THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
408 The Capitol

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November 24, 1998

SPECIAL MASTER'S FINAL REPORT	DATE	COMM	ACTION
The Honorable Toni Jennings	11/25/98	SM	Fav/1 amend
President, The Florida Senate	12/2/98	TR	Fav/1 amend
Suite 409, The Capitol	1/7/99	FR	Favorable
Tallahassee, Florida 32399-1100			

Re: SB 20 - Senator John Grant
Relief of Patricia D. Baker

THIS IS A $503,224 EXCESS JUDGMENT CLAIM FOR NEGLIGENCE OF THE DEPARTMENT OF TRANSPORTATION IN PREVENTING AN ASSAULT AND RAPE AT THE I-75 WELCOME CENTER BATHROOM. THE FINAL JUDGMENT AWARDED MS. BAKER $445,313, AWARDED MR. BAKER $100,000, ATTORNEY FEES OF $136,336, AND COSTS OF $21,574. THE DEPARTMENT OF TRANSPORTATION HAS PAID $100,000 TO MS. BAKER AND $100,000 TO MR. BAKER.

FINDINGS OF FACT:

Ms. Baker and her husband were traveling south on I-75 on December 1, 1987, when they stopped at the Florida Welcome Center at about 12:30 a.m. to use the facilities. Mr. and Ms. Baker entered their respective restroom facilities. Ms. Baker entered a stall and used the facility and when she left the stall a male with a knife stepped out of an adjacent stall, forced her to return to a stall, stole her money and jewelry, forced her to undress and then raped her. During the attack Ms Baker was cut behind her left ear. Ms. Baker was forced to lie on the floor until the assailant left the restroom. Her husband was waiting at the front of the restrooms and after the attack, with the assistance of the maintenance attendant, attempted to find the attacker and called the local sheriff who responded to the call.

As a result of the attack, Ms. Baker was seen by the emergency room staff of the hospital in Hamilton County. She was released and returned to Tampa where Mr. Baker took her directly to the hospital. She was examined by her physician and released. Later that night she became hysterical and her physician admitted her to the hospital for 2 weeks to deal with the trauma. Ms. Baker has continued sporadically in the care of a psychiatrist and has been diagnosed with Post Traumatic Stress Disorder. In addition, Ms. Baker suffers from pancreatitis which was a preexisting condition. The pancreatitis causes Ms. Baker to become violently ill and has been diagnosed as a terminal illness with no prognosis of remaining life span. Ms. Baker testified she has continued to suffer from emotional distress as a result of the attack, that the attack exacerbated the pancreatitis, and that because of the attack, she has been unable to resume a normal marital relationship with her husband. She and her husband are currently separated and Ms. Baker is seeking a divorce.

At the time of this incident the Florida Welcome Center was owned by the Florida Department of Transportation (DOT) and operated jointly by DOT and the Department of Commerce (DOC). The DOC operated and staffed the actual welcome center and the DOT operated and maintained the restrooms, vending machine areas, and the picnic and parking areas. The maintenance of the area had been contracted by the DOT to Triangle Maintenance, Inc. This firm was retained to provide round the clock maintenance services for the facility with one or more attendants required to be on the premises at all times. One male attendant who was working the 12:00 to 8:00 a.m. shift at the time of the attack was not working in or around the women's restroom and thus did not observe the assailant. Security for the rest area was provided by the Hamilton County Sheriff, and the Florida Highway Patrol. These officers testified at trial that they tried to patrol the rest area two or three times a night.

The restrooms are constructed with the women's restrooms containing two complete facilities which are each off a main hall. (See attached diagram.) At any given time one side is be closed for cleaning while the other side is in use. Upon entering the main door of the facility, located at one end of a long hall, a patron turns right or left to enter the door of the open restroom area. Each side of the restroom contains five or six stalls with the sinks at the far end and the only exit beyond the sinks. The exit door from the open side enters the hall at the opposite end from the entrance. A patron then walks down the hall to the exit door which is adjacent to the entry.

At the end of the hall, near the exits from the open restroom, there is a fire door for emergency exit of the building. At the time of this incident, the fire door did not have a handle on the outside of the door but could be opened by pulling on the louvered area of the door. The fire exit door did not lock to prevent opening from the outside. The interior and exterior of the facility is well lit at night.

No evidence was presented as to how the assailant entered or exited the women's restroom facility.

Approximately one million people visit this welcome center each year.

The plaintiffs originally joined Triangle Maintenance as a defendant in this case and subsequently settled with Triangle Maintenance for $60,455. It is the claimant's position that this is not a collateral source and that the jury verdict should not be reduced by this amount.

<u>CONCLUSIONS OF LAW</u>: <u>Claimant's Argument</u>:

As a property owner who invites the public onto welcome center and rest area property, the DOT has a duty to protect the public from hidden dangerous defects in the facility, and from foreseeable harm.

