Special Master's Final Report

The Honorable Daniel Perez
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 6529 - Representative Alvarez, D.
Relief/J.N./Hillsborough County

SUMMARY

This is a settled claim for $400,000 by J.N., a minor, against Hillsborough County ("the County") for injuries and damages she suffered when her bicycle's wheel caught on an uneven city-maintained sidewalk, causing her to flip over her handlebars, tumble down an adjacent slope into a County-maintained drainage culvert, and slam face-first into a rusted County-maintained drain pipe. J.N. and the County settled the claim for $600,000, and the County has since paid J.N. the $200,000 maximum authorized under Florida's sovereign immunity law, the net proceeds of which are now held in a trust for J.N.'s benefit.

The County supports the passage of this claim bill. For the reasons set out below, the undersigned recommends that HB 6529 be reported FAVORABLY.

FINDINGS OF FACT

The Incident

On June 7, 2019, then-11-year-old J.N. went for a bicycle ride with her mother's fiancé, Gabriel Soto ("Soto").[1] During the ride, J.N. and Soto proceeded along a sidewalk located on the east side of East Bay Road in Gibsonton, located in Hillsborough County, Florida ("the County"); according to the record, Hillsborough County owned and maintained this stretch of sidewalk, and neither J.N. nor Soto had traversed this particular sidewalk before.[2]

The record also shows that tree roots had pushed one portion of the sidewalk about two inches higher than the adjacent portion, creating an uneven surface area, and that the County had received at least two complaints about the danger this stretch of sidewalk posed, the first of which dates to October of 2015. Indeed, the County sent an employee to inspect the sidewalk area in question in 2016, and such employee determined the sidewalk's state necessitated

[1] According to the testimony, J.N. was an experienced bicycle rider and had ridden the particular bicycle in question before.
[2] The sidewalk in question lay just outside the subdivision in which J.N. and Soto resided, but Soto testified that J.N. typically rode her bike closer to their home; this ride was unusual as Soto was not working that day and could take J.N. further from her usual route. No testimony in the record contradicts this assertion.

repairs, for which he put in a work order; however, approximately three years later, the sidewalk remained unrepaired, and the County had not placed by the sidewalk anything designed to warn of the hazard the sidewalk posed, or a barrier to prevent passage over the area.[3]

Further complicating matters, this stretch of sidewalk happened to adjoin a grassy slope leading down to a County-maintained drainage culvert, in which a concrete retaining wall surrounded a rusting and corroded metal drain pipe. However, no barrier separated the sidewalk from the slope leading to the culvert or otherwise blocked human access to the drain pipe.

Unfortunately, J.N.'s front bicycle tire caught on the uneven surface area of the sidewalk as she attempted to ride over it, causing her to lose control of her bicycle, careen down the adjacent slope, and flip face-first over her handlebars; J.N.'s head then slammed into the concrete wall around the drain pipe, causing her to temporarily black out, and her face impacted the drain pipe itself. Panicking, Soto ran the profusely-bleeding J.N. home, after which he and Stephany Grullon ("Grullon"), J.N.'s mother, rushed her to the emergency room of St. Joseph's Children's Hospital; she was ultimately admitted for in-patient treatment.

Damages

At the hospital, J.N.'s treating physicians discovered that the impact with the cement barrier and drainage pipe had cut the top of J.N.'s head, split her upper lip open all the way to her nose, and avulsed several of her adult teeth; a CT scan also revealed that the impact fractured J.N.'s jaw and nasal bones. On June 8, 2019, J.N. underwent a surgical procedure to remove impacted gingiva and repair her gums and lips; six days later, J.N. underwent another surgery, this time for a nasal bone fracture realignment.

Numerous follow-ups with plastic surgeons, oral surgeons, and orthodontists followed, for which J.N. incurred $51,104.52 in medical expenses. Now 16 years of age, J.N. still has a scar on her upper lip, of which she is self-conscious, and she does not like to smile as the left side of her mouth droops a bit; she also finds it difficult to speak at times as her nerves twitch. Further, J.N. initially received dentures to replace her missing teeth, which caused her tremendous embarrassment at school when she had to remove her dentures to eat and her classmates would make fun of her; such was her embarrassment that she took to eating in the restroom before she received a bridge to replace her dentures. Even the bridge, better though it was than the dentures, did not save her entirely from embarrassment; J.N. testified that her classmates sometimes ask her about her teeth and gums, as the bridge does not appear natural, and it causes her discomfort, particularly when food becomes trapped inside. J.N.'s oral surgeon will eventually replace this bridge with dental implants, for which J.N. must first undergo a bone transplant surgery, expected to occur in the next year or so after her bones stop growing; these procedures will cost her an estimated additional $20,139.

