THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
12/1/01	SM	Favorable
	FT	

December 1, 2001

The Honorable John M. McKay
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 26 (2002)** – Senator Jack Latvala
HB 151 – Representative Leslie Waters
Relief of Eva Skowronek

SPECIAL MASTER'S FINAL REPORT

THIS IS AN EQUITABLE CLAIM FOR $200,000 PURSUANT TO A COURT-APPROVED SETTLEMENT AGREEMENT BETWEEN THE CITY OF CLEARWATER AND THE CLAIMANTS, DIVIDED AS FOLLOWS: $100,000 TO EVA SKOWRONEK AS WIDOW OF WIESLAW SKOWRONEK, AND $33,333.33 TO EACH OF THEIR THREE CHILDREN, ANNA MARIE, VICTOR, AND HUBERT SKOWRONEK. WIESLAW SKOWRONEK WAS KILLED BY A CLEARWATER POLICE OFFICER WHO WAS DETERMINED TO HAVE USED EXCESSIVE FORCE IN SUBDUING MR. SKOWRONEK DURING AN ARREST. THE PARTIES AGREED TO A $525,000 SETTLEMENT OF WHICH THE CITY HAS PAID $200,000, THE CITY'S EXCESS INSURER HAS PAID $125,000, AND THE REMAINING $200,000 IS TO BE PAID BY THE CITY PURSUANT TO A CLAIM BILL WHICH THE CITY AGREED NOT TO CONTEST.

FINDINGS OF FACT:

Relating to Liability: The pertinent facts in this case are not in dispute. On Sunday, January 19, 1997, Wieslaw Skowronek was on the grounds of the Seminole Finance Building in Clearwater, Florida, to view the Virgin Mary apparition on the glass walls of the building. Mr. Skowronek

was exhibiting strange behavior that led to a confrontation with two police officers employed by the City of Clearwater.

The first officer on the scene was Phillip Biazzo, who had received a report of a man walking around the building with a drill and a box of nails. Officer Biazzo observed Mr. Skowronek walking around the building dropping pills along the side. When Officer Biazzo approached him, Mr. Skowronek turned and walked away. Officer Biazzo tapped him on the shoulder and asked him what he was doing. Mr. Skowronek responded that he did not have to answer any questions and he again turned and walked away. Officer Biazzo grabbed the arm of Mr. Skowronek, who screamed and attempted to pull away. Officer Biazzo used his walkie-talkie to call another officer, John Smith, for assistance. A struggle ensued between Mr. Skowronek and Officer Biazzo that resulted in both men wrestling each other and falling to the ground. Officer Biazzo and Mr. Skowronek struggled on the ground for less than a minute and then stood up and continued to wrestle.

At this point Officer John Smith arrived on the scene. Officer Smith, who is approximately 6' 10" tall and weighs 270 pounds, told Officer Biazzo to stand back. Officer Smith grabbed Mr. Skowronek, who was 5' 7" tall and weighed about 165 pounds, by his shirt or jacket and slammed him to the pavement and dropped with his (Officer Smith's) full body weight with his knee onto the abdomen of Mr. Skowronek. Mr. Skowronek immediately became passive. Officer Biazzo later testified that Mr. Skowronek did not constitute any threat to Officer Smith at the time Officer Smith knee-spiked him on the ground. The officers had pepper spray and collapsible batons, but chose not to use them.

As Mr. Skowronek was lying on the ground, Officer Biazzo handcuffed him behind his back. Another police officer was called to the scene to transport Mr. Skowronek. That officer and Officer Biazzo pulled Mr. Skowronek up and placed him in the back seat of the police car. For approximately the next 30 minutes, Mr. Skowronek laid in the back seat of the police vehicle while the officers completed paperwork for his arrest for trespass after warning and resisting with violence. After this time the officers noticed that Mr. Skowronek was not moving and could not be revived by tapping on his face.

Paramedics were called who transported Mr. Skowronek to the hospital where he was pronounced dead.

The autopsy determined that Mr. Skowronek died of a ruptured pancreas caused by blunt trauma. Specifically, the autopsy report found the cause of death was transection of the head of the pancreas with adjacent retroperitoneal soft tissue hemorrhage. The autopsy found no evidence of drugs or alcohol in Mr. Skowronek's system.