The restroom facility was improperly designed so as to contain hidden dangerous defects about which the DOT failed to warn the public and the defects were the proximate cause of the injury to Ms. Baker. These included an emergency exit at the back of the facility which could be entered from the outside, a restroom facility which could only be exited by passing through the entire facility once the entrance door had closed, areas around the building in which an assailant could easily hide, and only a low fence protecting the facility from persons entering on a road behind the facility.

The DOT had a duty to provide security to protect Ms. Baker since the attack was foreseeable based on incidents at the welcome center and incidents at rest areas in the five surrounding counties. During the 3 years prior to the incident in questions, there had been 14 reported criminal incidents at the welcome center. Of those incidents three were between passengers of the same vehicle, six involved stolen wallets or purses either in the restroom or parking lot and one involved items stolen from a vehicle topper. There was only one incident of armed robbery and it was in the men's restroom. There were no reported rapes or attempted rapes. The admitted reports did include a robbery and stabbing at the Georgia Welcome Center.

At rest areas in the five surrounding counties there had been approximately 160 reported criminal incidents which included two incidents reported as rapes, two attempted murders, 27 solicitation or prostitution charges, and the remaining incidents ranged from strong armed robbery to vandalism. Additionally, the DOT knew of the criminal activity and in memorandums to the Secretary of District II, staff overseeing the rest areas in Alachua County recommended full time, on- premises security, or that the rest areas be closed.

Based on these incidents the claimant contended that the security provided by the Hamilton County Sheriff's Office and by the Florida Highway Patrol was inadequate; the DOT failed to coordinate with or seek assistance from either law enforcement agency to provide adequate security; the DOT knew criminal incidents were occurring; and, the DOT should have taken action to provide security or warned of the dangerous condition.

<u>Respondent's Argument</u>:

The respondent argued that sovereign immunity barred recovery by the claimant because the design of the restroom facility is a planning level function for which recovery is barred and there were no dangerous hidden defects which contributed to this accident which would require action by the DOT. Further, there was no evidence that any claimed defect contributed to the attack on Ms. Baker because it is unknown how the assailant entered the rest area or the restroom facility and there is no evidence that Ms. Baker attempted to exit the facility and was unable to do so.

As to the duty to provide security, the DOT argued that the decision to provide security at a rest area is a planning level function and a law enforcement function for which sovereign immunity bars recovery and further, that the incident was not foreseeable. There had been no previous report of rape or attempted rape in the welcome center and the 14 incidents reported at the welcome center, none of which were during the late night time period, were not of a nature that would provide notice that a rape may occur. The respondent further claimed that the information regarding incidents at other rest areas, which included the Alachua County rest area 98 miles away, and the DOT's knowledge of that criminal activity was improperly admitted to show the foreseeability of Ms. Baker's rape. The DOT argued that the other incidents were predominantly of a different character and were so far removed from the welcome center that the DOT could not foresee the possibility of this attack on Ms. Baker. The DOT further stated that the memos from the employee with oversight of the Alachua County rest areas concerned only criminal activity and prostitution problems at the Paynes Prairie rest area which was a unique problem for the DOT.

The DOT also claimed that the Florida Highway Patrol and the Hamilton County Sheriff's Offices provided security as part of their duty to patrol the highways. The Patrol is charged by statute with patrolling the state highways, maintaining public peace by preventing violence on the highways, and enforcing laws regulating public safety. The rest areas and welcome centers are part of the highways the Florida Highway Patrol is charged with patrolling.

Jury Verdict:

The Pinellas County jury found:

The attack on Ms. Baker was reasonably foreseeable by the DOT.

The legal causes of Ms. Baker's injury were the DOT's negligence in failing to provide adequate security and in the design of the building.

The DOT did not have a duty to warn Ms. Baker.

Ms. Baker was awarded:
$7,680 for lost property,
$8,079.90 for past medical costs,
$40,000 for future damages over 10 years
with a present value of 35,000.
$200,000 for past pain and suffering, and
$200,000 for future pain and suffering.

Mr. Baker was awarded:
$100,000 for his loss of services,
comfort, society and attention.

The final judgment was entered January 28, 1997. An amended judgment was entered February 24, 1997, to reduce the award to Ms. Baker by collateral sources. The amended final judgment awarded total damages to Ms. Baker of $445,313.85 and to Mr. Baker of $100,000.

The reduction of the judgment did not include the $60,000 received from the DOT contractor who settled with Ms. Baker prior to trial and was not a party at trial.

The DOT appealed to the Second District Court of Appeals and on December 31, 1997, the court, Per Curiam, affirmed the judgment.

General Conclusions:

The respondent requests the Legislature to overturn the jury verdict which was affirmed by the Second District Court of Appeals based on the same legal arguments which were made at trial and to the appellate court. No significant additional argument was made to the Special Master which would dictate that the Legislature should overturn the findings of the court on points of common law argued in this case.

