THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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November 25, 1998

SPECIAL MASTER'S FINAL REPORT	DATE	COMM	ACTION
The Honorable Toni Jennings President, The Florida Senate Suite 409, The Capitol Tallahassee, Florida 32399-1100	11/25/98	SM CF FR	Unfavorable

Re: SB 38 - Senator George Kirkpatrick
Relief of Walter S. McAdams, Jr.

THIS IS AN EQUITABLE CLAIM AGAINST THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES FOR $217,310 IN COSTS AND ATTORNEY'S FEES INCURRED IN DEFENSE AGAINST A DEPENDENCY PROCEEDING BASED ON AN ABUSE INVESTIGATION.

FINDINGS OF FACT:

On May 17, 1994, a health care professional reported a suspected abuse incident to the Child Abuse Hotline with the Department of Health and Rehabilitative Services, now known as the Department of Children and Family Services (department). The report was based on statements made by one of the claimant's daughters during a counseling session arranged by the claimant's ex-spouse and her own counselor. Under §415.505, F.S., relating to the department's obligation to receive and investigate reports of known or suspected child abuse or neglect, the department received the report and notified the Alachua County Sheriff's Office. Subsequently, the department called in the Child Protection Team as statutorily permitted under §415.5055, F.S.

On May 18, 1994, a member of the Children Protection Team and an Alachua County Sheriff's Department detective visited the home and determined that a criminal investigation was necessary. However, the record

indicates that the investigative techniques and line of questioning by both parties as reported in the offense/incident report were suspect.

On May 20, 1994, the department filed a petition based on a probable cause belief that the children were at risk. The children were placed with the mother and access by the father, the claimant, was restricted.

Allegations of abuse initially focused against the claimant and his brother, but over the course of the investigation expanded to the claimant's mother, father and his future spouse. Throughout the investigation, a number of other parties became involved including the Sheriff's Department of Alachua County, the Child Protection Team, a number of independent counselors and health professionals, and the Guardian Ad Litem Program. For almost a year before the trial, the claimant's children were subjected to a number of interviews, physical and mental examinations and counseling sessions. They were, at times, precluded entirely from visiting their father, or under restricted supervised visitations with their father.

The record shows that the department's handling of investigation was not always even-handed. The department could have been more objective in its dogged and oftentimes, singular pursuit to prosecute the claimant. For example, the department did not pursue as aggressively and failed to follow-through on the allegations against the claimant's brother. The department also did not follow-through on an anonymous abuse hotline report on May 20, 1994, regarding allegations against the claimant's ex-spouse's emotional abuse of the daughters (e.g., coaching the children into making abuse allegations against their father and uncle). In addition, the department did not inquire into the claimant's ex-spouse's mental state considering she was in therapy, the pending acrimonious divorce, her inconsistent support of the allegations against the claimant and failure to ensure permitted visitations. Even after the claimant wrote a January 8, 1995, letter expressing his serious concerns on the department's handling of the abuse investigation, the department never

followed through on submitting the claimant's ex-spouse to a psychological examination or submitting her to a polygraph test although a report had been filed with the abuse hotline on May 20, 1994. Although not required, the claimant willingly submitted himself to a polygraph test to prove his innocence.

The record also shows that enough consistent statements were being made by the children to various investigative or counseling parties to support pursuit of the investigation. However, the children probably suffered additional damage from the divorce proceedings and abuse investigation regardless of any actual sexual abuse. Moreover, the poorly coordinated involvement of so many people in their capacity as law enforcement officers, counselors, health practitioners, and guardian ad litems, may have cumulatively contributed, in part, to the contamination of the process and weakened what the department believed was a viable case.

However, the department's statutory responsibility for these other parties was limited to notification to the law enforcement agency and the Child Protection Team of the University of Florida. Nonetheless, I find that the claimant and his family, including the daughters, could have been spared some of the emotional ordeal and economic toll incurred during this investigation, and the department might have avoided a costly 3-day trial which resulted in a dismissal.

