



Special Master's Final Report

The Honorable Paul Renner
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 6009 - Representative Hart
Relief/Patricia Ermini/Lee County Sheriff's Office

SUMMARY

This is a contested excess judgment claim for \$626,769.93 based on a federal jury verdict awarding damages to Patricia Ermini ("Ermini") for the injuries and damages she sustained when Lee County Sheriff's Office ("LCSO") deputies entered her home to conduct a welfare check on the night of March 23, 2012, which welfare check resulted in an LCSO deputy shooting Ermini. Ermini alleges that the Lee County Sheriff¹ was negligent through the actions of his deputies taken during the welfare check, while the LCSO alleges that Ermini was herself negligent and therefore caused her own harm.

FINDINGS OF FACT

The Incident

Welfare Check Request

On the evening of March 23, 2012, then-71-year-old mother of two Patricia Ermini ("Ermini") lived alone in a home she owned in Fort Myers, Florida.² On that date, Ermini, who was in the process of a contentious, lengthy, and expensive divorce, consumed wine in her home and, some time thereafter, spoke on the telephone with her daughter, Maine resident Robin LaCasse ("LaCasse"). During the course of this telephone call, Ermini, upset over recent developments in her divorce proceeding, cried hysterically (a behavior that was unusual for her, according to LaCasse) and indicated to LaCasse that she "couldn't take it anymore." When Ermini became so upset that her crying interfered with her ability to speak, LaCasse asked Ermini to hang up, splash water on her face to calm down, and call her back.

After a brief time period, Ermini attempted to call LaCasse as requested; however, LaCasse was in a shop at that particular moment and consequently missed Ermini's call. Ermini then decided that, as she was very tired, she would go to sleep in her home's primary bedroom. Over the course of the next hour, LaCasse repeatedly attempted to reach Ermini on her cell

¹ This is not a claim against the Sheriff personally; rather, it is a claim against the Office of the Sheriff.

² Fort Myers is located in Lee County, Florida. The record indicates that Ermini had a daughter and a son, both of whom resided in Maine on March 23, 2012.

phone.³ When Ermini failed to answer or return any of these calls, LaCasse grew increasingly concerned that Ermini may have attempted or might commit suicide.⁴ In light of this concern, around 8:40 p.m., LaCasse called the Lee County Sheriff's Office ("LCSO") and requested that the LCSO send deputies to Ermini's home to conduct a welfare check. During the course of this phone call, LaCasse relayed:

- Ermini's name and age;
- The fact that Ermini lived alone;
- The fact that LaCasse feared for Ermini's life, along with the basis for her fear;
- The fact that Ermini had a gun for self-protection; and
- The possibility that Ermini might have been drinking.⁵

Law Enforcement Response

Shortly thereafter, an LCSO dispatch operator relayed LaCasse's request for a welfare check over the LCSO radio system and conveyed the information relayed by LaCasse, including Ermini's name and age; the fact that Ermini had a gun; and the fact that Ermini might have been drinking. LCSO deputy Charlene Palmese ("Palmese")⁶ responded to the call, informing the dispatch operator that she was en route to Ermini's home. LCSO deputies Richard Lisenbee ("Lisenbee") and Robert Hamer ("Hamer") also responded to the call and proceeded towards Ermini's home to assist Palmese.⁷

Lisenbee, the first deputy to arrive at Ermini's home, testified that he parked his patrol vehicle down the road in a position that was likely not visible from the home.⁸ According to his testimony, he then approached the home, which he described as dark with no visible interior or exterior lights illuminated, and took a quick look around the home's exterior. Seeing nothing, he opened the screen door to the front porch and propped it open, then pounded on the front door, calling out "Sherriff's Office." Getting no response, Lisenbee tried the front door handle, which he found unlocked, and proceeded to open the door, calling out "Sheriff's Office," and asking "Anyone here? Anyone home?", with no response. He then left the front door standing open and waited outside for backup.

Palmese arrived at Ermini's home shortly thereafter and, according to her testimony, parked her patrol vehicle down the road, as Lisenbee did, in a position that was likely not visible from Ermini's home. She then approached the home and, upon seeing that the front door was "wide open," notified dispatch of this fact over the radio and consulted with Lisenbee about the best course of action; both deputies agreed that it was best they wait for backup before entering the home. However, Palmese testified that, although she initially believed that Lisenbee had found the door wide open upon his arrival, Lisenbee later told her that it was he who had opened the door before her arrival, and left it open.