Aside from the physical reminders of the accident, J.N. deals with chronic migraine headaches, anxiety, and a sleep disorder, for which she sees a therapist and a pediatric neurologist; according to her testimony, and that of Grullon, she had no history of such headaches or sleep disruption before the accident. Unfortunately, her headaches occasionally cause her to miss school, or to have to leave class to obtain medication from the nurse; she is also struggling to participate in activities which she used to enjoy, including ballroom dancing, as activity triggers her headaches. In spite of all of this, J.N. testified that she is doing well in school, and hopes to attend a Florida university after her high school graduation. J.N. also expressed a desire to go into medicine, to help others the way her treating physicians helped her.

Litigation

[3] The record reveals that, after J.N.'s accident, the county placed white tape along the uneven edges of the sidewalk in an effort to alert persons traversing the sidewalk to the danger present.

On May 14, 2020, Grullon sued the County on behalf of J.N., alleging in her Complaint that the County was negligent in failing to repair the damaged sidewalk or to otherwise warn of the hazard it created.[4] The County subsequently filed an Answer to Grullon's Complaint, disputing her negligence claims and raising several affirmative defenses; particularly, the County intended to challenge the foreseeability of J.N.'s injuries, an argument addressed in more detail below.

However, on September 20, 2022, Grullon and the County entered into a settlement agreement, in which the County agreed to pay Grullon $600,000 to settle her claim. The County then paid the $200,000 maximum it was authorized to pay under Florida's Sovereign Immunity Law, codified in s. 768.28, F.S., the net proceeds of which went into a trust for J.N.'s benefit.[5] However, still in question is the $400,000 balance of the settlement amount.

CONCLUSIONS OF LAW

House Rule 5.6(b)

Pursuant to House Rule 5.6(b), settlement agreements 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, J.N. raises a negligence claim, the elements of which are duty, breach, causation, and damages.

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; this is true whether the defendant is an individual, a private business, or a government entity.[6] When dealing with a government entity, however, the duty inquiry does not stop there; to determine whether liability may attach, courts must also look to whether the conduct at issue constitutes a "discretionary function" – that is, a quasi-legislative decision involving some measure of judgment or discretion, for which the government entity may generally not be sued – or an "operational function" – that is, a decision or action implementing policy, for which the government entity may generally be sued.[7]

The decision of whether or not to build a sidewalk is likely a discretionary function for which a local government would generally be immune from suit. Further, the building of a sidewalk in furtherance of such a decision does not alone create liability on the part of a local government; indeed, the Florida Supreme Court has recognized that a local government is not an "insurer" of persons using a sidewalk and cannot be held liable for every instance of injuries sustained because a sidewalk has a defect.[8] Instead, for liability to attach, the defect must have rendered the sidewalk unsafe and the local government must have had a sufficient length of time from the defect's appearance to have discovered the defect by the exercise of reasonable care and to repair it.[9] In such an instance, the Court found, a local government would have a duty to repair the defective sidewalk and to make it safe.[10]

Similarly, a local government's decision to maintain a drainage system is likely a discretionary

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[4] Grullon also named as co-defendants the East Bay Lakes Homeowners' Association and its management company, Westcoast Management & Realty, Inc.; Grullon resolved these claims with a $5,000 nominal settlement, which went into a trust for J.N.'s benefit.
[5] According to the testimony presented in the Special Master Hearing held in this matter, the money held in trust will be paid to J.N. in installments tied to her reaching three different, specified ages and is not otherwise accessible to anyone, including J.N.
[6] *Trianon Park v. Condo Assoc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985).
[7] *Id.*
[8] *City of St. Petersburg v. Roach*, 148 Fla. 316 (Fla. 1941).
[9] *Id.*; *City of Miami Beach v. Quinn*, 4 So. 2d 367, 5 So. 2d 593 (Fla. 1942).
[10] *City of Clearwater v. Gautier*, 161 So. 433 (Fla. 1935).