The City of Clearwater conducted an investigation of this incident. Sid Klein, the Clearwater Chief of Police, determined that Officer Smith used excessive force that caused the death of Wieslaw Skowronek. Chief Klein determined that the knee spike applied by Officer Smith to the abdominal area was a level 5 aggressive physical force to aggressive physical resistance, even though Mr. Skowronek was not putting up aggressive physical resistance to the arrest. Chief Klein determined that Officer Smith had time to use lesser levels of force (level 4 active physical response), such as pepper spray or a collapsible baton to subdue Mr. Skowronek, and consciously chose not to. It was also determined that Officer Smith was untruthful to officers in explaining why he used the excessive force.

The claimant's attorney hired Ken Katsaris, a police expert and former Sheriff of Leon County, to conduct an independent investigation of this incident. The report from Mr. Katsaris stated that it was the clearest case of an excessive use of force that he had seen in over 30 years of police enforcement investigation work. It was also Mr. Katsaris' opinion that the city was clearly negligent in retaining Officer Smith when they knew, in the words of the Police Chief himself, that "he never should have been a police officer."

A few days prior to trial, in his Response to Request for Admissions, Officer Smith admitted that he had negligently applied force that more likely than not was the proximate cause of the injury to Wieslaw Skowronek. Mr. Smith also admitted that he did not intend to maliciously cause harm or death to Wieslaw Skowronek.

Officer Smith was originally hired by the Clearwater Police Department in 1988 and had received eight disciplinary

actions that resulted in reprimands, counseling or short suspensions prior to the incident in this case. Mr. Smith was fired in June 1995 for lying to investigators with regard to a complaint filed against him by a female citizen for making improper advances. Mr. Smith was re-hired by the city in 1996.

Relating to Damages: At the time of his death in 1997, Wieslaw Skowronek was age 44 and survived by his wife, Eva Skowronek, and his three minor children, Ana Skowronek, age 15, Victor Skowronek, age 11, and Hubert Skowronek, age 7.

Wieslaw Skowronek was a resident alien lawfully living and working in the United States. After graduating from high school in Poland, he attended the Merchant Marine Academy in Szczecin, Poland for 5 years, graduating with an engineering degree (equivalent to a bachelor's degree in the United States) in marine diesel and electrical mechanics. From 1978 to 1989, he was employed by the Polish Steamship Company as a Second Officer Engineer. He and his wife and two children came to the United States in 1989. In 1992 he was licensed as a first class steam engineer and in 1996 became certified as a universal technician in refrigeration transition/recovery. He was employed as a stationery engineer at the power plant of Morton Plant Hospital at the time of his death.

Mr. Skowronek's earnings for the years 1992, 1993, 1994, 1995, and 1996 were $23,561, $29,058, $28,981, $29,214, and $30,951 respectively. He was earning about $13.00 per hour at his job at the time of his death.

A consulting economist hired by the claimant's attorney estimated the present value of the total economic loss due to the death of Mr. Skowronek, discounted to present value, to be $771,892. This amount is the sum of the estimated discounted value of the loss of dependent support to the spouse and three children ($451,739), the loss of household services ($212,964), the loss of childcare services ($90,291), and loss of net accumulation to the estate ($16,908).

The medical expenses in this case totaled $2,069.50 and the funeral expenses totaled $5,012.65.

Wieslaw and Eva Skowronek were married for 16 years at the time of Wieslaw's death. He was a devout Catholic who was very close to his children. About one month prior to his death, Mr. and Ms. Skowronek experienced marital problems that led to a separation. Arguments between Mr. and Ms. Skowronek led to a decision by Ms. Skowronek that it would be best for the children to separate from her husband. She moved with the children to an apartment a few minutes away from their residence and Mr. Skowronek continued to visit his wife and children. Eva Skowronek could not explain the strange behavior apparently exhibited by Mr. Skowronek at the bank building on the day of his death and had never witnessed any similar behavior. She had seen her husband the night before his death and said that he was not acting strangely.

At the claim bill hearing, the claimant's attorney stated that he had some reservations about the amount of the settlement being too low. A major factor in settling was the concern that the jury may have found that Mr. Skowronek's behavior contributed to his injury. Also, Eva Skowronek wanted to settle the case, in part, to avoid the ordeal of her and her three children testifying at the trial. At the claim bill hearing, Eva Skowronek said that she did not believe the settlement was adequate because no amount of money would be adequate to replace her husband "walking down the aisle at his daughter's wedding." But, she did not express any regrets in agreeing to the settlement, which was primarily motivated by avoiding the trauma of the trial for her and her children.