Hamer, the last deputy to arrive at Ermini's home, testified that he, like Lisenbee and Palmese, parked his patrol vehicle on the street in a position that was likely not visible from Ermini's home. He then approached the house to confer with Lisenbee and Palmese, in the mistaken belief that the front door had been found "wide open," as he had heard Palmese's statement to

³ Ermini's testimony suggests that she did not have a land line, but that she did have two cell phones, one she had purchased for herself and another her daughter had recently sent her. Unfortunately, the phone calls LaCasse placed to the cell phone Ermini had purchased did not go through. Further, the ringer on the cell phone LaCasse sent Ermini had been switched to "silent," and Ermini did not know how to turn the volume on; thus, she did not receive any auditory alerts when this cell phone received an incoming call. In any event, Ermini testified that she left both cell phones in the kitchen before heading to bed.

⁴ The record indicates that Ermini had a history of depression but did not have a history of suicidal ideation. Ermini testified at trial that when she told LaCasse she "couldn't take it anymore," she was referring to her protracted divorce proceedings and was in no way indicating that she intended to take her own life or otherwise harm herself.

⁵ According to LaCasse's testimony, Ermini denied having consumed any alcohol while on the phone with LaCasse, but LaCasse suspected she might have consumed alcohol because of how upset Ermini was. Ermini later acknowledged she had consumed wine at some point before her phone call to LaCasse.

⁶ According to the record, on March 23 2012, the LCSO employed Palmese as a road patrol deputy.

⁷ According to the record, on March 23, 2012, the LCSO employed Lisenbee and Hamer as road patrol deputies.

⁸ A bank of trees largely shielded Ermini's home from the roadway.

that effect over the radio and neither Lisenbee nor Palmese corrected his false impression. Hamer subsequently returned to his patrol vehicle to retrieve his AR-15 rifle, which was equipped with a flashlight and a sighting device that enabled him to more easily find his target.

After Hamer returned to the house, the testimony from the deputies suggests that at least Lisenbee called out through the open front door, announcing "Sheriff's Office."⁹ The deputies then entered the home, with guns drawn, and maneuvered their way through in silence.¹⁰ Though all three deputies were wearing a dark green LCSO uniform and duty belt, along with visible badges and other insignia, the interior of the home was dark, causing the deputies to illuminate flashlights to increase their field of visibility; however, the deputies chose not to turn on any interior lights, apparently so that they would not make themselves visible to anyone in the home, lest they become targets.

In any event, shortly after entering through the front door, the deputies reached the home's primary bedroom, located directly off of the living room and marked by a set of closed French doors. During her deposition, and again at the trial held in this matter, LCSO Captain Kathryn Rairden ("Rairden")¹¹ testified that, although there is no specific protocol for conducting a welfare check, in a situation like the one presented to the deputies (that is, where the deputies know a person is potentially armed with a gun and might be behind a closed door), she would have secured the room, preventing any deputies from standing in front of the doorway or on the other side of the drywall; she would then have had the deputies "form up somewhere" safe and start trying to establish communication with the potentially-armed person in order to get such person to emerge from the room unarmed.

Unfortunately, the deputies did not follow these procedures. Instead, Lisenbee threw open the closed right-side door to Ermini's bedroom and peered inside without first attempting to establish communication with Ermini. Further, he did this at a time when Hamer was positioned behind him in the living room, and Palmese was behind him near the adjacent kitchen; in other words, both Hamer and Palmese were positioned on the other side of the drywall and in view of the open door. Thus, in throwing open the bedroom door as he did, Lisenbee placed himself, Hamer, and Palmese in the potential line of fire of any armed person waiting within.

According to her testimony, Ermini first became aware that there were strangers in her home when she was awoken by a man throwing her bedroom door open, shining a flashlight into the room, and saying "she's in here." She also heard a female's voice but couldn't make out what the female said. Ermini testified that she could not see anything, as the light from the flashlight was shining directly in her eyes, and that she was immediately terrified, not knowing who was in her home, or for what purpose.

