THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
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December 1, 2001

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

Re: **SB 36 (2002)** – Senator Tom Rossin
HB 45 – Representative Mark Mahon
Relief of Kharmilia Ferguson, Angela Jones & Raymond Ferguson

SPECIAL MASTER'S FINAL REPORT

THIS IS A $1,800,000 EXCESS JUDGMENT CLAIM BASED ON THE ENTRY OF A COURT ORDER APPROVING A SETTLEMENT AGREEMENT RESOLVING CLAIMS AGAINST THE PALM BEACH COUNTY SHERIFF'S OFFICE FOR DAMAGES SUFFERED BY KHARMILIA FERGUSON AS WELL AS ANGELA JONES AND RAYMOND FERGUSON, HER PARENTS. THE CLAIM RESULTED FROM THE NEGLIGENCE OF AN OFF-DUTY DEPUTY TRAVELING HOME FROM WORK IN A SHERIFF'S OFFICE VEHICLE. PURSUANT TO A SETTLEMENT AGREEMENT THE PALM BEACH COUNTY SHERIFF HAS PAID MISS FERGUSON AND HER PARENTS $200,000 AND HAS AGREED THAT THEY WILL NOT OPPOSE NOR SUPPORT THE PAMENT OF A CLAIM BILL IN THE AMOUNT OF $1,800,000.

FINDINGS OF FACT:

On August 23, 1996, Kharmilia Ferguson was traveling south on Gramacy Drive in Palm Beach County at approximately 7:20 a.m. Miss Ferguson was attempting to turn across the westbound lane of traffic on 45th Street to go east on her way to high school. At the time Miss Ferguson was 16 years old and she held a restricted Florida Driver's License, which had been issued on August 2, 1996. Miss Ferguson was alone in the vehicle that had been purchased

for her use by her parents. She was not wearing a seat belt but the automobile was equipped with a driver's side airbag.

Deputy Alfredo Araujo was traveling west on 45th Street on his way home from an 8-hour duty shift with the Sheriff's Office that ended at 7 a.m., on the day of the crash. Deputy Araujo was driving a sheriff patrol vehicle issued to him. He drove the vehicle during his patrol shift and from his home before his shift and to his home at the end of his shift. A fellow officer of Deputy Araujo, Deputy Maxwell, was also traveling home on 45th Street approximately 4 or 5 cars behind Deputy Araujo's vehicle. Deputy Maxwell stopped at the scene of the accident to render aid to Deputy Araujo.

The crash report prepared by a sheriff's deputy at the time of the accident indicated that Miss Ferguson failed to stop at a stop sign at the intersection of Gramacy road and 45th Street or that she failed to yield to Deputy Araujo's oncoming vehicle. No statements from Deputy Araujo or witnesses to the accident were able to confirm or deny that Miss Ferguson did or did not stop for the stop sign. Deputy Araujo testified in his deposition that she just appeared out of his peripheral vision at a high rate of speed. Deputy Araujo also testified that he was accelerating, after stopping for a traffic light, and at the time of the crash he was driving at a speed of approximately 50 to 55 miles per hour. Deputy Araujo further testified that he did not brake prior to the accident and may have actually accelerated in an attempt to avoid the crash.

The posted speed limit at the location of the crash was 45 miles per hour.

The claimants retained an accident reconstructionist to determine the speed of the vehicles at the time of the crash. Additionally, after a complaint was filed against the Palm Beach County Sheriff's Office regarding the investigation of this crash, the State Attorney's Office requested the Highway Patrol to prepare estimates of the speed of each of the vehicles. The expert retained by the claimants projected that Deputy Araujo's vehicle was traveling approximately 80 miles per hour at the time of the crash and that Miss Ferguson's vehicle was traveling approximately 4 miles per hour. The Highway Patrol Deputy, stating his estimate was conservative, estimated Deputy Araujo's speed at 78 miles

per hour at the time of the crash and Miss Ferguson's speed at 23 miles per hour.

During the collision both vehicles were severely damaged. Miss Ferguson's vehicle spun around more than once and Miss Ferguson, who was not wearing a seat belt, was thrown from the vehicle. The accident report indicates Miss Ferguson came to rest 67 feet from where her vehicle stopped spinning. Deputy Araujo's vehicle traveled over 400 feet after the accident.