Eva Skowronek was working at a pharmaceutical company earning about $27,000 annually at the time of her husband's death in January 1997, but she has not worked since April 1997. Since then (until at least the time of the claim bill hearing on September 22, 2000), she and her children had been supported by a man she was living with and who she was engaged to marry. As of October 2001, Ms. Skowronek remained single. Ms. Skowronek is a citizen of Poland and a legal resident alien and said she plans to apply for U.S. citizenship.

Procedural Background; Terms of Settlement:

A complaint for damages was filed in federal district court on behalf of Eva Skowronek as widow and personal representative of the estate of Wieslaw Skowronek, against the City of Clearwater, the Clearwater Police Department, and John Smith individually. Among other counts, the complaint alleged deprivation of constitutional rights under the Fourth, Fifth and Fourteenth Amendments when the city was deliberately indifferent to a pattern and custom of improper and excessive use of force; negligent retention and supervision of Defendant Smith by Defendant City; wrongful death as a proximate result of Defendant Smith intentionally and wrongfully kneeing the decedent; and wrongful death as a proximate result of Defendant City negligently failing to terminate, supervise and monitor Defendant Smith's interactions with citizens.

Prior to trial, in his Response to Request for Admissions, Officer Smith admitted that he had negligently applied force that more likely than not was the proximate cause of the injury to Wieslaw Skowronek. Mr. Smith also admitted that he did not intend to maliciously cause harm or death to Wieslaw Skowronek.

On the second day of trial, the parties informed the court that they had reached a settlement in the case for $525,000. The city agreed to pay its statutory sovereign immunity limits of $200,000 and the excess insurer for the city agreed to pay $125,000. The city also agreed that it would not contest a claim bill for the remaining $200,000. (The city had a $5 million excess liability insurance policy from Ranger Insurance Company that provided coverage above a $500,000 self-insurance retention that the city must pay first. In addition to its $200,000 payment, the city also paid about $100,000 for attorney's fees and costs in defending the suit and is responsible for paying the $200,000 claim bill amount.)

The federal district judge asked Ms. Skowronek whether she agreed with the settlement and if she understood how the costs and fees would be distributed. Ms. Skowronek said she agreed to the settlement and understood the fee distribution.

The federal district court entered an order approving the settlement. Of the $325,000 that was paid by the city and its excess insurer, $81,250 was paid as attorney's fees (25 percent of $325,000) and $56,958 was paid to the claimant's attorney for costs incurred, totaling $137,208 in fees and costs. The remaining $187,792 was paid to the claimant.

The court order disbursed the $187,792 remaining after attorney's fess and costs as follows: $103,896 to Eva Skowronek as widow, and $27,965 to each of the three minor children, Anna Marie, Victor, and Hubert, to be placed in a guardianship account. This distribution was in accordance with the settlement agreement which provided that the net proceeds would be divided pursuant to §732.102 and 732.103, F.S., which govern the distribution of estate assets for intestate heirs. These statutes provide that the surviving spouse receives the first $20,000 plus one-half of the balance of the estate, and that the lineal descendants receive the remaining one-half of the estate. The court appointed a guardianship for the three children. At the present time, Anna Marie Skowronek is 20 years old and has assumed legal control of her funds. The other two children are still minors, Victor (age 15), and Hubert (age 11).

Because settlements are sometimes entered into for reasons that may have very little to do with the merits of a claim or the validity of a defense, stipulations or settlement agreements between the parties to a claim bill are not necessarily binding on the Legislature or its committees, or on the Special Master assigned to the case by the Senate President. However, all such agreements must be evaluated. If found to be reasonable and based on equity, then they can be given effect, at least at the Special Master's level of consideration.