Lisenbee testified that he opened the right side of the bedroom door to find Ermini seemingly asleep on her bed, clothed only in undergarments; he then proceeded to loudly announce "Sheriff's Office," and he may have also said something to the effect of "we're here to help."¹² The record is unclear as to exactly what happened next, but the parties generally agree that Ermini picked up her gun and moved quickly from her bed to behind the partially-open bedroom door; Ermini testified that she moved to the door in an attempt to ascertain who was in her home, as she could not see them. The parties also generally agree that Ermini spoke to the deputies at this point, although exactly what she said is in dispute; Ermini testified that she warned the deputies that she had a gun and demanded that they leave her home, while the deputies testified that Ermini warned them about the gun and threatened to shoot them.

⁹ According to their respective testimonies, Palmese did not recall anyone other than Lisenbee announcing their presence, but Hamer was unsure as to whether or not he or Palmese had also done so.

¹⁰ The record indicates that each deputy carried an LCSO-issued Glock handgun. However, Hamer had his personal, LCSO-approved AR-15 drawn as he moved through the house. The record also indicates that the home was found in a state of disarray; Ermini later testified that this was due to her lax housekeeping skills and not anything sinister.

¹¹ Rairden was the Captain assigned to LCSO's South District, the district to which Hamer, Lisenbee, and Palmese were also assigned on March 23, 2012.

¹² It is unclear from the record precisely what Lisenbee said, as he couldn't recall specifically and the testimony of the deputies, and of Ms. Ermini, differ as to what his specific statement might have been. However, all three deputies remember him loudly announcing "Sheriff's Office."

Whatever Ermini's exact statement was, Lisenbee and Palmese testified that they immediately began backing up in response thereto; however, Hamer testified that he moved forward and "took the point," turning off his flashlight and stepping in front of Lisenbee as he was the more experienced deputy and had more firepower. According to Hamer, he then saw Ermini emerge from behind the still-closed left-side bedroom door, stand in the open, right side of the doorway, and assume a "shooting stance" with both of her hands wrapped around the gun and her finger on the trigger; he testified that, in fear for his life and the lives of the other deputies, he fired his AR-15 rifle immediately, without ever ordering Ermini to drop her gun, striking Ermini several times and causing her to collapse to the floor.¹³ However, Lisenbee testified that he only saw Ermini's gun emerging from around the side of the closed door before Hamer shot her,¹⁴ while Palmese testified that she saw neither Ermini nor her gun until after the shooting.

What is clear from the record is that Hamer fired seven rounds from his AR-15 rifle at Ermini, and that all seven rounds passed through the closed left-side bedroom door. At least two of those rounds struck Ermini, hitting her left leg and right arm and causing her to immediately fall backwards to the ground and drop her gun, which was found to the left of her body. Based on the location of the bullet holes from the rounds fired by Hamer, it is improbable that Ermini was standing in a shooting stance in the open right-side doorway and immediately shot by Hamer, as Hamer claimed; at the time she was shot, the record shows that Ermini must have been at least partially concealed behind the closed left-side doorway, through which all of Hamer's rounds passed, for any of those rounds to have struck her.

In any event, Hamer immediately called in the shooting over his radio and, after clearing the bedroom and handcuffing Ermini, began rendering medical aide to Ermini until emergency responders arrived and took over her care. Ermini was visibly confused and upset at this point, repeatedly asking the deputies and emergency responders who the deputies were, why they were in her home, and why they were trying to kill her.

Hamer later testified in the trial held in this matter that, when he enters a home without a warrant or consent, he anticipates that the person inside might be surprised or frightened by his presence, as the record suggests Ermini was; he also testified that, in such a situation, communication is the key to reducing the person's fear and surprise. However, the record is clear that, from the point that Palmese radioed in that the front door was "wide open" to the point that Hamer called in the shooting, a total of three minutes had elapsed; it is also clear that a matter of seconds elapsed from the point that Lisenbee opened Ermini's bedroom door to find Ermini sleeping and the point that Hamer shot her. Furthermore, at no point during the pre-shooting interaction did any deputy ensure that Ermini knew and understood that they were law enforcement officers or explain to Ermini why they were there. Neither did the deputies illuminate themselves so Ermini could see their uniforms; instead, they shone bright flashlights in her eyes, so she couldn't see them at all. Indeed, other than one pronouncement of "Sheriff's Office," the deputies failed to communicate anything of value to Ermini that would enable her to determine that her life was not in danger, and Hamer would later testify that he was unsure Ermini even knew who the deputies were at the time he shot her, as she seemed confused.