As a result of the crash Miss Ferguson was in a chronic vegetative state. She spent 1 year in the hospital and then resided in a full time long-term care facility until her death on January 2, 2001. After the accident she did not demonstrate any purposeful movement and required skilled nursing care for all her needs. Her nutritional needs were met through a G-tube into her stomach and she required a Foley catheter. She was given oxygen through a tracheotomy, and restraints were used for her hands and feet to reduce contraction of the extremities. According to nursing staff and family testimony she reacted to the name of her parents and to music or other pleasant sounds but beyond a pleased reaction she had no voluntary communication. Medical consultants indicated further improvement was not likely.

Miss Ferguson's parents oversaw Miss Ferguson's care as her guardian's. They testified they each visited her at least twice a week. While visiting Miss Ferguson the special master observed Ms. Jones and Mr. Ferguson providing care and assistance to their daughter during a severe coughing and choking spell.

At the time of the accident Miss Ferguson attended school and worked part time. She was in the 11th grade, she worked as a cashier in a movie theater earning minimum wage, and assisting her mother in Ms. Jones beauty salon by washing hair and cleaning up.

After high school Miss Ferguson wanted to enter the U. S. armed forces just as her sister had done.

CONCLUSIONS OF LAW:

Claimant argues that Deputy Araujo's negligent operation of a sheriff's office vehicle within the course and scope of his employment was the proximate cause of Miss Ferguson's injuries. If Deputy Araujo had not negligently operated the vehicle significantly in excess of the posted speed limit he would not have struck Miss Ferguson's vehicle causing the severe and permanent injuries from which she died. Pursuant to Sheriff's Office Regulations, Mr. Araujo should not have exceeded the speed limit unless responding to an in-progress call or in pursuit of someone breaking the law. Neither circumstance had arisen at the time of the accident.

For a governmental entity in Florida to be liable to a third party for the negligent acts of its employees under §768.28, F.S., the employee must be within the course and scope of employment and the action must not have been taken in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The courts have held that the state has not waived sovereign immunity for purposes of the dangerous instrumentality doctrine or for purposes of cars issued 24-hours a day to a government employee unless the person operating the vehicle was within the course and scope of employment at the time the injury occurred.[1]

In determining when an employee is initially within the course and scope of employment for purposes of §768.28, F.S., the court in Sussman v. Florida East Coast Properties, Inc.[2] held:

- The conduct must be of the kind the employee is hired to perform;
- The conduct occurred substantially within the time and specific limits authorized or required by the work to be performed; and
- The conduct must be activated at least in part by a purpose to serve the master.

The determination of whether an employee is within the course and scope of employment is a question for the jury. In making that determination the jury must not only consider the facts of the case but must also consider the inferences

[1] *Rabideau v. State*, 409 So.2d 1045 (Fla. 1982).
[2] 557 So.2d 74 (Fla. App. 3 Dist. 1990).

that can be made from those facts to determine whether the employee was acting within the course and scope of employment.[3]

The plaintiff argues that at the time of the accident Deputy Araujo was within the course and scope of his employment because:

- He was operating a sheriff's office patrol car;
- He was in uniform;
- He had his badge;
- He was armed;
- He had his radio on;
- He was in the Sheriff's jurisdiction;
- He had only concluded his actual shift a mere 20 minutes before the crash;
- Due to the unique nature of the functions of law enforcement officers Deputy Araujo has the authority to exercise his duties and authority as a law enforcement officer 24 hours a day.[4]
- The Sheriff's office demonstrated its ability to exercise control over Deputy Araujo thru the control exercised over Deputy Maxwell after the accident by:

    - Dispatching Deputy Maxwell from the scene of the crash to the hospital where Deputy Araujo was transported; and
    - Then dispatching him back to the scene of the accident even though his shift had ended.

Deputy Araujo was, at the time of the crash, within the jurisdiction of the Palm Beach County Sheriff's Office. Thus he was able to perform his official duties even though he was not within the area of the county he was specifically assigned to patrol when on duty.

