisting arrest with violence, by flailing his arms and legs while he was being removed from the residence, see Wright v. State, 681 So. 2d

852, 853 (Fla. 5th DCA 1996), any criminal conduct on Kevin's part ceased once he was handcuffed and hobbled. Any subsequent wiggling or movement on Kevin's part was merely an attempt to breathe, and did not constitute a criminal act. As such, his injuries were not sustained "during the commission" of a crime, which is required by the plain language of the statute for the defense to apply. See Copeland v. Albertson's, Inc., 947 So. 2d 664, 667 (Fla. 2d DCA 2007) (holding that although the plaintiff committed an aggravated assault against a grocery store clerk, the assault did not bar a civil action against store employees for injuries inflicted upon the plaintiff after he fled the store, since the "section 776.085 defense is applicable only to injuries the plaintiff sustains during the commission or attempted commission of a forcible felony") (emphasis added). Accordingly, the undersigned concludes, as did the arbitrator, that the Claimants are not barred from recovery by section 776.085(1).

The undersigned does agree with the Respondent's contention that the officers were under no legal duty to perform CPR. See L.A. Fitness Int'l, LLC v. Mayer, 980 So. 2d 550, 559 (Fla. 4th DCA 2008) (holding that CPR is more than mere first aid, and that non-medical personnel certified in CPR remain laymen and "should have discretion in deciding when to utilize the procedure"). Nevertheless, the Respondent is liable for Kevin's death based upon the other grounds discussed above.

Finally, the undersigned concludes that \$2,550,000, the amount sought through this bill, is reasonable and appropriate, particularly in light of the fact that the Claimants watched helplessly as their disabled child suffocated and lapsed into unconsciousness.

LEGISLATIVE HISTORY:

This is the first claim bill presented to the Senate in this matter.

ATTORNEYS FEES:

The Claimants' attorneys have agreed to limit their fees to 25 percent of any amount awarded by the Legislature in compliance with section 768.28(8), Florida Statutes. Lobbyist's fees are included with the attorney's fees.

FISCAL IMPACT:

Should this claim bill be approved, the first \$225,000 (the amount remaining on the Self Insured Retention for this



claim) would be paid by Respondent from its Self Insurance Trust Fund. The remaining \$2,325,000 necessary to satisfy the claim bill would be provided by Respondent's excess insurance coverage through State National Insurance Company.

As the City of Miami's annual budget is well in excess of \$400 million, the undersigned is not persuaded by the Respondent's argument that city operations would be adversely affected by an outlay of \$225,000.

SPECIAL ISSUES:

As it is presently drafted, Senate Bill 54 provides that the backup officers "violated their training and the city of Miami's policies by aggressively approaching Kevin Colindres, causing Kevin Colindres to attempt to leave the room." In light of the above factual findings, this sentence should be deleted from the bill.

In addition, while it is true that the officers did not perform CPR, they were under no legal obligation to do so. Accordingly, Senate Bill 54 should also be amended to remove the reference that officers "failed" to administer CPR.

RECOMMENDATIONS:

For the reasons set forth above, the undersigned recommends that Senate Bill 54 be reported FAVORABLY, as amended.

Respectfully submitted,

Edward T. Bauer  
Senate Special Master

cc: Senator Ronda Storms  
R. Philip Twogood, Secretary of the Senate  
Counsel of Record

**CS by Rules:**

Removes language in the title with regards to the "backup police" violating their training and City of Miami's policies and procedures by aggressively approaching Kevin Colindres and also merges the paragraphs within lines 46-53 outlining the negligent conduct of the police officers right before and after they realized that Kevin Colindres was not breathing.