THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
02/20/12	SM	Unfavorable

February 20, 2012

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

Re: **SB 44 (2012)** – Senator Mike Fasano
Relief of Irving Hoffman and Marjorie Weiss

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNOPPOSED EQUITABLE CLAIM FOR LOCAL FUNDS IN THE AMOUNT OF $2.4 MILLION AGAINST THE CITY OF TALLAHASSEE FOR WRONGFUL DEATH IN CONNECTION WITH THE MURDER OF RACHEL HOFFMAN, WHO WAS SHOT TO DEATH WHILE ASSISTING THE TALLAHASSEE POLICE DEPARTMENT AS A CONFIDENTIAL INFORMANT.

PREFACE:

At approximately 7:00 p.m. on May 7, 2008, Rachel Hoffman, 23, was murdered on a lonely stretch of Gardner Road north of Tallahassee in Leon County, Florida. Her killers were Andrea Green ("Green") and Deneilo Bradshaw ("Bradshaw"); these criminals were the targets of an investigation by the Tallahassee Police Department ("TPD") in which Ms. Hoffman, during the days leading up to her death, had been providing assistance as a confidential informant ("CI").

In December 2008, Ms. Hoffman's parents, Irving Hoffman and Marjorie Weiss (the "Claimants"), brought a wrongful death suit against the City of Tallahassee ("City"), alleging that the negligence of TPD's officers had caused Ms. Hoffman's death. On January 6, 2012, after selecting a jury

for the trial, the parties agreed to settle the wrongful death action for $2.6 million. As part of the settlement, the City paid $200,000 to the Claimants and agreed to support a claim bill for the remaining amount of $2.4 million.

As it happened, Senate Bill 44, which seeks relief for the Claimants, had already been filed ahead of the 2012 legislative session and referred to the undersigned Special Master. On November 28, 2011, an order had been entered placing the claim bill proceeding in abeyance pursuant to Senate Rule 4.81(6), which requires that all available legal and administrative remedies be exhausted before a claim bill can be heard. On February 8, 2012, based on the settlement of the civil action, the Claimants filed a motion urging the Special Master to take the case out of abeyance and schedule a hearing. After conferring with the parties' counsel, the undersigned issued a Notice of Hearing on February 9, 2012, which announced that the hearing would occur on Monday, February 13, 2012. The hearing took place as scheduled on February 13. Many documents were presented, as was an audio recording of the relevant TPD radio transmissions. No witnesses testified.

The ultimate issue presented in this case is whether TPD's negligence, if any, caused the brutal murder of Ms. Hoffman, thereby making the City legally liable to her parents for damages in a wrongful death suit. As explained in the Conclusions of Law below, I conclude that TPD's actions, even if negligent, were not the proximate cause of Ms. Hoffman's deplorable death. Therefore, I must recommend that this claim bill be reported unfavorably.

FINDINGS OF FACT:

In March 2008, Officer Chris Pate of TPD received a tip that Ms. Hoffman was selling a large amount of marijuana from her apartment in Tallahassee. Following that, Officer Pate and Investigator Ryan Pender ("Pender") placed Ms. Hoffman's apartment under surveillance. (Investigator Pender knew Ms. Hoffman's name, having been told by a CI in 2007 that she was a person who sold drugs in town.) The officers gathered evidence of criminal activity, including ledgers of drug sales pulled from the garbage, which was presented to a judge, who found probable cause and issued a warrant to search Ms. Hoffman's apartment. Pender and other officers executed the search warrant on April 17, 2008.

The officers found felony amounts of marijuana in Ms. Hoffman's apartment, plus a half-dozen ecstasy (MDMA) pills, some Valium, and multiple items of drug paraphernalia. This was not Ms. Hoffman's first encounter with law enforcement. She had been arrested in February 2007 for possession of marijuana (a felony charge) and consequently was, at the time of the search in April 2008, participating in a pretrial intervention program known as Drug Court. Her possession of marijuana on April 17, 2008, was—in addition to being a felony—a clear violation of the Drug Court agreement she had signed on April 20, 2007. (This was not Ms. Hoffman's only violation of the agreement. Earlier in April 2008, she had left Tallahassee and failed to show up for a random drug test, which resulted in her having to spend a weekend in jail.)