Physical Injuries

Emergency medical responders transported Ermini by ambulance to the emergency department of Lee Memorial Hospital, where she was sedated, intubated, placed on a ventilator, given fluids

¹³ Initial news reports submitted as evidence in the Special Master Hearing held in this matter suggested that Ermini fired the first shot. By the time the matter went to trial, the story had changed, such that all the deputies admitted that Hamer had fired the first shots. However, at some point after Hamer began shooting at Ermini, Ermini's gun discharged one round, which round passed through her kitchen wall at a point just inches below the ceiling. Ermini testified that she does not remember firing her gun, and it is unclear from the record whether Ermini's gun discharged in the course of her fall or whether she fired the gun intentionally in response to Hamer shooting at her; in either case, her finger must have been on the trigger to cause it to discharge.

¹⁴ This is consistent with Ermini's testimony that she was peering around the closed left side of her bedroom door, gun in hand, to determine who was in her home when Hamer shot her.

and two units of blood, and admitted in critical condition. An evaluation of her injuries revealed gunshot wounds to her right upper arm and left thigh; a probable graze wound to her head; a fractured left femur; a fourth ventricle hemorrhage; intracranial bleeding; and a foreign body lodged in her right eye.¹⁵ She was also noted to have a blood alcohol content of .148.¹⁶

After emergency medical personnel cleaned out her wounds and stopped her hemorrhage, Ermini was admitted to the surgical intensive care unit, where she underwent procedures to close her head wound, stabilize her fractured leg with screws and rods, and place skin grafts to her right arm and left leg. She subsequently underwent numerous wound drainage procedures and wound VAC changes before being discharged for out-patient and home care on April 18, 2012. However, Ermini became septic after her discharge, which infection caused her tremendous pain for which she was prescribed pain medication. She also developed post-traumatic stress disorder and paranoia, which, according to her testimony, causes her to occasionally hide in her closet at night in case anyone should enter her home and try to kill her.

Initial Investigations

The LCSO initially placed Ermini under arrest and charged her with two counts of aggravated assault on a law enforcement officer.¹⁷ However, on June 5, 2012, the State Attorney for the 20th Judicial Circuit ultimately declined to prosecute the matter, citing insufficient evidence, and dismissed all charges against Ermini.

The LCSO also conducted an internal investigation into the conduct of Hamer, Lisenbee, and Palmese, finding that each deputy had acted appropriately under the circumstances and that the shooting of Ermini was justified. No disciplinary action was ever taken against the deputies in response to their actions during the March 23, 2012, check of Ermini's welfare.

Litigation History

Initial Pleadings

On November 15, 2010, Ermini filed a Complaint against Sheriff Scott, in his official capacity, the LCSO detective who had arrested Ermini, in his individual capacity, and against Hamer, Lisenbee, and Palmese, in their individual capacities, (collectively "the Defendants") in the Fort Myers Division of the United States District Court for the Middle District of Florida.¹⁸ Therein, Ermini raised four counts alleging civil rights violations under 42 U.S.C. §1983 and nine counts under state law, including Count XII of the Complaint, which count alleged that Sheriff Scott was negligent through the actions of his detective and deputies.

On December 29, 2015, the Defendants filed an Answer denying the allegations in the Complaint, demanding a jury trial, and raising eight affirmative defenses, including a defense:

- That Ermini was herself negligent or engaged in wrongful conduct;
- That the actions by the Sheriff, through his deputies, were taken without malice; with probable cause; in pursuit of lawful and legal duties; with such force as was reasonable and appropriate; and in self-defense or defense of others.
- An alcoholic beverage defense under s. 768.36, F.S. (2012).¹⁹

¹⁵ The foreign body turned out to be a wood chip from Ermini's bedroom door.

¹⁶ Dr. Robert O'Connor, who treated Ermini in the emergency room, testified in the trial held in this matter that he could not determine whether or not Ermini was impaired or intoxicated based on her blood alcohol content alone, as the effects alcohol has on an individual vary based on how much alcohol that person regularly consumes.

¹⁷ Ermini was never transported to or held in jail; she was placed under arrest while in the hospital but eventually posted bail and thus was able to return to her home upon her discharge from the hospital. Aggravated assault on a law enforcement officer is a second-degree felony, punishable by up to 15 years' imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

¹⁸ See Case No. 2:15-cv-701-FtM-99CM.

