THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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November 17, 1999

SPECIAL MASTER'S FINAL REPORT	DATE	COMM	ACTION
The Honorable Toni Jennings President, The Florida Senate Suite 409, The Capitol Tallahassee, Florida 32399-1100	11/19/99	SM ED FR	Fav/2 amend

Re: SB 42 - Senator Roberto Casas
HB 461 - Representative Jerry Melvin
Relief of Andrew Greene

THIS IS AN EXCESS JUDGMENT CLAIM AND A REQUEST FOR ATTORNEY'S FEES AND COSTS AGAINST THE SCHOOL BOARD OF BROWARD COUNTY BASED ON A JURY VERDICT AND FINAL JUDGMENT, ARISING FROM DAMAGES INCURRED FROM THE RELEASE AND PUBLICATION OF RECORDS CONTAINING CONFIDENTIAL OR DEROGATORY MATERIAL PRIOR TO A LOCAL RUN-OFF ELECTION FOR A SCHOOL BOARD SEAT.

FINDINGS OF FACT:

The claimant, Mr. Andrew Greene (hereinafter "Mr. Greene"), is a 47-year old former employee of the respondent, the School Board of Broward County (hereinafter "School Board). The School Board employed Mr. Greene as a part-time (non-contract) teacher from 1981 until 1992. Mr. Greene taught primarily adult and community-based education. Despite his interest, inquiries and requests, the School Board never granted Mr. Greene permanent or full-time contract teaching employment. The record is silent as to the basis for the denial other than there might have been budgetary constraints at one time or another. There is no evidence in the record reflecting negatively on Mr. Greene's qualifications, teaching abilities or performance. His temperament and vocal complaints about school

operations sometimes antagonized a few of his colleagues and administrative superiors.

Due in part to his personal and professional frustration with school operations and the administration, Mr. Greene decided in December 1991 to run for the School Board's District V seat for a 4-year term. The seat's base salary was $10,000 annually. The School Board, consisting of 10 members, governs the fifth largest school district in the United States. Mr. Greene faced, at a minimum, the Democratic incumbent. Mr. Greene's campaign platform included eliminating nepotism and trimming the top administrative structure and administrative salaries.

On July 23, 1992, and August 26, 1992, the Sun-Sentinel, the largest -paper in Broward County endorsed Mr. Greene, whereas the Miami Herald endorsed the incumbent. Following the endorsement, Mr. Greene's records were checked out for review.

On September 1, 1992, Mr. Greene came in second in the primary election, garnering 34% of the votes while the incumbent garnered 50%, thereby necessitating a run-off election. Following the primary election, Mr. Greene's personnel records and related records became the subject of inquiries and public record requests, culminating with the School Board's release of confidential or derogatory material to the press. Dr. Tom Johnson, an associate superintendent for training, later admitted that the information and records were confidential and should not have been released.

Based on the release, the Miami Herald printed a story on September 22, 1992, detailing the particulars of two primary events: 1) Mr. Greene's 7-week counseling treatment in 1985 which were initiated due to comments Mr. Greene made to an adult education program counselor regarding his plot to kill an aunt over an inheritance dispute, and 2) an investigation surrounding a series of anonymous letters of complaint to the School Board. On September 23, 1992, the Sun-Sentinel printed a similar story with inflammatory headlines.

On October 1, 1992, Mr. Greene lost the run-off election to the Democratic incumbent board member, coming in second. The incumbent board member succeeded in her re-election bid at the general election on November 1, 1992. Mr. Greene ceased employment with the School Board thereafter.

STANDARDS FOR FINDINGS OF FACT: Findings of fact must be supported by a preponderance of the 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.

LEGAL PROCEEDINGS: In 1993, Mr. Greene filed suit against the School Board of Broward County in the circuit court of the 17th Judicial Circuit for Broward County, Case No. 93-22732. He advanced two theories of liability for recovery: negligence and invasion of privacy, and claimed damages for loss of employment and mental suffering. [Note: Mr. Greene brought a second suit against the individual school and non-school board members under essentially the same operative facts but for claims of intentional torts. (Greene v. Siegle, et al., Case No. 96-7215/Appellate Case No. 98-2490). This suit was voluntarily dismissed in October 1999 upon execution of a general release just days before the 4th DCA issued an opinion (now rendered moot) affirming summary judgments entered in favor of the defendants, with the exception of one individual school board member.]

