THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
2/1/11	SM	Unfavorable

February 1, 2011

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

Re: **SB 64 (2011)** – Senator Gary Siplin
HB 569 (2011) – Representative Janet Cruz
Relief of Ronald Miller

SPECIAL MASTER'S FINAL REPORT

THIS CONTESTED EXCESS JUDGMENT CLAIM FOR $1.05 MILLION AGAINST THE CITY OF HOLLYWOOD, WHICH WOULD BE PAID FROM LOCAL FUNDS, ARISES OUT OF AN AUTOMOBILE ACCIDENT CAUSED BY A MUNICIPAL EMPLOYEE WHOSE NEGLIGENT DRIVING ALLEGEDLY LEFT RONALD MILLER WITH INJURIES TO HIS KNEES.

FINDINGS OF FACT:

At about 5:30 p.m. on July 30, 2002, Ronald Miller, a self-employed lawn service provider, was driving north on Federal Highway. As he approached Sheridan Street in the City of Hollywood, Florida, Miller encountered traffic congestion in both of the northbound lanes on Federal Highway; cars were backed up for several blocks south of Sheridan Street, where the light was red.

Miller planned to turn left and travel west on Sherman Street, which is one block south of Sheridan Street. Avoiding the lines of traffic waiting for the light to turn green at Sheridan, Miller maneuvered his pickup truck—which was pulling a trailer carrying his lawn equipment—into the center left-turn lane, which is a common lane providing for the two-way movement of traffic. Miller's speed was at least 20 MPH—

within the posted limit but faster than the circumstances warranted, as the left-turn lane is not meant to be used, as Miller was using it, for passing cars waiting at a red light.

Meantime, Robert Mettler, an employee of the City of Hollywood, was attempting to leave a Burger King restaurant which is located on the east side of Federal Highway, facing Sherman Street. (The Burger King thus was off to Miller's right as he approached from the south.) Mettler was on duty, behind the wheel of a City-owned pickup truck. He wanted to head south on Federal Highway, and thus needed to make a difficult left-hand turn across three lanes of rush-hour traffic: the two northbound lanes, where traffic was currently stopped, and the common turn lane, in which Miller (unbeknownst to Mettler) was presently moving north.

Drivers stopped on Federal Highway (in the northbound lanes) let Mettler out of the Burger King parking lot. As he edged his way between the parked cars, Mettler saw one of the drivers give him a hand signal, which he interpreted as a sign that the center lane was clear. Mettler himself could not get an unobstructed southward view of the turn lane because of the vehicles backed up on Federal Highway.

Mettler decided that the turn lane was clear and began nosing his truck forward. By this time, Miller was almost there; he was looking both forward and to his left and didn't see Mettler on his right. Mettler accelerated, pulling forward into the turn lane. In so doing, he failed to exercise reasonable care under the circumstances. Instantly, the trucks collided head-to-head.

Miller was not wearing his seatbelt. The force of the impact thrust him forward, and his knees struck the dashboard. Though hurt, Miller was not incapacitated; indeed, he walked away from the crash without assistance and later declined medical treatment at the accident site. Mettler was not badly injured.

The Hollywood Police Department was called, and an officer investigated the accident. Metter was given a ticket for failing to yield the right-of-way, in violation of s. 316.125(1), Florida Statutes. (Several months later, Mettler would be found guilty of this infraction.)

Hours after the crash, Miller's knees were painful and his neck was sore, so he sought treatment at Hollywood Medical Center, checking into the emergency room at around midnight. The emergency room doctor prescribed painkillers and a cervical collar and sent Miller home.

Miller saw a chiropractor on July 31, 2002. After several visits, Miller switched to another chiropractor, Dr. Keith Buchalter, from whom he received treatment for neck and knee pain beginning August 12, 2002, and continuing until March 5, 2003. While under Dr. Buchalter's care, on September 16, 2002, Miller had magnetic resonance imaging (MRI) scans taken of his cervical spine, left knee, and right knee. These MRI scans, taken about one-and-a-half months after the crash, produced the first (and only) post-accident radiologic studies of Miller's knees and neck. The radiologist who read the scans believed the images showed, among other things, a torn anterior cruciate ligament (ACL) in both of Miller's knees.

On October 16, 2002, Miller was seen by Dr. Stephen Wender, an orthopedic surgeon. Dr. Wender prescribed a course of non-steroidal anti-inflammatory drugs for Miller's still-painful knees. On March 20, 2003, approximately eight months after the accident, Dr. Wender performed arthroscopic surgery on Miller's left and right knees. Dr. Wender did not repair the ACL in either of Miller's knees because, it turned out, Miller did not have ligament damage after all.