Taking the car home at the end of the duty shift was motivated at least in part to serve the master. Deputy Araujo was operating a marked vehicle and was required to have the radio on while in the patrol car. As a result he

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[3] *Gardner v. Holifield*, 639 So.2d 652 (Fla. App. 1 Dist. 1994), *Lawrence v. Dunbar*, 919 F. 2d 1525 (C.A. 11 (Fla. 1990), *Garner v. Saunders* 281 So.2d 392 (Fla. App. 2 Dist. 1973).
[4] *Huebner v. State*, 731 So.2d 40, (Fla. 4th DCA 1999).

continued to be available to be called back on duty while operating the vehicle even though he was not being paid for this time. He also had the ability through use of the vehicle equipped with lights and sirens to enforce the laws of the state in the same manner he would while on duty. Finally, the vehicle provided a law enforcement presence in the community both while being operated on the way home and while parked in Deputy Araujo's neighborhood.

An employee who would normally be considered to be acting within the course and scope of employment can eliminate his right to claim sovereign immunity and can eliminate the employer's liability by taking action that is in bad faith or for malicious purposes or exhibiting wanton and willful disregard of human rights, safety, or property. Once a determination was made that Deputy Araujo was within the course and scope of his employment at the time of the crash a determination had to be made as to whether Deputy Araujo's speeding constituted willful and wanton conduct under §768.28(9), F.S.

Black's dictionary defines "willful and wanton misconduct" as "conduct committed with an intentional or reckless disregard for the safety of others . . . ." Willful misconduct is defined as "misconduct committed voluntarily and intentionally." Wanton misconduct is defined as an act "in reckless disregard of another's rights, coupled with the knowledge that injury will probably result."

As applied to the facts in this case it does not appear that Deputy Araujo's behavior rose to a level that would remove the protections of sovereign immunity or that would relieve the Sheriff of vicarious liability. When questioned about his speed at the time of the crash Deputy Araujo stated he was driving between 50 and 55 miles per hour, that he was not looking at his speedometer, and that he was at his cruising speed. Both Deputy Araujo and Deputy Maxwell testified there were only 4 or 5 other cars on the roadway between the deputies and that there was little or no oncoming traffic. While there was expert testimony that Deputy Araujo was going up to 80 miles per hour at the time of the crash there was no testimony to indicate that that Deputy Araujo did not have control of the vehicle. In fact both Deputy Araujo and the claimant's expert testified the deputy attempted to take evasive action to avoid the accident.

Further, testimony did not support a determination that Deputy Araujo's driving would have been considered reckless under §316.192, F.S., Florida's reckless driving statute. That section defines reckless driving as operating a motor vehicle "in willful or wanton disregard for the safety of persons or property . . . ." The First District Court of Appeal, in Miller v. State, 636 So.2d 144 (Fla. App. 1 Dist. 1994), defined "willful and wanton" for purposes of reckless driving under §316.192, F.S. "'Willful' means intentionally, knowingly and purposefully;' 'wanton' means with a 'conscious and intentional indifference to consequences and with knowledge that damage is likely to be done to persons or property.'" The court went on to state "it appears that excessive speed alone is insufficient to constitute evidence of reckless driving."

At the hearing prior to Miss Ferguson's death the claimant's arguments on the issue of damages were that:

- As a result of the accident Miss Ferguson sustained a severe brain injury when she hit her head on the door frame as the vehicle spun around;
- The injury resulted in a persistent vegetative state;
- Miss Ferguson required 24-hour supervision and maximum assistance in all activities of daily living for the duration of her life.

Upon Miss Ferguson's death the claimants additionally argued that her death was the direct result of the injuries sustained in the accident.

At the time suit was filed claims were brought on behalf of Miss Ferguson for bodily injury, resulting pain and suffering, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, extensive hospitalization, medical and nursing care and treatment, loss of earnings, and loss of ability to earn money in the future.

Additionally, claims were brought on behalf of Angela Jones (mother) and Raymond Ferguson (father) for the medical expenses and the care and treatment of Miss Ferguson until she reached the age of eighteen and for their loss of parental consortium, which included the loss of Miss Ferguson's comfort, companionship, society, love and

affection.

As a result of the accident Miss Ferguson incurred medical costs for one year of hospitalization and 4½years of full time long-term care.