LEGAL PROCEEDINGS: On May 20, 1994, the department filed a juvenile dependency petition under Part III, Chapter 39, F.S., and the Florida Rules of Juvenile Procedure to remove the claimant's daughters from custody based on allegations of sexual abuse by the claimant and his brother. The Court granted the petition and the children were placed in sole custody of the claimant's ex-spouse, with restricted access by the father, the claimant.

In March 1995, a 3-day hearing was conducted by Judge David E. Bembry. Over 22 lay and expert witnesses testified. On July 15, 1995, Judge Bembry whose has presided over juvenile and dependency cases for almost 19 years, entered an Order Dismissing the Juvenile

Dependency Case. The Court found that the allegations arose after unsuccessful reconciliation efforts and threats by the claimant's ex-spouse, that certain investigative techniques by the department had been "highly suspect" rendering the process contaminated, that claimant's ex-spouse probably falsified information and prodded the children in their allegations, and that the department had "wholly failed" to prove the sexual abuse allegations.

The claimant filed a motion to tax costs under §57.041, F.S., relating to award of costs to a prevailing party. The claimant withdrew a motion for attorney's fees. On November 5, 1995, Judge Bembry denied the motion for costs on the basis that the department had acted on good faith allegations of a third party and that the department had a statutory duty to prosecute the case to its ultimate unsuccessful conclusion. The claimant appealed and the appellate court reversed and remanded with the order to identify and award those costs "reasonably and necessarily" incurred by the claimant in defending against the department's petition. See *W.S.M., Jr. v. Dept. of Health and Rehabilitative Services* (Fla. 1st DCA 1997). On December, 1997, Judge Bembry entered an Order awarding total costs of $15,686.39.

CLAIMANT'S POSITION:

1. The Doctrine of Sovereign Immunity precludes the claimant from seeking recovery under any tort theory against the department because the department acted within its statutory duty to prosecute an abuse investigation even to an unsuccessful conclusion

2. The claimant has no other legal remedy to seek recovery of attorney's fees and other costs.

RESPONDENT AGENCY'S POSITION:

1. The department acted in good faith and pursuant to its statutory obligation.

2. Claimant has not exhausted his legal remedies for attorney's fees under §57.105, F.S., and for damages under several causes of action including "malicious prosecution" and other tort claims under §768.28, F.S.

3. Claimant seeks costs not sought at the trial level or recoverable under existing case or statutory law.

4. Claimant seeks past and future damages caused, in part, if at all, by certain parties functioning independent of the department.

5. Claimant seeks equitable relief outside the scope of the claimant's claim and seeks special treatment as an individual who is in a larger class of similarly situated persons.

CONCLUSIONS OF LAW: The claimant seeks redress to recover present and projected costs including counseling expenses and attorney's fees totaling $217,310.14 incurred as a result of litigation initiated by the Department of Children and Family Services in a juvenile dependency proceedings. It should be noted that this amount has been revised since the claim bill was filed.

Sovereign Immunity

Under chapters 39 and 415, F.S., the department acted within its legislatively delegated powers to investigate and had a statutory duty to prosecute the matter to its conclusion, even if unsuccessful. The department's conduct appears to satisfy the four threshold questions for invoking sovereign immunity. See Commercial Carriers Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979). Preventing child abuse is an exercise of the agency's policy, judgment, statutory duty and expertise. Judge Bembry testified that in his opinion the department acted in accordance with the law. Moreover, while a review of the record suggests that the department could have done a better job of investigating, its conduct was not egregious. Moreover, the record would not support a claimant's tort claim under §768.28. For example, the claimant would probably not be able to prove the fourth and fifth elements of a claim for "malicious prosecution": 1) that the proceeding was commenced or continued, 2) that he was the legal cause of the proceeding, 3) that the proceeding was terminated in his favor, *4) that probable cause for the proceeding was absent, and 5) that malice was present* and 6) that

he suffered resulting damage. See McCraney v. Barber, 677 So.2d 355, (Fla. 1st DCA 1996). Moreover, §768.28(9)(a) bars an action for malicious prosecution against the state or its subdivisions arising from the malicious acts of their employees. Therefore, the claimant is without legal redress to pursue any tort claim against the State successfully.