In March 1997, Mr. Greene made a demand for judgment against the School Board, pursuant to §768.79, F.S., for $225,000, inclusive of attorney's fees and costs. The School Board did not accept or counter the settlement offer.

In October 1997 after a 5-day jury trial, the jury returned a verdict finding the School Board liable for damages totaling $250,000.00 based on the negligence count and $600,000.00 based on the invasion of privacy count. Judge Rosemary Usher Jones entered a final judgment on October 10, 1997.

The School Board appealed the judgment to the First District Court of Appeals. On June 16, 1999, the 1st DCA affirmed the verdict and final judgment but remanded to the trial court to limit the collectibility of the judgment amount to conform with the statutory cap of $100,000.

CLAIMANT'S POSITION:

- The School Board is liable based on the same legal arguments made at the trial court and appellate court that the School Board breached multiple duties owed to Mr. Greene when it invaded Mr. Greene's right of privacy by negligently placing and disseminating to the press private or confidential information that was of a derogatory nature and that was not open for public inspection in contravention of the procedure in §231.191, F.S. (1991).

- The jury awarded damages based on the substantial competent evidence and testimony and the final judgment was upheld on appeal.

- Mr. Greene is entitled to attorney's fees, representing 25% of the judgment, and to costs, based on §768.79, F.S.

RESPONDENT AGENCY'S POSITION:

- The School Board is not liable based on the same legal arguments made at the trial court and appellate court that the School Board did not violate its statutory duty regarding the release of files under §231.191, F.S., and that the documents released were not confidential and were subject to public inspection under §231.191, F.S.

- The evidence is insufficient to prove damages, and alternatively, the amount is excessive.

- Mr. Greene is not entitled to attorney's fees and costs under existing case law, statutory law, or otherwise, or alternatively, Mr. Greene has failed to provide sufficient evidence to support the claims for attorney's fees and costs.

CONCLUSIONS OF LAW: The Legislature gives great deference to jury verdicts in the claim bill process. The jury verdict found liability

against the School Board and awarded $850,000 for damages. The final judgment was affirmed on appeal although the court remanded the case to limit Mr. Greene's collectibility under the judgment to $100,000 in accordance with the sovereign immunity statute under §768.28, F.S. Thus, the Legislature must approve Mr. Greene's claim bill before he can recover any of the excess judgment.

Liability--The jury verdict assessed liability under two theories of recovery. No significant or new arguments were made during the Special Master hearing or through supplemental documentation that would dictate a recommendation to overturn the jury verdict and the findings of the trial court and appellate courts on points of law arguments.

1. Negligence: The School Board was negligent in its statutory duty when it released Mr. Greene's personnel file including privileged or confidential information and derogatory information in contravention of the procedure set forth in §231.191, F.S. The School Board had a duty under §231.291, F.S., to provide Mr. Greene 10-day notice prior to the release of any derogatory material in his employee's personnel file which is public record under s. 119.14, F.S. Personnel files are defined to include all records, information, data, or materials maintained by a public school system, in any form or retrieval system, which is uniquely applicable to that employee whether maintained in one or more locations. An employee's medical records, including psychiatric and psychological records, however, are confidential.

   The School Board violated its duty under the statute by releasing confidential records relating to Mr. Greene's psychological counseling through the School Board's employee assistance program, and derogatory material within his personnel file, without providing Mr. Greene 10-day notice before public disclosure and dissemination to the press. The confidential and derogatory material related to Mr. Greene's referral and counseling with the School

Board's Employee Assistance Program for 6-7 weeks in 1985, prompted by his disclosure to a programs' counselor of his plan to kill an aunt over an inheritance dispute. The material and records also related to a few investigations at the school in which Mr. Greene was either the sole target or complainant. The first Special Investigative Unit investigation began in December 1989, to investigate anonymous complaint letters and spanned over three years as intertwined with subsequent investigations regarding improper conduct allegations made by Mr. Greene. The investigation entailed recorded interviews taken under oath with witnesses, including Mr. Greene and the programs' counselor who disclosed information regarding the counseling session. No findings of probable cause were found nor the identity of the letters' author ever determined as indicated by a disposition form dated by the SIU investigator on 7/29/93.

