

November 28, 1997

SPECIAL MASTER'S FINAL REPORT

DATE

COMM.

ACTION

The Honorable Toni Jennings
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

NR
WM

Re: SB 48 - Senator Silver
HB 3013 - Representative Cosgrove
Relief of Alan Taylor

THIS IS AN EQUITABLE CLAIM FOR \$4,511,708.77
AGAINST THE SOUTH FLORIDA WATER
MANAGEMENT DISTRICT FOR INJURIES SUSTAINED
BY ALAN TAYLOR IN A BOATING ACCIDENT ON A
WATERWAY CONTROLLED BY THE DISTRICT.

FINDINGS OF FACT:

After having carefully reviewed the Exhibits submitted by both parties, having heard testimony of various witnesses at a hearing on September 25, 1997, including the Claimant, Alan Taylor; Lee Swanger (an expert retained by the Respondent); and Thomas Fratz, Director of the Right of Way Division of the Department of Construction and Land Management for the South Florida Water Management District, having heard presentations by counsel for both parties and having otherwise reviewed the pleadings and appellate briefs in the underlying judicial action, the Special Master hereby makes the following findings, conclusions, and recommendation:

On March 14, 1987, 18 year old Alan Taylor was severely injured when as a passenger in a boat traveling on a canal, the top of his head hit a steel I-beam supporting water pipelines crossing the Biscayne Canal at NE 131st Street in Dade County, Florida.

At the time of the accident, Alan Taylor was facing backwards. He was one of five occupants in a 19-foot boat being operated by his friend, Kevin Wright. Each of the

occupants, including Mr. Taylor, was very familiar with the canal and low bridge. They had been boating under the bridge for years, including earlier that same day. Mr. Wright was operating the boat at 15-20 mph and never slowed down or voiced any warning as he approached the obviously low bridge. The Claimant contends that the District was negligent in that it failed to correct the alleged dangerous condition or failed to warn him of it.

The evidence presented by the Claimant indicates that from 1964 until up to and including the date of the accident involving Alan Taylor, the Biscayne Canal (also known as the C-8 Canal) was under the control of the District and/or its predecessor in interest, the Central and Southern Flood Control District.

Although the canal was designed and constructed by the United States Army Corps of Engineers (Corps) it was turned over to the District in the early 1960s for operation and maintenance for flood control and water management purposes.

The bridge was already in place. The District did not design or construct the bridge, nor has the District ever owned or maintained the bridge. Rather, the bridge is owned and maintained by the City of North Miami.

However, the Claimant presented reliable evidence at trial, and again at the hearing, that the District was the entity that had the right to permit the pipelines and support structures crossing the Biscayne Canal.

Although the U.S. Army Corps of Engineers and the District made recommendations in the 1950s that the minimum vertical clearance requirement for bridges and other crossings over District canals should be 6 feet for maneuvering boats and maintenance equipment, the 4.2-foot clearance of the bridge at issue does not violate any applicable safety standards.

However, the 1985 version of the District's permit criteria manual, which was in effect on the date of the accident,

required a 6-foot vertical clearance under new bridges spanning District canals.

Although the District has not designated the canal a "recreational area," the citizens of the State of Florida did, on a regular basis, use the Biscayne Canal for recreational purposes. The District had actual knowledge of the recreational use of the canal and, in fact, permitted boat ramps into the canal.

It should be noted that several years prior to Mr. Taylor's accident, a similar accident occurred on the same canal involving a different bridge. The Respondent, both in the underlying trial and at the Special Master's hearing, by and through the testimony of Thomas Fratz, conceded that the District was aware of the 4.2 foot vertical clearance of the pipelines and support structure prior to the Alan Taylor accident.

Following the Alan Taylor accident, the District implemented the use of various warning signs and reflective tape in the Biscayne Canal as well as other district canals in South Florida.

The undersigned heard testimony from the Claimant, Alan Taylor, which was very credible. Although Mr. Taylor is an outstanding young man who has accomplished much in spite of his severe limitations, including having obtained a bachelor's degree, a master's degree, and having enrolled in law school subsequent to the occurrence of this accident, he has still been left with enormous physical, cognitive and psychiatric disabilities as a result of his injuries.

As a result of the accident, Alan Taylor has a left-sided hemiparesis which is a form of paralysis that basically deprives him of full use of his left arm or left leg. He also suffers from violent and uncontrollable muscle spasms in the left arm and leg, as well as muscle tightening and constricture of the hand. He has memory problems and other cognitive deficits as well as psychiatric problems. He is highly motivated and is doing extremely well to cope with these severe injuries. Notwithstanding, he is permanently brain damaged, severely

handicapped, and his condition will progressively get worse as he gets older.

LEGAL ISSUES:

This matter was initiated as a negligence action filed in the Circuit Court of the Eleventh Judicial Circuit in Dade County, Florida.