Attorney's Fees

A final amended affidavit as to attorney's fees, upon which the claimant's claim for attorney's fees is based, was filed with the undersigned, on November 10, 1998. The affidavit sets forth the total reimbursement sought:

Attorney's Fees	258.90 hours	$150.00	$38,835.00
Associate Attorney Fees	189.00 hours	$ 85.00	$16,065.00
Paralegal Fees	114.90 hours	$ 45.00	$5,170.50
	562.80 hours	TOTAL	60,070.50

In order to recover attorney fees under current law, there must be some statutory or contractual basis unless the parties acquiesce or there is a waiver by the other party. Stockman v. Downs, 573 So.2d 835, 838 (Fla. 1991). The party must then move for and present proof of fees "within a reasonable time" after the final judgment. Id.

There was and still is no provision under part III, Chapter 39, F.S., relating to dependency proceedings, or under Florida Rules of Juvenile Procedure, allowing for a respondent party to respond to a dependency petition and plead for attorney fees during the proceedings should the petition be dismissed. There is no common law basis for recovery of attorney's fees either in these type of proceedings.

Thus the claimant was limited to recovery under §57.105, F.S., which provides for attorney fees in any civil action where the court finds there is a complete absence of justiciable issue of fact or law raised by the losing party. The law is clear, however, that the prevailing party must plead the claim for attorneys fees with specificity to prove entitlement and that the court must state explicitly in its order the basis for awarding the attorney's fees. Id. The record indicates, however, the claimant withdrew an amended motion for attorney's fees and the trial court never made a finding of complete absence of justiciable issue of fact or law in its order.

The claimant did not refile his motion or file a post-judgment motion for attorney's fees which he could have done as a 'collateral and independent claim' subsequent to the resolution of the underlying action. However, the undersigned's own review of the record below and the final claim bill hearing including testimony therein by the trial court judge concludes that there were justiciable issues of fact or law for the department to proceed under its statutory duty, that the motion would have been denied, and that an appeal would have been unsuccessful as well. It is questionable what would have been gained if the claimant's attorney had pursued the claim for attorney's fees and asked the court to make the necessary finding to preserve the right for the record.

Throughout the proceedings, the claimant expressed his frustrations and concerns about his increasing attorney's fees to which the department responded that it could not help. On March 2, 1998, per a request by the department based on a plea from the respondent claimant to recover his attorney's fees, the Attorney General issued an advisory opinion regarding the recovery of attorney fees by a prevailing party in a dependency action. See Op. Att'y Gen. Fla. 98-18 (1998). The Attorney General concluded that the department may not lawfully pay attorney fees incurred by a prevailing respondent to a dependency petition under Part III, Chapter 39, F.S., when there was no request for attorney fees made during the pendency of the case, no court order to award attorney's fees, and no pending issues before the court. The Attorney General advised that the respondent's only

remedy lay with the legislative claim bill process to recover attorney's fees.

Costs

As to the children's counseling costs, the claimant served notice, on October 30, 1998, to withdraw the claim for future counseling expenses for his daughters totaling $19,200.00, which left a request to recover $2,800.00 in past counseling costs. Even if the claimant had provided sufficient evidence to support a claim for recovery of counseling costs, it is not recommended for the reasons stated later in the report.

As to court costs and expenses, the claimant had the opportunity and did submit a list of all his costs to the department although the department initially resisted payment. Finally, the Court entered an Order, in accordance with the mandate of the appellate court, and pursuant to an oral agreement by the parties for the department to pay $15,686.39, all of the costs presented by the claimant at the time. The department refused to pay attorney's fees and the court did not enter an award for attorney's fees. It is not known why certain costs and expenses such as appellate filing fees and deposition costs were not originally submitted along with that list. Therefore, the claimant waived the right to add more costs to be recovered at that point.