Pender interviewed Ms. Hoffman in her apartment. She did not want to get into more legal trouble and asked if she could be an informant. Ms. Hoffman told Pender that selling cannabis was her job (she was not otherwise gainfully employed) and that she had been selling five to 10 pounds of marijuana per week, worth between $4,800 and $5,200 per pound. (To put this in perspective, sales at this rate would annualize at between $1.2 and $2.7 million gross. The Claimants disagree with the notion that Ms. Hoffman did anything other than sell small amounts of marijuana to her friends. There is insufficient evidence for the undersigned to determine whether Ms. Hoffman actually did as much illegal business as she led Pender to believe, and she certainly would have had reasons to exaggerate, e.g., to increase the chances of being accepted as a CI. Regardless of the quantities involved, however, the likelihood is that Ms. Hoffman was making her living selling marijuana—she was an experienced dealer, in other words, small-time perhaps, but nevertheless not an amateur.) Ms. Hoffman impressed Pender with her knowledge of the drug trade; she was quite fluent in the street language in which drug deals are transacted. Pender offered to let Ms. Hoffman assist TPD as a CI, and as a result she was not immediately arrested. Instead, Pender instructed her to meet with him the next day, April 18, at his office.

Ms. Hoffman appeared for the meeting with Pender, as planned. She was told that if she provided substantial assistance to TPD as a CI, she could work off the potential

charges stemming from the search of her apartment, which were not insignificant: possession of cannabis with intent to sell; possession of ecstasy; maintaining a drug house; possession of a controlled substance with intent to sell; and possession of paraphernalia. She was offered, but declined, the opportunity to call her criminal defense attorney; according to multiple sources, Ms. Hoffman neither liked nor trusted him. The evidence does *not* show that the police threatened, bullied, coerced, or lied to Ms. Hoffman to induce her to become a CI; to the contrary, the evidence persuasively establishes that she was eager to cooperate, and did so freely and voluntarily. Ms. Hoffman signed the documents in the "CI packet," including a Confidential Informant Code of Conduct, which provided in part as follows:

> I, Rachel Hoffman, the undersigned, understand that while I am cooperating and assisting the [TPD], agree to the following:
>
> 14. I agree to cooperate with the [TPD] on my own free will, and <u>not</u> as a result of any intimidation or threats.
>
> * * *
>
> 20. I hereby release the City of Tallahassee, the State of Florida, the [TPD], its officers, agents, affiliates and any other cooperating law enforcement agency, from any liability or injury that may arise as a result of this agreement.

Ms. Hoffman separately initialed each of the 20 numbered paragraphs of the "Code," including the two quoted above.

Ms. Hoffman made her first controlled call as a CI that day (April 18, 2008) to an individual named D.S. whom she knew sold drugs in Tallahassee. The intent was to arrange a purchase of ecstasy from D.S., but a deal was not made, and Pender advised that they would try again later.

That night, however, D.S. confronted Ms. Hoffman after having learned that her apartment recently had been raided by the police. She confessed to him that she was serving as a CI, which effectively ended the attempt to set D.S. up for a

buy-bust operation. Somewhat surprisingly, however, D.S. was willing to work as a CI to help Ms. Hoffman avoid her potential charges. Ms. Hoffman promptly reported this to Pender, and he arranged to meet with them on April 21, 2008.

At the meeting on April 21, D.S. signed up as a CI; his assistance led to a successful buy-bust operation on April 24, 2008, which was credited toward Ms. Hoffman's substantial assistance. Of greater interest to this case, though, is that it was D.S. who identified Green as a potential target. D.S. told Pender that Green—who worked at a carwash/tint shop on Tennessee Street—and another man whose name he didn't know (it was Bradshaw) were big dealers in drugs and other illegal items, including guns.

After leaving the police station on April 21, D.S. and Ms. Hoffman ran into Green at the carwash. D.S. introduced Ms. Hoffman to Green; in the course of the conversation, D.S. informed Green that Ms. Hoffman was looking to buy drugs, and Green gave Ms. Hoffman his phone number.

On April 22, 2008, Ms. Hoffman reported the contact with Green to Pender. This led to Ms. Hoffman's second operation as a CI, in which she made a controlled call to Green to arrange a purchase of 1,500 ecstasy pills. This was supposed to lead to a buy-bust at the carwash, but the operation was aborted because Green did not have the drugs on hand and his supplier failed to deliver the pills in time to complete the transaction without unreasonable delay. Although this operation was not successful, Ms. Hoffman performed her role exactly as expected, without incident.

Ms. Hoffman's next operation took place on May 5, 2008. The goal was for Ms. Hoffman to go to the carwash wearing a wire and meet with Green to discuss purchasing drugs. She followed instructions and the operation went according to plan—except that instead of meeting Green, Ms. Hoffman met Bradshaw. Bradshaw informed her that he and Green worked as a team, and that they could do the deal she sought the following day. Ms. Hoffman later reported that she was comfortable with Bradshaw.