function for which the local government would generally be immune from suit. However, courts have found that, where the local government undertakes to build the drainage system, the local government has a duty to maintain the drainage system so that it does not present an unreasonable risk of harm to persons or property, and is liable for torts committed in failing to undertake such maintenance.[11]

Based on the foregoing, the County is likely immune from suit on the issue of whether or not it should have laid the sidewalk that caused J.N. to lose control of her bike, or built the drainage culvert in which she landed. However, the undersigned finds that, once the County chose to lay the sidewalk in question, and to build the drainage culvert, it had a common-law duty to persons using the sidewalk and passing by the culvert to maintain both in a safe condition. Thus, I find the first element of negligence met.

Breach

The existence of a duty of care is alone insufficient to sustain a negligence claim.[12] Once the 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.[13]

In considering what might constitute a breach of the duty of care owed to persons using a sidewalk, the Florida Supreme Court has found that a local government's failure to exercise reasonable diligence in repairing a known sidewalk defect amounted to a breach of the duty it owed to persons using such sidewalk.[14] Further, in a case involving a bicyclist injured when her bicycle hit concrete pieces left behind by the defendant during a sidewalk repair, causing her to tumble into an adjacent ditch and suffer injuries, the court found that it would be permissible for a jury to conclude that the negligent maintenance of said ditch constituted a breach of the duty the defendant owed to the bicyclist.[15] Similarly, in a case involving a motorist injured when her car slipped over an unusually-steep drop-off on a road's shoulder, the court found that it would be permissible for a jury to conclude that the hazard the drop-off presented was unreasonable in nature and therefore the defendant breached the duty it owed to the motorist.[16]

In the instant matter, the County had knowledge of the sidewalk's defective condition at least four years before J.N.'s accident, having received at least two complaints from the public reporting the dangerous condition the sidewalk presented and having sent an employee to inspect the stretch of sidewalk at issue. Indeed, the county employee recognized that the sidewalk needed to be repaired, and put in a work order for such repairs; however, the County did not repair the damaged stretch of sidewalk at issue until after J.N.'s accident, and neither did it place any kind of warning or barrier that might have alerted J.N. to the danger the sidewalk presented or otherwise have prevented her injury. Similarly, the County knew that its drainage system on the whole needed repairs, as it began a drainage culvert repair project that eventually led to the repair of the drainage culvert at issue; however, at the time of J.N.'s accident, the County had not placed any barriers to prevent persons using the damaged sidewalk from falling down the adjacent slope and into the culvert, where a drainpipe sat rusting and corroded, even after sending the employee to inspect the sidewalk. Based on the foregoing, I find that the County breached the duty of care it owed to J.N.

Causation

Once a duty and a breach thereof are established, causation must be determined. In making this determination, Florida courts follow the "more likely than not" standard, requiring proof that

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[11] *Bray v. City of Winter Garden*, 40 So. 2d 459 (Fla. 1949); *City of Tallahassee v. Elliott*, 326 So. 2d 256 (Fla. 1st DCA 1975).
[12] *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001).
[13] *Id.* at 221.
[14] *Quinn*, 5 So. 2d at 318.
[15] *Warren v. State Dept. of Transp.*, 559 So. 2d 387 (Fla. 3d DCA 1990).
[16] *State Dept. of Transp. v. Manning*, 288 So. 2d 289 (Fla. 2d DCA 1974).

the negligence proximately caused the plaintiff's injuries, which in turn requires the factfinder to analyze whether the injury was a reasonably foreseeable consequence of the danger created by the defendant's negligent conduct.[17] 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.[18] Further, this analysis does not turn on whether the defendant could foresee the exact injury the plaintiff suffered; rather, the analysis turns on whether prudent human foresight would lead one to expect that harm similar to that which the plaintiff suffered is likely to occur.[19]