¹⁹ S. 768.36, F.S., prohibits a plaintiff in a civil action from recovering any damages if the trier of fact finds that, at the time the plaintiff was injured, the plaintiff was under the influence of any alcoholic beverage to the extent that the plaintiff's normal faculties were impaired or had a blood or breath alcohol level of 0.08 or higher, and as a result of the influence of such alcoholic beverage, the plaintiff was more than 50 percent at fault for his or her own harm.

Further, on January 19, 2017, Sheriff Scott filed a Motion for Summary Judgment; the LCSO detective and deputies filed their own Motion for Summary Judgment the next day. On April 5, 2017, the Court granted the Motion filed by the LCSO detective and deputies, thereby dismissing all counts against them. The Court also granted in part and denied in part the Motion filed by Sheriff Scott, dismissing all counts against him except for the portion of Count XII which alleged that he was negligent through the actions of his deputies.²⁰

Jury Trial

On January 9, 2018, the Court convened a jury trial to hear the sole remaining count of Ermini's Complaint. At the conclusion of Ermini's case-in-chief, Sheriff Scott elected not to present a case, instead moving for a Judgment as a Matter of Law, wherein the Sheriff alleged that Ermini failed to meet her burden of proving that the Sheriff, through his deputies, breached a duty owed to her. The Court denied the Motion and sent the matter to the jury.

On January 11, 2018, the jury returned a verdict finding that Sheriff Scott was negligent, through the actions of his deputies, which negligence was a legal cause of Ermini's injuries. The jury also found that Ermini was herself negligent, which negligence was also a legal cause of her injuries. Ultimately, the jury attributed 75 percent of the negligence to Sheriff Scott and 25 percent of the negligence to Ermini, awarding her \$1,000,000 in damages and reducing that award by her percentage of fault, for a total award of \$750,000, plus interest and taxable trial and appellate costs in the amount of \$76,769.93.

Motions for New Trial and Judgment as a Matter of Law

On February 7, 2018, Sheriff Scott filed a Motion for New Trial, wherein he asked the Court to vacate the judgment against him and order a new trial on the grounds that he believed the Court improperly admitted evidence,²¹ and that Ermini's counsel improperly pursued a non-existent "negligent use of force" claim. The Sheriff also renewed his Motion for Judgment as a Matter of Law, asking the Court to set aside the judgment and dismiss the lawsuit. The Court ultimately denied both Motions on March 2, 2018.

Appeals

On August 1, 2018, Sheriff Scott appealed the judgment entered against him to the United States Court of Appeals for the Eleventh Circuit.²² In his Initial Brief, the Sheriff argued that:

- The trial court improperly instructed the jury about the legal consequences for accepting his alcoholic beverages defense – that is, that Ermini would be unable to recover any damages;
- Ermini impermissibly pursued a non-existent "negligent use of force" claim;
- Ermini's counsel made a forbidden "golden-rule" argument; and
- The trial court abused its discretion by admitting immaterial character evidence pertaining to Deputies Hamer and Lisenbee.

On September 10, 2019, the Court affirmed the judgment in Ermini's favor. Sheriff Scott then filed Petitions for Rehearing and Rehearing En Banc, but the Court ultimately denied these Petitions on November 7, 2019.

Payment and Excess Judgment

On December 9, 2019, the LCSO paid \$200,000 to Ermini, which amount is the maximum

²⁰ The order dismissed that portion of the count relating to the actions of the LCSO detective, but did not dismiss those portions of the count relating to the actions of the deputies.

²¹ The evidence in question pertained to the apparently unrelated firing of Deputies Hamer and Lisenbee by the LCSO shortly after the March 23, 2012, shooting of Ermini. The undersigned has not considered this evidence in making her recommendation.

²² See Case No. 18-11220-H.

amount the LCSO was statutorily authorized to pay her under Florida's sovereign immunity law, codified in s. 768.28, F.S. This leaves in question an excess judgment of \$550,000, plus interest and taxable trial and appellate costs awarded to Ermini in the amount of \$76,769.93.

CONCLUSIONS OF LAW

House Rule 5.6(b)

Pursuant to House Rule 5.6(b), judgments are not binding on the Special Master or the House or any of its committees of reference. Thus, each claim is heard *de novo*, and the Special Master must make findings of fact and conclusions of law which support the claim.