CONCLUSIONS OF LAW:

Relating to Liability: The sovereign immunity statute provides in §768.28(9), F.S., that that the state or its subdivisions shall not be liable in tort for the acts or omissions of an officer or employee committed while acting outside the course and scope of his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

In the case of *Richardson v. City of Pompano Beach*, 511 So.2d 1121 (Fla. 4th DCA, 1987), the court considered a case involving excessive use of force by a city police officer. The court ruled that the statute does not immunize a governmental entity for all intentional torts. The court determined that the conduct must be more reprehensible and unacceptable than mere intentional conduct. The main inquiry, according to the court, is not the difference between negligence and intentional torts but whether the intentional tort falls outside the scope of employment, which is a question of fact.

The Florida Supreme Court reached a similar conclusion in a case involving a sheriff's deputy who beat a plaintiff following his arrest. The court held that a material issue of fact existed as to whether the deputy acted outside the scope of employment. According to the court, the fact that the deputy may have intentionally abused his office was not sufficient to immunize the county from liability. [*McGhee v. Volusia County*, 679 So.2d 729 (Fla. 1996)]

In *Craft v. John Sirounis & Sons, Inc.*, (575 So.2d 795, Fla. 4th DCA 1991), the court held that a city was immune from a negligence suit, which was brought as a result of injuries sustained in a barroom fight involving four off-duty police officers, because the police officers were not acting within the scope of employment.

In *Hennagan v. Department of Highway Safety & Motor Vehicles*, (467 So.2d 748, Fla. 1st DCA, 1985), the First District Court considered an action stemming from alleged sexual abuse of a minor by a highway patrol officer. The court held that the actions of the officer may have been within the scope of employment. The court noted that an employee acts within the scope of employment if the actions occur substantially within the authorized time and space limits of employment, if the employee has not "stepped away" from the employer's business at the time the wrong occurred, and if the motive was in some way related to the employer's interests.

In the present case, Officer Smith was responding to a call from a fellow police officer to help subdue a person who was resisting arrest. I conclude that the actions taken by Officer Smith that caused the death of Wieslaw Skowronek were

taken within the scope of Officer Smith's employment and were not of such malicious purpose or wanton and willful disregard of human safety as to immunize the city from liability.

The Clearwater Police Department Rule 213.49 states, "No employee shall use a greater degree of force than is necessary to perform official duties." Officer Smith owed a duty of due care to use the level of force that was necessary, but not to use excessive force, in subduing the resistance to arrest of Wieslaw Skowronek. I conclude that Officer John Smith breached this duty in using excessive force in intentionally kneeing Wieslaw Skowronek in his abdomen during his arrest which act was the proximate cause of his wrongful death. The use of excessive force was at least negligent and may have constituted an intentional tort, but the fact that the actions may have constituted an intentional tort does not immunize the city from liability.

Due to the above conclusions, it is not necessary to determine whether the City of Clearwater was independently negligent in failing to terminate, supervise and monitor Officer Smith or whether such negligence was a proximate cause of the claimant's wrongful death.

Related to Damages: Section 768.21, F.S., allows for damages in a wrongful death action to be awarded to each survivor for the value of lost support and services, reduced to present value, which may include consideration of the decedent's probable net income and the replacement value of the decedent's services to the survivors. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority for the children may be considered. The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering. Minor children of the decedent may also recover for mental pain and suffering. Medical or funeral expenses due to the decedent's injury or death may also be recovered by a survivor who has paid them.

The value of lost support and services due to the death of Wieslaw Skowronek is based primarily on his 1996 wages of $30,951. He was age 44 at the time of his death and could reasonably have been expected to work for approximately

21 more years, until age 65. Data from the U.S. Department of Labor reflect that the earnings of U.S. miscellaneous services employees have increased at a compound average annual rate of 3.62 percent. Projecting a $31,000 earnings level over 21 years, with an annual growth rate of 3.62 percent, totals $950,689 in gross wages over a 21-year period. In estimating loss of support, income tax must be deducted and amounts spent by Mr. Skowronek on his own support must also be deducted. Assuming that 13 percent of his gross income was paid in taxes, $123,590 would be deducted, resulting in $827,099. Assuming that two-thirds of this amount would be spent as support for his spouse and minor children, reduces this value to $551,399, without reduction to present value. (The estimates of the amount of support should actually vary between the spouse and children, since the children would generally be entitled to loss of support only until their age of majority.)