On Pender's instructions Ms. Hoffman arranged for the transaction to take place on May 7, 2008. The plan was to

purchase 1,500 ecstasy pills, some cocaine, and a handgun, for $13,000 in a buy-bust operation; this meant that upon receiving a prearranged signal from Ms. Hoffman—who, after being "wired" to surreptitiously transmit and record communications, would be making the buy in her capacity as a CI—the police would move in and arrest the suspects. As originally conceived and planned, the deal was to occur at a residence in the Summerbrooke neighborhood, located in north Tallahassee on the east side of North Meridian Road. This was the home of the parents of one of the suspects. A Walmart store on Thomasville Road was identified as an alternative location. While the operation was still in the planning stage, the suspects told Ms. Hoffman during a controlled call that they preferred to complete the transaction in the parking lot near the tennis courts at Forest Meadows, a park located on the west side of North Meridian Road, several miles south of Summerbrooke. Because this location was suitable for law enforcement purposes, Ms. Hoffman was told to agree to meet the suspects at Forest Meadows.

Shortly before the operation was to commence, a briefing was held at the police station, during which all of the participating personnel and supervisors were informed of the details, including the newly chosen location, Forest Meadows. After the briefing, the officers left to set up inside and around the park. The personnel inside the park included two arrest teams, one of which comprised current and former TAC (Tactical Apprehension & Control) team members, and a block vehicle whose assignment was to block the suspects' escape from the park once the arrest teams approached to detain the suspects. Four officers in individual vehicles were dispatched to patrol north and south of the park, to locate the suspects. Another surveillance vehicle and a DEA airplane were assigned to monitor the house in Summerbrooke.

At 6:28 p.m., Ms. Hoffman received a phone call from Green, who advised that he and Bradford were at Forest Meadows. At 6:30 p.m., Pender, Ms. Hoffman (who was wearing a wire and carrying a separate recording device in her purse, together with $13,000 in cash), another TPD officer, and DEA Special Agent Lou Andris left the police station. Ms. Hoffman and Pender would communicate with each other during the operation via cell phone.

At 6:40 p.m., Pender pulled in to the parking lot at the Maclay School, south of Forest Meadows. His plan was to monitor Ms. Hoffman's wire from that location. At 6:41 p.m., Pender spoke with Ms. Hoffman on the phone for about one and one-half minutes. She reported that the suspects had told her to meet them at Royalty Plant Nursery—which is located about 1.5 miles north of Forest Meadows, on the west side of North Meridian Road—and get into their car. Ms. Hoffman told Pender that she would not enter the suspects' car. At about this time (6:41 p.m.), Ms. Hoffman turned left, entering the Meridian Park, which is a separate park containing baseball and soccer fields; it is located a bit more than a half-mile south of Forest Meadows. Agent Andris promptly advised the units that Ms. Hoffman had made a wrong turn.

Pender proceeded immediately to Meridian Park. Upon arrival, he saw Ms. Hoffman's car facing North Meridian Road, waiting to pull out. At 6:43 p.m., Pender spoke with Ms. Hoffman on the phone for 20 seconds. Pender slowed down to allow Ms. Hoffman to make a left turn onto North Meridian Road, so that she could continue northbound toward Forest Meadows. Pender instructed Ms. Hoffman to proceed to the flashing yellow light and enter Forest Meadows at that spot. He then pulled in to Meridian Park, to monitor the wire from that location.

Ms. Hoffman drove north toward Forest Meadows. At 6:44:26 p.m., she began a phone conversation with Green which lasted two minutes and 49 seconds (to 6:47:15 p.m.). She stated that she was pulling in to the park with the tennis courts, i.e., Forest Meadows, "right now." Given that she had left Meridian Park at around 6:44 p.m., it is reasonable to infer that Ms. Hoffman reached the flashing yellow light at close to 6:45 p.m., and it was at this time that she made the remark about entering the park. In fact, however, Ms. Hoffman did *not* turn left and head in to Forest Meadows. Instead, she drove through the yellow light and continued traveling north on North Meridian Road. At 6:45 p.m., Pender—having just learned that Ms. Hoffman had not arrived in the park, and that none of the officers had his eyes on her—made the first of several calls to Ms. Hoffman, attempting to determine where she was. She did not answer.

Meantime, Agent Andris, who had continued driving north on North Meridian Road after reporting Ms. Hoffman's wrong turn, observed the suspects at the Royalty Plant Nursery, sitting in a BMW that was parked with its nose out by the road. Agent Andris alerted the units to this fact at 6:46 p.m. Pender responded by notifying the units at 6:46 p.m. that he had lost wire contact with Ms. Hoffman and had been attempting without success to communicate with her by phone. Pender asked that the suspects' vehicle at the nursery be watched.