Negligence

In the instant matter, Ermini raises a negligence claim, the elements of which are duty, breach, causation, and damages, and argues that Sheriff Scott was negligent through the actions of his deputies under the *respondeat superior* doctrine. In turn, the LCSO alleges that the shooting of Ermini was justified, that it was Ermini who was negligent, and, in any event, that there is no cause of action for "negligent use of excessive force."

Though the LCSO is correct that there is no such cause of action,²³ Ermini does not argue that the shooting itself was negligent; rather, she argues that the shooting was the consequence of the negligent conduct of Hamer, Lisenbee, and Palmese on March 23, 2012. Thus, the undersigned finds it appropriate to consider Ermini's negligence claim.²⁴

Duty

For a defendant to be liable for negligence, there must be either an underlying statutory or common law duty of care with respect to the conduct at issue.²⁵ Though there is no statutory or common law duty of care for exercising discretionary police power (that is, in choosing whether or not to make an arrest or otherwise enforce the law), law enforcement activities involving general health and welfare services may give rise to a common law duty of care.²⁶

In the case of a welfare check, the Florida Supreme Court has found that a Sheriff owes a common law duty of care to the person whose welfare his deputies are dispatched to verify pursuant to the "undertaker's doctrine."²⁷ In accordance with this doctrine, a person who undertakes to render services to another, which services he should recognize as necessary for the protection of the other person, is subject to liability to the other person for physical harm resulting from his failure to exercise reasonable care in performing his undertaking, if his failure to exercise such care increases the risk of such harm.²⁸

In the instant matter, Sheriff Scott, through the actions of Hamer, Lisenbee, and Palmese, voluntarily undertook to perform a check of Ermini's welfare at the request of LaCasse, which welfare check the Sheriff recognized was necessary for the protection of Ermini. Thus, the undersigned finds that the Sheriff owed a common law duty of care to Ermini.

Breach

The existence of a duty of care is alone insufficient to sustain a claim of negligence.²⁹ Once the

²³ *City of Miami v. Sanders*, 672 So. 2d 46 (Fla. 3d DCA 1996) (finding that there is no cause of action for "negligent use of excessive force" because there is no such thing as the negligent commission of an intentional tort).

²⁴ Courts have found evidence of a law enforcement officer's conduct, which conduct culminated in the officer shooting an innocent person, sufficient to support a finding of negligence. *Mazzilli v. Doud*, 485 So. 2d 477 (Fla. 3d DCA 1986).

²⁵ *Trianon Park v. Condo Assoc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985).

²⁶ *Wallace v. Dean*, 3 So. 3d 1035 (Fla. 2009).

²⁷ *Id.*

²⁸ Rest. 2d Torts § 323.

²⁹ *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001).

existence of a duty has been established, it merely “opens the courthouse doors”; a plaintiff must still prove the remaining elements of negligence, the next of which is a breach of the duty of care.³⁰ In the instant matter, Hamer, Lisenbee, and Palmese knew that Ermini was an elderly female who lived alone; that Ermini had a gun for self-protection; and that Ermini had likely consumed alcohol and could, therefore, be intoxicated, or at least impaired. The deputies also knew that it was not Ermini who had contacted the LCSO, and therefore, that she might be frightened or confused by their unexpected appearance inside her home.

However, Hamer, Lisenbee, and Palmese chose to enter Ermini’s home after only briefly attempting to establish contact with her by banging on her door and shouting inside. Further, due to Lisenbee’s interference with the scene before Palmese and Hamer arrived, and their subsequent failure to communicate the fact of this interference to Hamer, Hamer entered the home in the mistaken impression that the front door had been found wide open.

Unfortunately, the communication failures did not stop there. Once at the primary bedroom, Lisenbee threw open Ermini’s bedroom door without first attempting to establish contact with Ermini; it was only once the door was open that he announced “Sheriff’s Office” and attempted to make their presence known to her. Such actions directly conflict with the procedures Riordan testified a deputy should generally follow when confronted with the possibility that an armed person may be behind a closed door; in proceeding as he did, Lisenbee put himself, and consequently Hamer and Palmese, in what could have been the direct line of fire, thus heightening the risk for the deputies and, consequently, Ermini.