In the instant matter, J.N. suffered the injuries in question when her bicycle tire struck an uneven stretch of sidewalk, causing her to lose control of her bicycle, tumble down an adjacent slope, flip over her handlebars, and land in a drainage culvert. The facts presented show that J.N. had never traversed this section of sidewalk before and would not, therefore, have been aware of the hazard, and the County presented no evidence that she saw the uneven surfaces before riding over them. Even if J.N. had seen them, in the case involving the bicyclist first discussed above, the court found that, given the momentum of the plaintiff's bicycle, it was not reasonably possible for her to safely avoid the hazard, so the fact that the plaintiff might have been able to see the hazard before impact did not render her approach to it the sole legal cause of her accident; instead, it was fair to argue that the defendant's negligent maintenance of the sidewalk and of the adjacent ditch may also have been a legal cause of the plaintiff's harm.[20]

Based on the foregoing, the undersigned finds that it was reasonably foreseeable to the County that a person biking along the sidewalk might lose control of his or her bicycle upon hitting the uneven stretch and sustain injuries; indeed, complaints received by the County from citizens in the area warned of the risk of harm that stretch of sidewalk presented to persons traversing it. It was also reasonably foreseeable to the County that a person biking along the sidewalk might not be able to stop his or her bicycle in time to avoid the impact. Further, though one does not generally expect someone who falls off of a bicycle to sustain the types of injuries J.N. sustained, taking the specific facts of this case into account, the undersigned finds that it was reasonably foreseeable that a person who loses control of his or her bicycle on the uneven stretch of sidewalk might tumble down the adjacent embankment due to the lack of a barrier preventing such an occurrence. It is also reasonable to assume that a person tumbling down the embankment might be unable to stop her downward momentum and, consequently, land in the drainage culvert at the bottom, in which lay a concrete barrier and a rusting and corroded drainpipe; injuries sustained from such a landing could, naturally, be much worse than those sustained just from falling off of a bicycle. Based on the foregoing, the undersigned finds that the County's negligence was a proximate cause of J.N.'s injuries.

[17] *Gooding v. University Hosp. Bldg., Inc.*, 445 So. 2d 1015 (Fla. 1984); *Ruiz v. Tenet Hialeah Healthsystem*, Inc., 260 So. 3d 977 (Fla. 2018).
[18] *Id.* at 982.
[19] Gibbs v. Hernandez, 810 So. 2d 1034 (Fla. 4th DCA 2002); *Deese v. McKinnonville Hunting Club, Inc.*, 874 So. 2d 1282 (Fla. 1st DCA 2004).
[20] *Warren*, 559 So. 2d at 388.

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.[21] 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) or "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).[22]

In the instant matter, the record reveals that J.N. suffered economic damages, totaling approximately $75,243.52, for the medical care necessary to treat the injuries she sustained in the accident. Any future medical care or therapy she receives will add to this total. However, her injuries were not just economic; J.N.'s testimony reveals that J.N. has also suffered emotional harm from the lasting impacts of her physical injuries. Based on the foregoing, I find that J.N. suffered actual damages resulting from the injury she sustained due to the County's negligence.

POSITIONS OF CLAIMANT AND RESPONDENT

Claimant's Position: The Claimant asserts that she is entitled to the balance of the settlement amount, totaling $400,000. In support of her position, the Claimant assert that the County was negligent, which negligence caused her injuries and other damages.

Respondent's Position: Counsel for the County indicated that, had the matter gone to trial, the County would have challenged the foreseeability of the Claimant's injuries; however, given the risk of losing that argument on summary judgment, the County supports the passage of this claim bill as a reasonable resolution of the claim. Counsel for the County also indicated that passage of the claim bill will not impact the County's operations as the settlement is structured to contemplate two annual payments of $200,000 each, thereby reducing the financial impact on the County's annual budget.

ATTORNEY AND LOBBYING FEES

Under the terms of the claim bill, attorney fees may not exceed 25 percent of the total award (that is, $100,000). Further, lobbying fees are limited by agreement of the parties to five percent of the total award (that is, $20,000).

RECOMMENDATION

Based on the foregoing, I recommend that HB 6529 be reported FAVORABLY.

Respectfully submitted,

CAITLIN R. MAWN,
House Special Master

[21] *McKinley v. Gualtieri*, 338 So. 3d 429 (Fla. 2d DCA 2022); *Birdsall v. Coolidge*, 93 U.S. 64 (1876).
[22] FLJUR MEDMALP § 107.