A mitigating factor is that Ms. Skowronek was employed at the time of her husband's death in January 1997, but had not worked since April 1997 until at least the time of the claim bill hearing (September 2000) because she and her children were supported by a man with whom she has been living since April 1997 and to whom she was engaged. Ms. Skowronek remains single (as of October 2001). The Wrongful Death Act provides that the evidence of the remarriage of the spouse is admissible evidence (§768.21(6)c, F.S.)

The medical expenses in this case totaled $2,069.50 and the funeral expenses totaled $5,012.65. Together, these damages total $7082.15.

The Florida Supreme Court has recognized the difficulty of establishing tangible criteria or standards for measuring pain and suffering and has stated that the trier of fact must use his or her enlightened conscience based on the evidence in the case. [*Braddock v. Seaboard Air Line R. Co.*, 80 So. 2d 662, 667-68 (Fla. 1955); *Steele v. Miami Transit Co.*, 34 So. 2d 530, 531 (Fla. 1948); *Florida Dairies Co. v. Rogers*, 161 So. 85, 87 (Fla. 1935).] Evidence regarding the domestic relationship between a decedent and his or her survivor is relevant in assessing the mental pain and suffering of those survivors. [*Adkins v. Seaboard Coast Line R. Co.*, 351 So. 2d 1088, 1092 (Fla. App. 2nd 1977).]

Ms. Skowronek has experienced mental pain and suffering and the loss of companionship due to the death of her husband of 16 years. A mitigating factor is that she and her husband had separated about one month prior to his death, but it is unknown whether this separation would have led to divorce.

The three children have each experienced significant pain and suffering due to the death of their father with whom they had a very close relationship. Their father devoted substantial time to caring for them. Anna Marie, the oldest child, appeared to hold back her grief at first, but later had an emotional outburst. The younger boys each exhibited grief and sorrow.

The $525,000 settlement reached by the parties in this case is a reasonable amount to compensate the claimants, given the uncertainties associated with proceeding to trial and the desires of the claimant. A competent and well-prepared attorney represents the claimant. The attorney was concerned that the actions of the decedent in resisting arrest may have been determined by the jury to be negligence that contributed to the cause to his injury and death, which would have reduced the damages award. Ms. Skowronek also wanted to avoid the trauma to herself and the children associated with testifying at trial.

Without the benefit of the consent agreement, I would independently conclude that a greater amount than $525,000 would be appropriate to compensate the claimants for their damages. However, a settlement agreement knowingly and voluntarily entered into that is reasonable and supported by the evidence should be accepted.

The claim bill directs that a total of $200,000 be paid by the City of Clearwater, divided as follows: $100,000 to Eva Skowronek, as the widow of Wieslaw Skowronek; and $33,333.33 to each of the three children, Anna Marie (age 20), Victor (age 15) and Hubert (age 11). The amounts paid to the two children who are minors are to be deposited into the established guardianship accounts. Amounts paid for attorney's fees and costs, as limited by the 25 percent cap in accordance with s. 768.28, F.S., shall be payable pro rata from each of the claimants.

ATTORNEYS FEES: The attorney fees in this case are limited to 25 percent of the recovery in accordance with §768.28, F.S., as evidenced by an affidavit signed by the claimant's attorney.

LEGISLATIVE HISTORY: This bill is substantively the same as Engrossed SB 58 as passed by the Senate in the 2001 Regular Session, which died in House Messages.

Last session's bill, SB 58 (Latvala), as filed, directed that $200,000 be paid to Eva Skowronek, as the widow and personal representative of the estate of Wieslaw Skowronek, on behalf of the estate, herself, and their three minor children. The Special Master's Final Report of November 16, 2001 recommended that the bill be reported favorably. The Senate Criminal Justice Committee reported the bill favorably with one amendment. The amendment divided the award among the claimants pursuant to the terms of the court-approved settlement agreement, as follows: $100,000 to Eva Skowronek as widow and $33,333.33 to each of the three children. The amounts paid to the two children who were minors were required to be placed in each of their guardianship accounts. The Senate passed the bill, as amended by the committee amendment, which then died in House Messages. The House companion bill, HB 823 (Fields) died in the Committee on Claims.

RECOMMENDATIONS: I recommend that Senate Bill 26 be reported FAVORABLY.

Respectfully submitted,

Brian Deffenbaugh
Senate Special Master

cc: Senator Jack Latvala
Representative Leslie Waters
Faye Blanton, Secretary of the Senate
Stephanie Birtman, House Claims Committee