Furthermore, once Lisenbee began communicating with Ermini, it became apparent to the deputies that Ermini was confused; however, the deputies failed to ensure that Ermini knew they were in fact law enforcement officers; failed to inform Ermini of why they were there, or who had sent them; and failed to order Ermini to drop her gun. Indeed, given that it was a matter of seconds from the time the deputies opened the sleeping Ermini’s bedroom door to the time Hamer shot her, it is apparent that the deputies failed to give Ermini sufficient time to comprehend that they were not intruders or otherwise a threat to her safety, and to consequently decide to put down her gun and exit the room unarmed.

Though the undersigned has no doubt that Hamer feared for his own life, and the lives of Lisenbee and Palmese, at the time he shot Ermini, it appears that the deputies, through a persistent failure of communication, created a situation that put Ermini in fear for her life and, consequently thereafter, put the deputies in fear for their own lives. Based on the foregoing, the undersigned finds that Sheriff Scott, through the actions of his deputies, failed to exercise reasonable care in conducting the check of Ermini’s welfare he had undertaken to perform, thereby increasing the risk of Ermini’s harm, and, thus, breached the duty of care he owed to Ermini.

Causation

Once a duty and a breach thereof are established, causation must be determined. In making such a determination, Florida courts follow the “more likely than not” standard, requiring proof that the negligence proximately caused the plaintiff’s injuries.³¹ In determining whether a defendant’s conduct proximately caused a plaintiff’s injury, the factfinder must analyze whether the injury was a reasonably foreseeable consequence of the danger created by the defendant’s negligent conduct.³² This analysis does not require the defendant’s conduct to be the exclusive, or even the primary, cause of the injury suffered; instead, the plaintiff must only show that the defendant’s conduct was a substantial cause of the injury.³³

In the instant matter, Hamer shot Ermini several times, causing her physical injury and impairment and related psychological harm. Thus, the record is clear that Ermini suffered injuries as a result of Sheriff’s Scott’s breach of the duty of care.

³⁰ *Id.* at 221.

³¹ *Gooding v University Hosp. Bldg., Inc.*, 445 So. 2d 1015 (Fla. 1984); *Ruiz v. Tenent Hialeah Healthsystem, Inc.*, 260 So. 3d 977 (Fla. 2018).

³² *Ruiz*, 260 So. 3d at 981-982.

³³ *Id.* at 982.

In analyzing whether such injuries were a reasonably foreseeable consequence of the danger created by Sheriff's Scott's negligence, and thus the proximate cause of Ermini's injury, the undersigned gives weight to the information the deputies possessed (that is, that Ermini was an elderly female who lived alone; that she likely did not know that law enforcement was coming to her home, or for what reason; that she had a gun for self-protection; and that she had likely consumed alcohol and could, therefore, be intoxicated, or at least impaired). Given this information, the undersigned believes that it was reasonably foreseeable that a person who lives alone might fear for her safety if she hears uninvited, unknown persons inside her home at night; that a person who possesses a gun for self-protection might draw said gun, and keep it drawn while she fears for her safety; and that a person who may be impaired, or at the very least frightened, might need more than seconds and a shout of "Sherriff's Office" to comprehend that she was not in danger.

Taking all of this together, the undersigned believes that Ermini's actions were reasonably foreseeable to the deputies, and yet the deputies proceeded without sufficient caution, thereby creating the situation that ultimately put them in fear for their lives. Further, the deputies entered Ermini's home prepared to respond to threats to their safety with firepower. Though the undersigned does not fault the deputies for having their weapons at the ready in the face of an uncertain situation, the undersigned believes that it was reasonably foreseeable that a deputy might shoot Ermini for responding to their unexpected presence and failure to effectively communicate in the manner that she did. Thus, the undersigned believes that Sheriff Scott's negligence was the proximate cause of Ermini's injuries.³⁴

³⁴ In coming to this conclusion, the undersigned considered the jury's determination that Ermini was 25 percent at fault for her own harm and, thus, a proximate cause of her own injuries. While the undersigned wonders how an officer-involved shooting is a reasonably foreseeable consequence of a person drinking alcohol alone; getting upset during a phone call with a family member; playing "phone tag" with such family member; and then going to sleep in her own bed, all without ever leaving her home or calling law enforcement herself, the undersigned accepts the jury's apportionment of fault as reasonable. The undersigned also rejects any argument that Ermini was more than 50 percent at fault for her own harm due to intoxication; though she had consumed alcohol and had a blood alcohol content of .148, Ermini's treating emergency room physician could not say with any certainty that she was intoxicated, or even impaired. Furthermore, even if Ermini was intoxicated or impaired, it does not logically follow that she should be more responsible for her injuries than the LCSO, as she did not know the deputies were coming to her home and thus could not have prepared for their arrival by abstaining from alcohol.