This was not the first time that an orthopedic surgeon had operated on Miller's right knee. It was, in fact, the *fourth* surgery on Miller's right knee, which had been damaged years earlier when Miller, as a pedestrian, had been hit by a car. The previous accident had led to three knee surgeries by two different doctors. Medical records from the prior surgeries were not produced at hearing, and the orthopedic surgeons who performed them did not testify.

The undersigned is persuaded, and finds, that Miller's right knee sustained some injury as a result of the July 2002 crash. Without information concerning the nature and extent of the previous injuries to Miller's right knee, however, it cannot be determined, with reasonable particularity, which damage was proximately caused by the accident in 2002,

and which was present before this accident. That said, the evidence shows (and the undersigned finds) that, broadly speaking, roughly 80 to 90 percent of the damage to Miller's right knee existed before the 2002 accident.

Miller's left knee, too, was injured in the 2002 crash. While the left knee (unlike the right) had not previously suffered a traumatic injury, by July 2002 Miller's left knee already had begun to deteriorate due to degenerative arthritis. In other words, Miller's left knee had a chronic, preexisting condition. There is no evidence, however, that Miller's left knee was bothering him before the accident in question.

Miller incurred approximately $75,000 in medical expenses following the 2002 accident, beginning with the next-day treatment in the emergency room and continuing until he had knee surgery in March 2003. These medical expenses constitute an economic loss that was directly and proximately caused by the 2002 accident.

Whether the 2002 accident was the proximate cause of medical expenses yet to be incurred is a more difficult question. Miller seeks an award of $415,000 for future medical treatment which, he claims, will be necessary as a result of the accident. Most of this sum is needed, according to Miller, to pay for knee replacement surgeries. Dr. Wender is of the opinion that Miller will need to have *both* of his knees surgically replaced with artificial joints at least once and potentially as many as three times each (because the lifespan of an artificial knee is approximately 15 years), at a cost of $50,000 to $60,000 per knee, per replacement. Thus, in a worst-case scenario, assuming Dr. Wender is correct, Miller would have three bilateral knee replacement surgeries, for a total cost of between $300,000 and $360,000.

The City strongly disagrees with Dr. Wender's opinion and offered two experts of its own, Dr. Robert L. Kagen and Dr. Philip F. Averbuch, whose opinions (though not identical) cast genuine and substantial doubt on the notion that Miller will need multiple knee replacements—or *any* knee replacements. Having carefully considered all of the evidence, the undersigned has determined that the possibility of Miller's having six total knee replacements (three per leg) is so remote as to be speculative.

The chance that Miller might need fewer (or no) knee replacement surgeries must be evaluated separately for each knee because his right knee is in worse shape than the left, due to the traumatic injury which damaged the former long before 2002—and was caused by the prior negligence of another, unidentified party. Taking the (healthier) left knee first, the pain that Miller presently experiences in that joint stems at least in part from arthritic degeneration that began before the July 2002 accident. It is likely, however, that the accident aggravated the arthritis—for the arthritic left knee was asymptomatic before the crash. As for future medical treatment, the evidence taken as a whole persuades the undersigned that Miller will not likely need to have his left knee replaced with an artificial joint. (Dr. Kagen, for example, testified credibly that Miller's left knee is "largely normal." Similarly, Dr. Averbuch "didn't find a whole lot wrong" with Miller's left knee.) While it is reasonable to infer that Miller's left knee will require *other* future medical attention (besides a total knee replacement), the evidence is insufficient to support findings as to either (a) the nature of such treatment or (b) the cost thereof. The evidence, therefore, fails to support an award of future medical expenses with regard to Miller's left knee.

As for Miller's right knee, it is likely that the accident aggravated the preexisting injury, making it worse that it would have been otherwise. But the undersigned is unable to determine with reasonable particularity *how much* worse Miller's right knee is today than it otherwise would have been had the accident in 2002 not occurred. This is because Miller did not make a reasonable effort to present evidence sufficient to permit an apportionment of his damages between the preexisting traumatic injury and the traumatic injury sustained in the 2002 accident.

Apart from his knees, Miller has sought compensation for an alleged injury to his neck. The MRI scan taken after the accident showed some herniations (bulging) of the discs at the C5-6 and C6-7 levels of the cervical spine. The evidence persuades the undersigned, however, that this damage is the result of wear-and-tear. The chronic problems that Miller has had with his neck, in other words, stem not from the accident (as far as the evidence shows), but from the aging process.