The DOT did not dispute the amount of the damage award on appeal except as to the wording of the verdict form regarding what could be considered in determining future damages. At the hearing on this matter held by the Special Master, DOT did not contest the damage amount.

ATTORNEY'S FEES:

The trial court awarded attorney fees, costs and post judgment interest pursuant to the offer of judgment provisions of §768.79, F.S. The award of fees was based on a judgment 25 percent greater than the demand for judgment rejected by the Department of Transportation of $190,000. The court determined a reasonable attorney fee calculated in accordance with Supreme Court guidelines would be $974,512.50 for 1,835.9 hours, however, that fee was reduced by the court to 25 percent of the judgment or $136,335.85 in accordance with the 25 percent of judgment limitation on attorney fees in §768.28 (8), F.S. Reasonable costs were determined to be $21,574.39.

The respondent appealed the award of fees and costs pursuant to the offer of judgment statute. The DOT alleged the rejection of the claimant's offer was appropriate because this was a test case on the issue of whether the DOT would be liable for not providing security in rest areas. Additionally, respondent on appeal argued that there was no specific waiver of sovereign immunity in §768.28, F.S., or §768.79, F.S., for the payment of fees and costs pursuant to the offer of judgment statute.

On appeal the claimant generally argued that the award of fees and costs was mandated by §768.79, F.S., since the jury award exceeded the demand for judgment by more than 25 percent. Further, the fact this was a test case and a case with close questions of fact and law can only be considered by the court in determining a reasonable fee along with other issues such as the apparent merit in the claim, and the amount of additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

On appeal the awarding of attorney fees equal to 25 percent of the judgment as well as costs and post judgment interest on the fees and the underlying judgment were per curium affirmed by the Second District Court of Appeals along with the damage award to the Bakers. The court has applied the offer of judgment statute to the state and concluded that any amount exceeding the statutory cap of $200,000 is payable only through a claim bill. Pinellas Co., Board of County Commissioners v. Bettes, 659 So.2d 1365 (Fla. 2d DCA 1995).

CONCLUSIONS: The offer of judgment statute in §768.79, F.S., is the manner the Legislature has chosen to assure that litigants carefully assess the merits of a case. This statute provides that if an offer of judgment or demand for judgment is made and rejected and the final judgment exceeds that offer by 25 percent or more that the party rejecting the offer or demand is liable for attorney fees and costs of the other party. The courts have applied this statute in favor of the state when opposing parties have rejected offers of judgment or demands for judgment from the state. Additionally, the courts have applied this statute to the state up to the amount of the statutory limits on waiver of sovereign immunity and have held that trial courts may enter judgments for damages, costs, and fees in excess of the $200,000 cap or waiver of sovereign immunity. Those amounts in excess of the cap may only be payed upon action of the Legislature.

Respondent argued in this case that the rejection of a $190,000 offer of judgment was not unreasonable because it was at the limit of the agency's liability and thus the agency could not be liable for more than $200,000 regardless of the outcome of the jury verdict. Thus it was impossible for the plaintiff to obtain a judgment against the DOT which was more than 25 percent greater than the offer.

Since the Legislature does give great deference to jury verdicts in the claim bill process, it is incumbent on agencies to consider the full implications of the liability of the state in assessing a claim, not just the direct agency liability. Further, agencies do settle cases in excess of the cap by agreeing for the plaintiff to present a claim bill. The offer of judgment statute should be given effect so as to require an agency to assess the full potential liability of the state in assessing a claim rather than only that liability up to the statutory cap for waiver of sovereign immunity.

INTEREST: Under the sovereign immunity doctrine, governmental agencies cannot pay any judgment in excess of the statutory cap until passage of a claim bill. Therefore, it has been legislative policy not to award interest on money awarded by a jury that exceeds the statutory cap.

The DOT did pay the $200,000 when the appeal of the entire judgment was denied. Thus, no post judgment interest is due.

COSTS: Costs of $21,574.39 were awarded by the trial court in the final judgment.

RECOMMENDATIONS: I recommend amendments to provide for the Department of Transportation to pay:

1. The remaining $345,313.42 unpaid on Ms. Baker's final judgment less the $60,000 received from the DOT contractor Triangle Maintenance, Inc., which was settlement for the same incident. In light of Ms. Baker's pancreatitis, the $200,000 awarded for future pain and suffering should be paid to Ms. Baker over a 10-year period with reversion to the state of any remainder should Ms. Baker die before the final payout;

2. The payment of $21,574.39 in costs; and

3. The payment of $136,335.85 in attorney fees which is 25 percent of the final judgment.

Accordingly, I recommend SB 20 be reported FAVORABLY AS AMENDED.

Respectfully submitted,

Dorothy S. Johnson
Senate Special Master

cc: Senator John Grant
Faye Blanton, Secretary of the Senate
John Topa, House Special Master