The School Board's negligent act resulting in press publication of confidential and derogatory material immediately preceding the date of the Democratic run-off election proximately deprived Mr. Greene of his ability to pursue employment as a teacher, subjected Mr. Greene to the scorn and ridicule of friends, family and colleagues, and caused him serious mental suffering.

2. Invasion of Privacy: The School Board allegedly invaded Mr. Greene's privacy when it released privileged or confidential records and information to the local press. The elements of the tort of invasion of privacy are public disclosure of private facts that are offensive and are not of public concern. *See Cape Publications, Inc. V. Hitchner*, 549 So.2d 1374 (Fla. 1989).

   It is not so clear from the record that the facts were not of public concern. By virtue of Mr. Greene's election bid as a local school board member, it is questionable whether Mr. Greene had a legitimate expectation of privacy. Although Florida citizens are afforded greater protection under the state's

constitutional right of privacy in Sec. 23, Art. I of the Florida Constitution than under the federal constitution, there is no guarantee against all intrusion, and the expectation of privacy depends upon the circumstances. *See City of North Miami v. Kurtz*, 653 So.2d 1025 (Fla. 1995)

The public interest in a candidate transcends the bounds of privacy accorded an individual citizen. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Nonetheless, the jury was instructed and found that the School infringed on Mr. Greene's privacy in the "wrongful dissemination or publication of truthful private information concerning Andrew Greene that is not a legitimate news item, is not a part of the public records, and has not previously been disseminated or published, and the dissemination or publication is so objectionable that it would offend the sensibilities of a normal person." Notably, the record reflects that during the jury deliberations, the jury came back with a request to provide a definition for invasion of privacy and explain the distinction between private and public. The jury subsequently found the School Board liable on this count and the jury verdict was upheld on appeal.

Damages--The jury awarded damages of $850,000, apportioning $250,000 under the negligence count and $600,000 under the invasion of privacy count. Damages alleged during the trial included loss of employment and mental suffering.

1. Loss of Employment: Mr. Greene is no longer employed with the School Board. Although Mr. Greene holds a bachelor of arts degree in education from the University of Miami, and certification in K-12 and special certification for Social Studies, Elementary Education, and Gifted, Mr. Greene was not able to secure any part-time non-contract, let alone full-time employment in the teaching field from 1992 until 1999. Available records indicate a concerted effort to find teaching employment within and outside the School Board district. Notably, a

review of the School Board's website identifies its critical teacher needs area in Early childhood, English, Math, Music, Reading, Science, and working with at-risk students, and a sliding scale of annual teaching salaries beginning with $29,100 with 0 years of experience.

Mr. Greene has performed general office work for in-kind service with a private investigative firm since 1994. At the November 5, 1999, Special Master hearing, it was disclosed that Mr. Greene finally found teaching employment after six and half-years through the assistance of a colleague and friend. Mr. Greene student tutors 2-3 hours per week at an hourly wage of $10 in the areas of math, science, social studies, reading, English, penmanship, and religion. In addition, Mr. Greene also teaches sporadically as a substitute teacher with the Peace Lutheran School on as-needed basis, teaching K-8 in English, science, math, social studies, religion and physical education. He averages 2 days per week at a hourly wage of $8.

Mr. Greene has had no other collateral sources of income, other than dividends and capital gains he receives annually arising out of a $50,000 inheritance in 1987.

2. Mental Suffering: There is no clear yardstick for measuring, let alone proving, damages such as humiliation, indignity, ostracization in the community, and mental and emotional distress. Although Mr. Greene initially attended 18 counseling sessions following the incident, he stopped because he questioned their effectiveness until resolution of his legal matters. It is evident from the record and otherwise that Mr. Greene's psychological well-being is hampered by the ongoing anger and obsession over the incident and that he would benefit from a resumption of counseling sessions.

   I reviewed a number of publications including jury verdict reporters and tables, and allowed for subjective variances between cases in determining

an appropriate range in measuring and awarding these types of damages. However, I have again relied upon the enlightened conscience of the competent jurors who acted as the fact-finders in the 5-day trial. The jury heard and witnessed first-hand the testimony, evidence, the numerous facts, and demeanor of the witnesses and the defendant. The jury was also cognizant of Mr. Greene's pre-existing emotional temperament and mental state when it rendered an unanimous verdict reflecting its collective assessment as to the School Board's liability and Mr. Greene's damages arising from his abortive foray into the local political arena.