Miller wants to be compensated for "pain and suffering" (which category includes, in addition to pain and suffering, such noneconomic losses as mental anguish, inconvenience, and loss of capacity to enjoy life). At the trial on the civil suit in which Miller sued the City for negligence, the jury awarded Miller $700,000 for pain and suffering—$200,000 for past suffering and $500,000 for future suffering.

(It should be mentioned here, at least parenthetically, that Miller has not sought to recover for lost wages or loss of ability to earn money. The reason Miller has not pursued such a claim is that he has not filed a federal income tax return since the mid-1990s—a fact that the jury would have learned if Miller had urged an award for lost income. The City suggests that the jury (unaware of Miller's tax situation) might have padded its award to compensate Miller indirectly for loss of income or ability to work. While this may be true, it was not proved.)

Mettler's failure to use reasonable care to avoid colliding with Miller's pickup truck unquestionably constituted negligence. Miller, however, was negligent too, for he drove too fast for the circumstances and failed to pay reasonable attention to all of the traffic on the road. The jury in the civil trial was asked to compare the negligence of Mettler to that of Miller and apportion the fault between them by percentages. The jury determined that Mettler's negligence comprised 95 percent of the cause of Miller's injuries, while finding Miller himself five percent at fault.

While the undersigned might have placed a bit more blame on Miller, he nonetheless considers the jury's apportionment of the fault to be consistent with the evidence and will defer to the jury's collective wisdom in the matter. It is found, therefore, that Metter was 95 percent responsible for the crash, Miller five percent.

LEGAL PROCEEDINGS:

In January 2005, Miller brought suit against the City. The action was filed in the Broward County Circuit Court.

The case was tried before a jury in June 2006. The jury returned a verdict awarding Miller a total of $1.19 million in damages, broken down as follows: (a) $200,000 for past pain and suffering; (b) $500,000 for future pain and suffering; (c) $75,000 for past medical expenses; and (d) $415,000 for

future medical expenses. The trial court entered a judgment against the City in the amount of $1.13 million—or 95 percent of the total damages, in accordance with the jury's apportionment of fault. (All of the foregoing numbers were rounded for ease of reference.)

The City appealed the adverse judgment. The Fourth District Court of Appeal affirmed, per curiam, without issuing an opinion.

On August 16, 2007, the City paid $100,000 to Miller, satisfying so much of the judgment as falls outside the protection of sovereign immunity. The City previously (in 2002) had compensated Miller in full for his property damage, which consequently is not in issue here.

The proceeds recovered on the judgment were distributed to Miller in February 2008. His net recovery, after paying attorney's fees ($30,000), litigation costs ($21,000), and medical bills ($6,400), was $43,000. (These numbers have been rounded for convenience.)

CLAIMANT'S ARGUMENTS: The City is vicariously liable for its employee's negligent operation of a municipal vehicle, which negligence caused an accident wherein Miller suffered severe and permanent bodily injuries.

RESPONDENT'S ARGUMENTS: The City disputes the severity of Miller's claimed injuries, asserting that they are not permanent and, in any event, are largely the result of preexisting conditions. The City contends that Miller himself was negligent and at least partially to blame for the crash. The City is adamant that the "runaway" jury's award was grossly excessive and plainly informed by improper sympathies, which had been stoked by the inflammatory arguments of plaintiff's counsel. Finally, the City maintains that, in view of its current budgetary constraints stemming from increased costs and diminished revenues, exacerbated by the ongoing economic downturn, paying the claim would have a devastating impact on the City's fiscal condition. (The City's general liability insurer, TIG Insurance Company, disclaimed coverage for the accident on the ground that the City had unreasonably rejected Miller's pre-trial offer to settle the case for $85,000.)

CONCLUSIONS OF LAW:

As provided in s. 768.28, Florida Statutes (2010), sovereign immunity shields the City against tort liability in excess of $200,000 per occurrence.

Under the doctrine of respondeat superior, the City is vicariously liable for the negligent acts of its agents and employees, when such acts are within the course and scope of the agency or employment. See Roessler v. Novak, 858 So. 2d 1158, 1161 (Fla. 2d DCA 2003). Metter, a City employee, was acting within the course and scope of his employment when he negligently collided with Miller. The City, therefore, is liable for Mettler's negligence.