Many of the claimant's costs and expenses were paid through voluntary contributions made by the claimant's family on his behalf. The fact that the claimant's family lent or donated money or that the family converted personal or real property into assets to assist the claimant are laudable but voluntary acts. Without going into all details of these costs and expenses, any obligation on the part of the claimant to repay his family and friends is that of the claimant and not the public. Other costs actually relate to the defense of other family members and are outside the scope of this claim bill.

Even so the law limits the recovery of certain other costs and expenses and the claimant could not be reimbursed for those costs. With the exception of certain statutory

exceptions, a prevailing party is entitled to recover all legal costs and charges following a judgment in its favor under §57.041, F.S. (1993). See also, The Florida Bar v. Bosse, 609 So.2d 1320 (Fla. 1992). The fact that the other party is a state agency does not preclude the award. Simpson v. Merrill, 234 So.2d 350 (Fla. 1970). Taxation of costs is applicable in juvenile proceedings. W.S.M., Jr. v. Dept. of Health and Rehabilitative Services, 692 So.2d 246 (Fla. 1st DCA 1997). However, under §39.414, F.S. "court fees" and witness fees for certain witnesses (parties, parents, legal custodians, and children named in petitions) are not included in an award of costs against the department in dependency proceedings.

GENERAL CONCLUSIONS: The claimant incurred substantial attorney's fees and costs in defending himself and his family throughout this dependency proceeding. The investigation no doubt caused emotional and economic consequences which the family will have to deal with over time. It is apparent from the record that these children's relationship with their father will be in need of repair as a consequence of the divorce proceedings and the department's investigation.

Although the claimant and his family underwent a harrowing experience, the claimant's claim is not an isolated one but is in fact, representative of a class of claims by persons who have or could raise similar claims against the department in child abuse investigations. I find, however, that the department not only acted within its legislatively delegated powers to investigate but had a statutory duty to prosecute the matter to its conclusion, even if unsuccessful.

As the Honorable David E. Bembry, judge in the trial court dependency proceedings, testified at the final hearing of the claim in November 1998, the department may not have always acted in good judgment (e.g., failure to investigate the mental state of mind and conduct of the claimant's ex-spouse) but it did act in good faith and in accordance with its statutory obligations and procedures.

On the other hand, a review of the record strongly indicates that the department could have handled the

abuse investigation better and might even have avoided the need for a trial.

In sum, I find that the claim for attorney's fees and costs including counseling costs involves significant policy issues, i.e., whether the law should allow recovery of attorney's fees and costs by a child's parent or guardian or a county prevailing in dependency cases dismissed by the court and whether this would have a "chilling effect" or otherwise impair the department's ability to carry out its statutory duty.

For the past four legislative sessions, legislation on this issue has failed to pass. It is the Legislature's prerogative how to balance best the protection of children against abuse and the undue burden placed on parents and other persons who must defend themselves in child abuse investigations by the Department in the State of Florida. Bearing in mind that this claimant appears to be without other legal redress, it is a decision to be made by the Legislature whether the time is ripe to change current policy and law in light of this claimant's experience and others similarly situated.

STANDARDS FOR FINDINGS OF FACT: Findings of fact must be supported by a preponderance of evidence, although the Senate's Special Master is not bound by the formal rules of evidence or procedure applicable in the trial of civil cases. The claimant has the burden of proof on each required element.

RECOMMENDATIONS: Accordingly, for the reasons stated herein, I recommend that Senate Bill 38 be reported UNFAVORABLY.

Respectfully submitted,

Maria Isabel Matthews
Senate Special Master

cc: Senator George Kirkpatrick
Faye Blanton, Secretary of the Senate
Tom Cooper, House Special Master