Conclusion: The jury verdict was most vigorously contested by the School Board. However, the School Board has not satisfied its burden to show that the verdict was unsupported by any credible evidence, was influenced by corruption, passion, or prejudice, had some reasonable relation to the damages shown; or was based on post-judgment considerations that were not known at the time of the jury verdict. However, I recommend a downward adjustment from the damages award of $850,000 to $347,210 as follows:

Counseling expenses (18 sessions with Family Service Agency from 11/92 - 4/93)	$ 360.00
Loss of Teaching Employment (representing 6.5 years based on an average of 6-year salary prior to 1992)	$ 96,850.00
Past, Present, and Future Mental Suffering	$250,000.00
	$347,210.00

ABILITY TO PAY AND PAYMENT SCHEDULE:

The School Board has expended a lot of time and money to defend this suit and the individuals in an accompanying suit. Its exposure might have been reduced if the demand for judgment had been accepted or some other settlement could have been reached. The sovereign immunity provision does not and would not have precluded the School Board from settling for an amount in excess of the $100,000 statutory cap with stated terms

that Mr. Greene would have to pursue a legislative claim to collect on the amount in excess of that cap.

According to John M. Quercia, Associate Superintendent for Financial Management and Support Services in a November 12, 1999 letter, the School Board of Broward County is self-insured to $300,000 per occurrence, and has a policy in effect providing $700,000 in coverage in excess of the self-insured retention. As of November 9, 1999, in a letter from the National Director for Arthur J. Gallagher & Co-Boca Raton regarding the status of the insurance policy, the School Board has expended $518,371.58 in expenses under this claim, including the $100,000 already paid to Mr. Greene. Thus $481,628.42 remain under the policy limit for expenses and potential loss payments. In the event that the claims award were to exhaust the School Board's insurance coverage, the claim would be paid from the county's unappropriated general funds.

ATTORNEYS FEES: Section 768.28(8), F.S., limits claimant's attorney's fees to 25 percent of claimant's total recovery by way of any judgment or settlement obtained pursuant to §768.28, F.S.

On March 10, 1997, Mr. Greene made an offer of judgment to the School Board for $225,000, inclusive of attorney's fees and costs. The School Board did not respond and Mr. Greene prevailed with a jury verdict of $850,000. An order was entered entitling Mr. Greene to attorney's fees and costs which Mr. Greene did not pursue given the sovereign immunity statute. Under §768.79, F.S., litigants are encouraged to carefully assess the merits of a case. If an offer of judgment or demand is made and rejected and the final judgment exceeds that offer by 25 or more, the party rejecting the offer or demand is liable for attorney's fees and costs of the other party. However, entitlement is limited to recovery of attorney's fees from the date the demand was served. 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 $100,000 per person or $200,000 per occurrence

cap or waiver of sovereign immunity. These excess amounts, however, may be recovered only upon legislative action.

I do not have specific documentation (i.e., number of hours reasonably expended and hourly rate and itemization of taxable costs since the date of judgment to the final appeal) to support or justify the claims bill request for attorney's fees of $212,000, representing 25% of the original judgment, and $16,000 in costs. Therefore, I recommend that the Legislature appropriate the following:

Attorney's Fees (Represents 25% of total damages recommended)	$ 86,802.50
Taxable Costs for Trial Court Firm	$ 8,000.00
Taxable Costs for Appellate Firm	$ 1,349.32
	$ 96,151.82

RECOMMENDATIONS: I recommend that the Legislature authorize and direct the appropriation of $443,361.82 to Mr. Greene, to be reduced by $100,000 which the School Board has already paid. In the event, this amount exhausts the limits of the School Board's insurance policy in paying this claim, I recommend that Mr. Green be paid $100,000 when the bill becomes law; and that the balance be paid in two annual installments of equal amount, all without interest.

Accordingly, for the reasons stated herein, I recommend that SB 42 be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

Maria Isabel Matthews, Esq.
Senate Special Master

cc: Senator Roberto Casas
Representative Jerry Melvin

Faye Blanton, Secretary of the Senate
Robert Wolfe, Esq, House Special Master