Damages

To sustain a negligence claim, the plaintiff must prove actual loss or damages resulting from the injury, and the amount awarded must be precisely commensurate with the injury suffered.³⁵ Actual damages may be “economic damages,” that is, financial losses that would not have occurred but for the injury giving rise to the cause of action, such as lost wages and costs of medical care. Actual damages may also be “non-economic damages,” that is, nonfinancial losses that would not have occurred but for the injury giving rise to the cause of action, such as pain and suffering, physical impairment, and other nonfinancial losses authorized under general law.³⁶

In the instant matter, Ermini testified to non-economic damages, including severe and crippling permanent bodily injury; pain and suffering; humiliation; mental anguish; and loss of capacity for the enjoyment of life. The jury ultimately awarded Ermini \$1,000,000 for said damages; however, the jury also assigned her 25 percent of the fault for her own harm.

Under the “pure comparative negligence” standard in effect at the time of Ermini’s trial, a plaintiff could only recover damages proportional to the percentage of fault assigned to her by the jury.³⁷ Accordingly, the jury reduced Ermini’s \$1,000,000 damages award by 25 percent, for a total award of \$750,000, plus costs and interest. The LCSO has since paid Ermini \$200,000 of this amount, which is the maximum amount Florida’s sovereign immunity law authorized it to pay, leaving Ermini with an excess judgment claim for \$626,769.93. Thus, the undersigned finds that Ermini suffered actual damages resulting from her injuries.³⁸

Respondeat Superior

Under the common law *respondeat superior* doctrine, an employer is liable for the negligence of its employee when the:

- Individual was an employee when the negligence occurred;
- Employee was acting within the scope of his or her employment; and
- Employee’s activities were of a benefit to the employer.³⁹

For conduct to be considered within the course and scope of the employee’s employment, such conduct must have:

- Been of the kind for which the employee was employed to perform;
- Occurred within the time and space limits of his employment; and
- Been due at least in part to a purpose serving the employment.⁴⁰

Because Hamer, Lisenbee, and Palmese were at all times relevant to the instant matter employed by Sheriff Scott as deputy sheriffs and were acting within the scope of their employment, which employment benefitted the Sheriff, and by extension, the LCSO, the LCSO is liable for their negligence under the common law *respondeat superior* doctrine.

POSITIONS OF CLAIMANT AND RESPONDENT

Claimant’s Position

Ermini asserts that she is entitled to the excess judgment amount of \$626,769.93 requested in the claim bill. In support of her position, Ermini alleges that Sheriff Scott was negligent through the actions of his deputies, which negligence culminated in an LCSO deputy shooting Ermini.

Respondent’s Position

³⁵ *McKinley v. Gualtieri*, 338 So. 3d 429 (Fla. 2d DCA 2022); *Birdsall v. Coolidge*, 93 U.S. 64 (1876).

³⁶ FLJUR MEDMALP § 107.

³⁷ *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

³⁸ The undersigned finds that the \$1,000,000 jury verdict, offset by the percentage of fault the jury apportioned to Ermini, was a reasonable award in light of Ermini’s continued physical impairments and psychological suffering.

³⁹ *Iglesia Cristiana La Casa Del Senor, Inc. v. L.M.*, 783 So. 2d 353 (Fla. 3d DCA 2001).

⁴⁰ *Spencer v. Assurance Co. of Am.*, 39 F.3d 1146 (11th Cir. 1994) (applying Florida law).

The LCSO contests the passage of this claim bill, as it is the LCSO's position that Ermini was negligent and therefore caused her own harm. However, should the claim bill pass, the LCSO, through counsel, indicated that payment of the requested amount would not impact the LCSO's operations as it is self-insured through the Sheriffs Risk Management Fund, which fund has sufficient resources to pay the requested amount.

ATTORNEY AND LOBBYING FEES

Under the terms of the claim bill, attorney fees may not exceed 25 percent of the total award – that is, \$156,692.48. Because Claimant's counsel is also acting as her lobbyist, there are no separate lobbying fees requested.

RECOMMENDATION

Based on the foregoing, I recommend that House Bill 6009 be reported FAVORABLY.

Respectfully submitted,



CAITLIN R. MAWN,
House Special Master