Because Agent Andris was traveling northbound at the time, he needed to reverse course to return to the nursery. At around 6:47 p.m., he pulled in to Hawks Rise Elementary School to turn around. As he executed this maneuver, he was unable to watch the traffic on North Meridian Road.

It would have taken Ms. Hoffman about two minutes, more or less, to drive the distance between Forest Meadows (which she passed at 6:45 p.m.) and the Royalty Plant Nursery, where the suspects were waiting for her. She was on the phone to Green during this time. Green and Bradshaw, looking southward down North Meridian Road, would easily have been able to see her coming from their vantage point at the edge of the nursery's parking lot, where Agent Andris had spotted them. It is my inference that Ms. Hoffman approached the nursery at around 6:47 p.m., and that as she did, she slowed to allow the suspects to pull out in front of her, so that she could follow them northbound on North Meridian Road. The two cars then proceeded to travel north together, passing Hawks Rise Elementary at just the moment when Agent Andris was turning around—and, unfortunately, unable to see them. By the time Agent Andris got back to the nursery, the suspects were gone. He continued driving south, to Forest Meadows, assuming incorrectly that the suspects had headed that way.

The suspects were moving in the opposite direction, leading Ms. Hoffman to Gardner Road, a dead-end street situated on the west side of North Meridian Road, just shy of one mile north of the Royalty Plant Nursery. The trip from the nursery to Gardner Road probably took about 90 seconds. I infer that the suspects and Ms. Hoffman reached Gardner road at around 6:48 p.m. The BMW made a left-hand turn onto Gardner. Ms. Hoffman followed.

At 6:48:11 p.m., Pender finally connected with Ms. Hoffman by phone. She told him that she had followed the suspects from the nursery to Gardner Road, that they were on the dead-end street, and that the deal would go down there. Pender instructed Ms. Hoffman to stop following the suspects and turn around. Ms. Hoffman did not respond and the call ended, having lasted 42 seconds. At 6:48:20 p.m., apparently while still on the phone with Ms. Hoffman, Pender radioed the units that Ms. Hoffman was on Gardner Road, "all the way at the end," and was "following [the]m right now." At 6:48:32 p.m., Pender told the units: "Alright guys, we're gonna have to run on the fly now. She pulled out and followed them all the way down where the nursery is, and got, followed them down the back street . . . and now she's down at the back end of where that nursery is. You turn off Gardner where the nursery is and go all the way to the end of the street—that's where she's at."

It is most likely that Ms. Hoffman reached the end of Gardner Road (which is at least a mile or so west of North Meridian Road) at around 6:49 p.m., shortly after terminating the conversation with Pender. She parked and met the suspects at the dead-end, which was remote and isolated. That this was obviously not a residential neighborhood would have been readily apparent: surrounding Gardner Road on all sides was undeveloped or rural land. No one else was nearby.

At 6:49:22 p.m. Pender advised: "She's probably with [the]m right now in the car so we need to move, move." The two arrest teams arrived on Gardner Road at 6:52:34 p.m. They were approximately four and one-half minutes behind Ms. Hoffman and the suspects.

Tragically, that brief window of time afforded the suspects sufficient opportunity to murder Ms. Hoffman. Probably sometime between 6:50 p.m. and 6:52 p.m., one of them shot her to death in her own car with the handgun that she had intended to purchase, apparently after discovering the wire and recording devices hidden on her person. The killers then escaped, one driving Ms. Hoffman's Volvo, the other driving the BMW. (There is a dirt road that provides an exit from the dead-end of Gardner Road. Presumably the killers used that unpaved track to make their getaway.) By

the time the police arrived, at around 6:53 p.m., the cars, the killers, and Ms. Hoffman were gone. At 6:54:35 p.m., Green made a phone call to his wife. By that time, he and Bradshaw were on the run. They would be caught the next day, in Orlando.

LEGAL PROCEEDINGS: In December 2008, Irving Hoffman and Marjorie Weiss, as co-personal representatives of Ms. Hoffman's estate, brought suit against the City of Tallahassee. The action was filed in the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida. As mentioned earlier, the case was headed to trial in January 2012 when, after picking a jury, the parties reached a settlement during a mediation conference. The City agreed to pay the Claimants $2.6 million, with $200,000 (the sovereign immunity limit of the City's liability) payable immediately and $2.4 million to be paid, if ever, after the enactment of a claim bill. The City agreed to support the passage of a claim bill in the amount of $2.4 million. The claimants agreed to execute a general release and dismiss the civil suit with prejudice.