During the course of the litigation, the Respondent filed Motions to Dismiss and Motions for Summary Judgment in attempts to have the court dismiss the case on sovereign immunity grounds. These motions were denied. Likewise, motions for directed verdict were filed during the trial as well as post-trial motions requesting dismissal. All these motions were likewise denied.

The case was bifurcated with the issue of liability being tried in a one-week jury trial commencing on October 17, 1994. During the liability trial, the District raised various defenses including the alleged negligence of the Claimant, Alan Taylor, the operator of the boat, Kevin Wright, as well as the City of North Miami. The jury, following a lengthy deliberation, rendered a verdict finding the South Florida Water Management District guilty of negligence which was a legal cause of injury to the Claimant.

Following the conclusion of the liability trial, a second trial dealing with the issue of damages was held commencing November 8, 1994. Following the conclusion of the 5-day trial, the jury rendered a verdict on behalf of the Claimant in the amount of \$5 million. Post-trial motions filed by the District were successful in reducing the amount awarded to the Claimant and the court entered judgment against the District in the amount of \$4,511,708.77. The medical evidence was not disputed.

Thereafter, an appeal was taken from the jury verdict and judgment to the Third District Court of Appeal. The amount of damages awarded was never contested by the District in the appeal.

On May 29, 1996, the Third District Court of Appeal reversed the jury's verdict in the liability trial as a matter of law. In its terse opinion, the District Court did not set forth

the facts upon which the court relied in rendering its decision. It simply held that Mr. Taylor could not recover for his injuries against the District both because the District was protected by sovereign immunity and because the District was not negligent.

Based on the fact that the District Court's opinion was unappealable to the Florida Supreme Court, the Claimant entered into an agreement with the Respondent whereby the Claimant agreed to drop a pending motion for rehearing and agreed not to pursue an appeal to the Florida Supreme Court, in exchange for the Respondent's agreement not to seek payment of attorney's fees and costs. Moreover, it appears from the correspondence reviewed by the undersigned as well as testimony presented at the Special Master's hearing that at no time did the Claimant waive or forego his right to pursue this claim bill.

CONCLUSIONS OF LAW:

There is no duty of care under negligence law or otherwise to protect a person against dangers which are known to that person, or which are so obvious and apparent that the person may reasonably be expected to discover them. See *Ashcroft v. Calder Race Course, Inc.*, 492 So.2d 1309, 1311 (Fla. 1986). The low clearance of the bridge and the danger of hitting one's head on it at 15-20 mph is obvious to all boaters, and was actually known by and readily apparent to Mr. Taylor, and the boat driver, who had been boating under this bridge for years. The undersigned concurs with the appellate court that there was no negligence on the part of the District.

Although the Respondent contends that any conduct of the District was subject to sovereign immunity since it amounted to planning level, discretionary functions, this argument is moot. The facts are that the District did not own or maintain the 30+ year old bridge, it did not create the alleged dangerous condition, the hazard presented by the low clearance bridge was plain, obvious, and readily apparent, and the lack of any other accidents at the specific bridge over the preceding 30 years indicated it did not present a known dangerous condition. *Id.* See *DOT v. Konney*, 587 So.2d 1292 (Fla. 1991); *DOT v. Neilson*, 419 So.2d 1071 (Fla. 1982); *Barrera v. DOT*, 470 So.2d 750 (Fla. 3d DCA 1985). Moreover, it would not be in the public interest or equitable

to abrogate the District's sovereign immunity in this case given that the District was not negligent. *Taylor*, 676 So.2d at 11. See *Trianon Park v. City of Hialeah*, 468 So.2d 912, 919 (Fla. 1985) (in order to subject a governmental entity to liability, there must first be an underlying common law or statutory duty of care in the absence of sovereign immunity).

Despite the jury verdict awarding Mr. Taylor \$5 million, passage of the proposed bill would have the effect of diverting millions of dollars of the District's taxpayers' public funds away from authorized public projects to provide relief to an individual who has no existing legal entitlement to the funds. Such diversion of public funds would not be in the public interest and would be inequitable to the District and its taxpayers.

COLLATERAL SOURCES:

Mr. Taylor received and accepted \$100,000 from the City of North Miami and \$100,000 from Mr. Wright's insurance carrier in settlement of his claims against those parties for his injuries. In addition, Mr. Taylor received \$288,291.23 from insurance company reimbursements for medical expenses incurred.

ATTORNEYS FEES:

Limited to 25 percent of recovery under the provisions of s. 768.28, F.S.

RECOMMENDATIONS:

Therefore, based upon the foregoing, I recommend that Senate Bill 48, in the amount of \$4,511,708.77, be reported UNFAVORABLY.

Respectfully submitted,

William R. Pfeiffer
Senate Special Master

cc: Senator Silver
Representative Cosgrove
Faye Blanton, Secretary of the Senate
Richard Hixson, House Special Master