Miller was negligent, too, and his negligence was a contributory cause of the accident. Therefore, it is necessary to determine the extent of Mettler's fault as compared to Miller's. As noted above, the jury's allocation of 95 percent of the fault to the City (through Miller) is reasonable. The undersigned accordingly concludes that the City was 95 percent to blame for the accident.

While it is relatively easy to determine that Mettler's negligence was a substantial cause of the *accident*, it is difficult to ascertain which of Miller's *injuries* were proximately caused by Mettler's negligence. Complicating the issue of proximate cause is the fact that each of Miller's knees had a preexisting condition, defect, or injury.

"It is a fundamental principle . . . that where one seeks to recover damages by reason of the negligence of another, the former must not only prove the extent of his injuries, but also that they were proximately caused by the negligence of the latter." Washewich v. LeFave, 248 So. 2d 670, 672 (Fla. 4th DCA 1971). This general rule is qualified by the theory that the defendant must take the plaintiff "as is"—which means that the plaintiff's preexisting conditions or injuries, though not the result of the defendant's fault, might nevertheless become the defendant's responsibility. Regardless, however, "where the evidence reveals two successive accidents, and the defendant is only responsible for the second accident, the burden is on the plaintiff to prove to the extent reasonably possible what injuries were proximately caused by each of the two accidents." Id. at 672.

In Washewich, the plaintiff, who had been run over by the defendant's car after having been ejected from her own vehicle in consequence of an accident for which she herself was at fault, obtained an award against the defendant for all her injuries, which evidently could not be apportioned. The court affirmed the judgment because "the plaintiff [had done] everything that could reasonably have been expected of her [at trial] to segregate the damages as between the two accidents." Id. at 673; see also Gross v. Lyons, 721 So. 2d 304, 308 (Fla. 4th DCA 1998)(The jury "instruction in this case [was fatally defective because it] failed to inform the jury that if the injuries could not be apportioned between the two accidents, the tortfeasor causing the first accident could be held responsible for the entire condition if plaintiff has made all reasonable efforts to apportion the injuries.")(emphasis added), aff'd, 763 So. 2d 276 (Fla. 2000).

In this case, the undersigned has found and concluded that Miller failed to make all reasonable efforts to apportion the injuries to his right knee between the July 2002 accident, on the one hand, and the earlier accident wherein his knee was so severely injured that he was required to undergo three knee surgeries, on the other. Based on this failure of proof, the undersigned concludes that, with respect to the injuries to his right knee, Miller is not entitled to recover damages.

Miller failed to prove his claim for future medical expenses arising from the injuries to his left knee, for a different reason. Miller's evidence in support of the contention that he will need three knee replacement surgeries on his left leg was simply not persuasive when weighed against the conflicting—and ultimately more persuasive—evidence presented by the City in this regard. As found above, Miller's left knee will not likely need to be replaced. Because he failed to prove any *other* measurable future medical costs, Miller's claim for such damages cannot succeed.

Miller did prove, however, that Mettler's negligence proximately caused acute injuries that resulted in Miller's incurring $75,000 in medical expenses. An award for these past medical expenses is factually and legally justified (apart from sovereign immunity considerations).

LEGISLATIVE HISTORY: This is the third year that this claim has been presented to the Florida Legislature.

ATTORNEYS 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." Miller's attorney, Winston & Clark, P.A., has submitted proposed distribution statement showing that the attorneys' and lobbyist's fees would be limited, in the aggregate, to 25 percent of the compensation being sought. (To date, Winston & Clark, P.A., has been paid $18,750 for its work as trial counsel, while another attorney, serving as co-counsel, has received $6,250. Their fees totaled 25 percent of the $100,000 that the City previously paid in partial satisfaction of the judgment. Miller's appellate counsel was paid $5,000 from those proceeds.) Miller's attorney proposes that an additional $15,606.25 be deducted from Miller's award on this bill, to cover costs incurred.

In its current form, the instant claim bill provides that the "total amount paid for attorney's fees, lobbying fees, costs, and other similar expenses relating to this claim may not exceed 25 percent of the amount awarded under this act." For Miller's attorney to be reimbursed the $15,606.25 in costs claimed in addition to fees (see above), the bill would need to be amended to remove "costs" from the items placed under the 25 percent cap.

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 64 (2011) be reported UNFAVORABLY.

Respectfully submitted,

John G. Van Laningham
Senate Special Master

cc: Senator Gary Siplin
Representative Janet Cruz
R. Philip Twogood, Secretary of the Senate
Counsel of Record