CLAIMANTS' ARGUMENTS: The City is vicariously liable for the negligent acts of the TPD officers who participated in the May 7, 2008, operation, including but not limited to:

- Unreasonably selecting Ms. Hoffman to work as a CI, and thereafter failing to deactivate her when her unsuitability for such service became apparent.

- Failing to make reasonable preparations for the May 7, 2008, operation.

- Failing to provide reasonable supervision of the officers before and during the operation.

- Failing to reasonably implement and execute the operation.

RESPONDENT'S POSITION: The City supports the bill. If the bill is enacted, the City, which is self-insured, will use funds set aside for contingent liabilities to satisfy the claim. Payment of the claim will not adversely affect the City's ability to perform its operations.

CONCLUSIONS OF LAW:

As provided in section 768.28, Florida Statutes (2012), sovereign immunity shields the City against tort liability in excess of $200,000 per person and $300,000 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).). TPD's officers are employees of the City, and each of them who participated in the May 7, 2008, operation was acting in the course and scope of his employment. Accordingly, the negligence of TPD's officers in connection with the failed buy-bust operation, if any, is attributable to the City.

The fundamental elements of an action for negligence, which the plaintiff must establish in order to recover money damages, are the following:

> (1) The existence of a duty recognized by law requiring the defendant to conform to a certain standard of conduct for the protection of others including the plaintiff;
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> (2) A failure on the part of the defendant to perform that duty; and
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> (3) An injury or damage to the plaintiff proximately caused by such failure.

Stahl v. Metro. Dade Cnty., 438 So. 2d 14, 17 (Fla. 3d DCA 1983)(footnote omitted).

In this case there are serious legal questions regarding whether the City owed Ms. Hoffman a duty of care, for as a general rule tort liability does not attach to the conduct of public employees carrying out such essential governmental functions as law enforcement. In certain circumstances, the police might be held to owe an individual a duty of care, such as where a "special relationship" has been created with that individual. It is not clear, however, that such a legal relationship existed between TPD and Ms. Hoffman or, if it did, that the harm which befell her was within the "zone of risk" created by TPD's conduct. It would not be

unreasonable to conclude that no duty existed in this instance; such a conclusion, without more, would defeat the Claimants' case.

There are, as well, serious legal questions regarding whether TPD's actions are immune from suit due to sovereign immunity, which shields governments from tort liability for "discretionary" governmental functions, as opposed to those which are "operational" in nature. Here, many (maybe most) of the actions forming the basis of the Claimants' complaint were arguably discretionary in nature, e.g., the decision to use Ms. Hoffman as a CI. Discretionary decisions are not actionable where the plaintiffs seek to impose tort liability on a governmental entity.

Assuming TPD owed Ms. Hoffman a duty of care, and that the City is not immune from suit in this instance, serious questions of fact exist regarding the applicable standards of care against which the police conduct should be measured. What should a reasonable law enforcement officer have done under the same or similar circumstances? This is a question that must be answered by evidence, typically adduced in the form of expert testimony. Reasonable people could disagree about whether TPD's officers violated any cognizable standards of care in connection with the May 7, 2008, operation. If they did not, there could be no liability.

A thorough analysis of this case would require a careful examination of the questions relating to duty, immunity, and standards of care mentioned briefly above. For the sake of brevity, however, I will focus solely on the matter of proximate cause because that element, in my opinion, is not met here; thus, the claim is legally insufficient for that reason alone.

"Proximate cause" is an involved legal concept. The proximate cause element of a negligence action embraces not only the "but for," causation-in-fact test, but also fairness and policy considerations, with the question of whether the consequences of the negligent act were foreseeable in the exercise of reasonable prudence being of great importance. See, e.g., Stahl, 438 So. 2d at 17-21.

In Stahl, the district court undertook comprehensively to elucidate the doctrine of proximate cause. The following, from the court's thorough opinion, is instructive:

> It seems clear at the outset that the "proximate cause" element of a negligence action embraces, at the very least, a causation-in-fact test, that is, the defendant's negligence must be a cause-in-fact of the plaintiff's claimed injuries. In this respect, a negligence action is no different from any other tort action as clearly there can be no liability for any tort unless it be shown that the defendant's act or omission was a cause-in-fact of the plaintiff's claimed injuries. To be sure, such a showing, without more, is insufficient to establish the "proximate cause" element of a negligence action, but it is plainly [an indispensible] ingredient thereof. See e.g., W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971).
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> The Florida courts, in accord with most other jurisdictions, have historically followed the so-called "but for" causation-in-fact test, that is, "to constitute proximate cause there must be such a natural, direct, and continuous sequence between the negligent act [or omission] and the [plaintiff's] injury that it can reasonably be said that *but for* the [negligent] act [or omission] the injury would not have occurred." Pope v. Pinkerton-Hays Lumber Co., 120 So.2d 227, 230 (Fla. 1st DCA 1960), cert. denied, 127 So.2d 441 (Fla. 1961), relying on Seaboard Air Line Ry. v. Mullin, 70 Fla. 450, 70 So. 467, 470 (1915). This has proven to be a fair, easily understood and serviceable test of actual causation in negligence actions, which test is currently in use as part of the Florida Standard Jury charges on this subject in the trial of negligence cases. Fla. Std. Jury Instr. (Civil) 5.1a.
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> The "proximate cause" element of a negligence action embraces more, however, than the aforesaid "but for" causation-in-fact test . . . . Florida courts, in accord with courts throughout the country, have for good reason been most reluctant to attach tort liability

for results which, although caused-in-fact by the defendant's negligent act or omission, seem to the judicial mind highly unusual, extraordinary, bizarre, or, stated differently, seem beyond the scope of any fair assessment of the danger created by the defendant's negligence. Plainly, the courts here have found no proximate cause in such cases based solely on fairness and policy considerations, rather than actual causation grounds.

> In this connection, no single test fitting all cases has yet been adopted, see generally Pope v. Pinkerton-Hays Lumber Co., 120 So.2d 227 (Fla. 1st DCA 1960), cert. denied, 127 So.2d 441 (Fla. 1961), but the test most often employed by the courts is the so-called "foreseeability" test. Indeed, it has been said that "the key to proximate cause is foreseeability." Vining v. Avis Rent-A-Car Systems, Inc., 354 So.2d 54, 56 (Fla. 1977). . . . . The following leading Florida cases, however, appear to summarize in substance the test as understood under our established law.
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> "Not every negligent act of omission or commission gives rise to a cause of action for injuries sustained by another. It is only when injury to a person . . . has resulted directly and in ordinary natural sequence from a negligent act without the intervention of any independent efficient cause, or is such as ordinarily and naturally should have been regarded as a probable, not a mere possible, result of the negligent act, that such injured person is entitled to recover damages as compensation for his loss. Conversely, when the loss is not a direct result of the negligent act complained of, or does not follow in natural ordinary sequence from such act but is merely a possible, as distinguished from a natural and probable, result of the negligence, recovery will not be allowed. Seaboard Air Line Ry. Co. v. Mullin, 70 Fla. 450, 70 So. 467, L.R.A.1916D, 982, Ann.Cas.1918A, 576. 'Natural and probable' consequences are those which a person by prudent human foresight can be expected to anticipate as likely to result from an

> act, because they happen so frequently from the commission of such act that in the field of human experience they may be expected to happen again. 'Possible' consequences are those which happen so infrequently from the commission of a particular act, that in the field of human experience they are not expected as likely to happen again from the commission of the same act. See 38 Am.Jur. 712, Negligence, Sec. 61."
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> Cone v. Inter County Telephone & Telegraph Co., 40 So.2d 148, 149 (Fla. 1949).
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> "The Florida courts, as well as a great majority of other jurisdictions, have incorporated into their definitions of proximate cause certain modifying factors or tests which have been formulated to help determine whether proximate cause or legal cause is present in a particular case. The principal tests are the following: (a) 'Foreseeability', by which, even though the defendant has been negligent there can be no recovery for an injury that was not a reasonably foreseeable consequence of his negligence, although . . . the particular injury or the manner in which the hazard operated need not have been clearly foreseeable. . . ."
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> Pope v. Pinkerton-Hays Lumber Co., 120 So.2d 227, 229 (Fla. 1st DCA 1960), cert. denied, 127 So.2d 441 (Fla. 1961)(footnotes omitted).

Stahl, 438 So. 2d at 17-21 (footnotes omitted).

Due to the element of proximate cause, a negligent party is not liable for someone else's injury if a separate force or action was "the active and efficient intervening cause, the sole proximate cause or an independent cause." Dep't of Transp. v. Anglin, 502 So. 2d 896, 898 (Fla. 1987). Such a supervening act of negligence so completely disrupts the chain of events set in train by the original tortfeasor's conduct that any negligence which occurred before the supervening act is considered too remote to be the proximate cause of any injury resulting from the supervening act. On the other hand, if the intervening cause were

foreseeable, which is ordinarily a question of fact for the trier to decide, then the original negligent party may be held liable. Id. In circumstances involving a foreseeable intervening cause, the original tortfeasor sometimes is said to have "set in motion" the "chain of events" that resulted in the plaintiff's injury. See Gibson v. Avis Rent-a-Car System, Inc., 386 So. 2d 520, 522 (Fla. 1980). In contrast, where the intervening cause was not the foreseeable consequence of the original negligent party's conduct, the latter, who is not liable for the resulting injury to the plaintiff (because his negligence was not the proximate cause thereof), may be found to have "provided the occasion" for the later negligence which harmed the plaintiff—but not to have set in motion the injurious chain of events. Anglin, 502 So. 2d at 899.

Concerning the question of foreseeability as it arises in the context of an "intervening cause" case, the Florida Supreme Court has explained:

> Another way of stating the question whether the intervening cause was foreseeable is to ask whether the harm that occurred was within the scope of the danger attributable to the defendant's negligent conduct. A person who creates a dangerous situation may be deemed negligent because he violates a duty of care. The dangerous situation so created may result in a particular type of harm. The question whether the harm that occurs was within the scope of the risk created by the defendant's conduct may be answered in a number of ways.
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> First, the legislature may specify the type of harm for which a tortfeasor is liable. See Vining v. Avis Rent-A-Car, above; Concord Florida, Inc. v. Lewin, 341 So.2d 242 (Fla. 3d DCA 1976) cert. denied 348 So.2d 946 (Fla. 1977). Second, it may be shown that the particular defendant had actual knowledge that the same type of harm has resulted in the past from the same type of negligent conduct. See Homan v. County of Dade, 248 So.2d 235 (Fla. 3d DCA 1971). Finally, there is the type of harm that has so frequently resulted from the same type of negligence that "'in the field of human experience' the same *type* of result may be expected again." Pinkerton-Hays

> Lumber Co. v. Pope, 127 So.2d 441, 443 (emphasis in original).

Gibson, 386 So. 2d at 522-23 (citations omitted).

In this case, the question arises whether Ms. Hoffman's unilateral decision to abandon the planned buy-bust operation—for which some twenty police officers had staged at Forest Meadows—and embark on the far more dangerous mission of following the suspects to a secluded and remote location (outside City limits) to meet them alone, with no police protection, was an unforeseeable intervening cause which so profoundly and unexpectedly changed the course of events as to sever any reasonable causal connection between TPD's alleged negligence and the murder. The undersigned concludes that Ms. Hoffman's actions constituted an unforeseeable, supervening cause which relieved the City of liability for her death, for the reasons that follow.

But first, consider this hypothetical situation, as an aid to conceptualizing the distinction between causation-in-fact (which is necessary but not sufficient to establish liability for an injurious result) and proximate cause. Suppose that at 6:46 p.m. a tree had fallen on Ms. Hoffman's car and killed her while she was en route to the nursery. (The odds of such an occurrence are infinitesimally small, to be sure, yet freakish accidents of the sort do happen in human experience.) By 6:46 p.m. on May 8, 2008, the police had committed all or most of the negligent acts on which the present case is based, and the potentially dangerous buy-bust operation was well underway. Just as in the actual case, TPD's actions (whether negligent or not) were a cause-in-fact of the injury inasmuch as but for proceeding with the operation and negligently allowing (as the Claimants would have it) Ms. Hoffman to overshoot the park, she would not have been struck by the tree. (Indeed, just as in the actual case, Ms. Hoffman's own actions, e.g., her decision to bypass the park and head to the nursery, were a cause-in-fact of the injury.) In the hypothetical scenario, however, no one blames TPD for the death, for the good reason that the fatal accident was not foreseeable and, in any event, was outside the zone of danger created by police negligence, if any. The falling tree was a supervening cause of the death,

relieving TPD of liability for any prior negligence, which was not the proximate cause of the injury.

What actually happened was, like the fictional falling tree, not reasonably foreseeable either. To begin, although Ms. Hoffman has been described by some as immature, inexperienced, unreliable, and "demonstrably incapable" of conducting an undercover drug purchase, the evidence presented paints a different picture. Ms. Hoffman was a college graduate (FSU '07) whose intelligence seems clearly to have been above average. At the time of her death she was, in effect, an entrepreneur running her own small business, albeit an illegal one. Ms. Hoffman was apparently worldly, streetwise, and clever. Certainly the police thought so, and the evidence does not show otherwise. She was fully capable of understanding and adhering to the major elements of the operation, the most important of which—and probably the easiest to comply with—was that she would meet the suspects inside Forest Meadows Park.

On May 7, 2008, at around 6:45 p.m., Ms. Hoffman decided not to turn in to Forest Meadows Park at the flashing yellow light as instructed and as the police reasonably expected, but to proceed instead to the Royalty Plant Nursery to rendezvous with the suspects. This was not an accident on her part; it was a deliberate, willful decision, for which she undoubtedly had her reasons. When she made this decision, she was not in imminent danger, nor was she acting under duress or coercion. The bad guys were not in her car, and as long as she remained at the wheel and on the move, she was safe from them.

As Ms. Hoffman drove toward the nursery, she had time to reflect on what she was doing, probably about two minutes. Her unilateral decision to improvise, to abandon the plan—which she did not communicate to the police—was not a split-second, impulsive choice. Her rationale for acting as she did is unknowable, but her actions were undeniably free, voluntary, and purposeful. And, again, at any point along the way to the nursery, Ms. Hoffman could have reconsidered and returned to the relative safety of Forest Meadows Park.

After reaching the nursery, Ms. Hoffman still had time to change her mind and go back to the park. She did not get into the suspects' car at that point, nor did she let one of

them get into her car. Therefore, at 6:47 p.m., when she began following the two men toward Gardner Road, she was not yet in immediate danger. When Ms. Hoffman turned her vehicle onto Gardner Road and began traveling west down that desolate and narrow street, she would have known that the police were not nearby because she could have seen that there was nowhere for them to be, except on the road itself, and they obviously were not following her. At any point until reaching the end of Gardner Road, she could have stopped and sped away, yet she chose not to do so. At 6:48 p.m. Pender pleaded with Ms. Hoffman to turn around. She went ahead anyway.

There is no question that being a CI in an undercover buy-bust operation is dangerous. As planned, the operation in Forest Meadows would have entailed a degree of risk notwithstanding that the venue—a public place with plenty of people around—was crawling with police ready to pounce at the first sign of trouble. Meeting the suspects alone, however, as Ms. Hoffman did without warning, at the end of a rural road, in the middle of nowhere, surrounded by undeveloped and unpopulated land with no police nearby, created an exponentially more dangerous situation—one that was beyond the scope of danger attributable to TPD's actions.

To be very clear, I realize that the police could have foreseen the possibility that the suspects might try to rob or harm Ms. Hoffman; in fact, they were prepared for this. Of course they knew that something could go wrong which might put their CI at risk: a miscue on her part, the suspects' evil plans, or some combination thereof could foreseeably produce a high-risk situation. That is why the transaction was supposed to take place in the park under the watchful eyes of twenty-some police officers on high alert. But just because the planned operation posed foreseeable risks does not mean that the police should reasonably have foreseen every conceivable risk, no matter how remote or unlikely. In my judgment, TPD could not reasonably have anticipated that Ms. Hoffman would purposefully slip off the carefully set stage and freelance an improvisational, extraordinarily dangerous operation at a remote location with no one watching.

Clearly, Ms. Hoffman's conduct—at least as much as that of the police—was a cause-in-fact of the tragic outcome, in that but for her deliberate decision to meet the suspects alone in an isolated location, which she acted upon despite having had ample opportunity to reflect, reconsider, and retreat, Ms. Hoffman likely would not have been murdered. The police could not reasonably have foreseen that Ms. Hoffman, acting on her own, would take such an inordinate risk. Indeed, even with the benefit of hindsight, it is practically inexplicable that she voluntarily placed herself in extreme peril the way she did. Why she didn't flee from a situation that must have seemed increasingly ominous as she approached that deserted dead-end on Gardner Road? This is a mystery. No one could reasonably have anticipated such a strange, sad turn of events.

Ms. Hoffman, it must be stressed, is not to blame for what happened in the sense of legal liability or moral culpability. Green and Bradshaw are exclusively responsible for her death. Their despicable act of murdering Ms. Hoffman was a supervening cause vis-à-vis both Ms. Hoffman's conduct and TPD's. Thus, Ms. Hoffman's actions, no less than TPD's, all of which comprised the sequence of events leading to disaster, nevertheless did not proximately cause the crime. But from TPD's standpoint, Ms. Hoffman's actions were an independent, efficient, unforeseeable, and ultimately supervening cause, which decisively changed the reasonably expected outcome. In sum, TPD might have been negligent, but if so the particular horror that transpired was far beyond the scope of danger fairly attributable to such negligence. Consequently, the City is not legally liable for Ms. Hoffman's death.

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." The Claimants' attorneys, therefore, would receive $600,000 from the proceeds of this claim bill, if enacted.

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 44 (2012) be reported UNFAVORABLY.

Respectfully submitted,

John G. Van Laningham
Senate Special Master

cc: Senator Mike Fasano
Debbie Brown, Secretary of the Senate
Counsel of Record