- Miss Ferguson's PIP coverage paid $8,000 toward those medical bills with a $2,000 deductible taken from the PIP.
- As of Miss Ferguson's death on January 2, 2001 Medicaid had a third party liability lien of $399,437.96 for Miss Ferguson's care.
- The estate has now also paid $9,743.60 in funeral expenses.

In analyzing the claim prior to Miss Ferguson's death, the expert retained by the claimant analyzed Miss Ferguson's pre-injury lifetime earning capacity and determined her earnings would have ranged between $24,604 and $30,956 per year after completion of one year of technical training or obtaining an AA degree. The present value of this lifetime loss of earning capacity, based on Miss Ferguson working to age 65, was determined to be $894,445.

At the time of the settlement of the claim the claimant's medical consultants projected that Miss Ferguson's life expectancy varied from the normal life expectancy for a person of her age and race if she had optimal care, to a significantly shortened life span resulting from complications of her condition such as lung infections, or blood clots. Modeling was performed to project the cost of lifetime care for Miss Ferguson, which at the lowest cost was around $1.5 million. This information is not addressed in detail in the final report because Miss Ferguson died on January 2, 2001, and continuing care is not an issue except as it was considered in the settlement agreement.

The economic damages claimed prior to Miss Ferguson's death including medical expenses, lost wages and Miss Ferguson's need for continuing care significantly exceeded the $2,000,000 settlement amount. In addition, so long as she lived, Miss Ferguson had a claim for pain and suffering which the claimant did not quantify.

If Miss Ferguson's claim is addressed as a claim for wrongful death, her estate may only claim loss of earnings from the date of injury until her death and medical and funeral expenses paid by the estate. Lost earnings capacity was minimal as Miss Ferguson was a full time high school student and only worked part time in a minimum wage job. She planned to enter the military upon graduation from High School or to continue her education. Based on the plans used in projecting her future lost wages in the original claim Miss Ferguson would have had only 1 to 1.5 years at her projected low average full time wage of $24,604 or 4 years at the minimum salary of military personnel. Medicaid paid medical expenses with an outstanding Medicaid lien of $399,437.96. Her estate claims funeral expenses of $9,743.60. Since Miss Ferguson was a minor for purposes of the wrongful death statute her estate has no claim for loss of accumulation of assets after her death. These claims would result in a potential recovery for the estate of between $446,087 and $507,598.

In regard to the individual claims of Mr. Ferguson and Ms. Jones no specific dollar amounts were provided regarding their individual claims either prior to Miss Ferguson's death or based on the wrongful death statutes. No information was provided regarding any medical costs that they might have paid. Lost support and services were not quantified for the loss of services Miss Ferguson provided to her mother prior to the injury. The claims of Mr. and Miss Ferguson for their pain and suffering from the date of the injury were not quantified, however, information was provided that Ms. Jones has a life expectancy of 37.5 years and Mr. Ferguson's life expectancy is 34.1 years on which to base a determination of compensation for pain and suffering.

A review of recent wrongful death verdicts for parents of minor children, from the Florida Jury Verdict Reporter, indicated a range of verdicts for parental pain and suffering for the death of a child 18 to 25 ranged from $1 million to $9 million with 5 out of the 6 cases found exceeding $4.9 million. The $2 million settlement is at the low end of this range of verdicts.

In August of 2000, prior to Miss Ferguson's death, Miss Ferguson's representative and Mr. Ferguson and Ms. Jones entered into a settlement agreement with the Palm Beach

County Sheriff's Office for all claims. The settlement agreement called for the Sheriff's Office to pay $200,000 to the claimants and to not support or dispute a claim bill for the remaining $1,800,000. Miss Ferguson's guardian ad litem, Mr. A. Clark Cone, Esq., reviewed the settlement agreement and indicated that it was in the best interest of Miss Ferguson. The court then entered an order approving the settlement agreement, authorizing the signing of a settlement and release agreement, and directing that the Guardian Ad Litem should make a recommendation to the court for apportionment of the settlement proceeds upon the passage of a claim bill. Based on the provisions of the settlement agreement respondent's presented no arguments at the hearing and refused to provide any documents unless subpoenaed.

Because stipulated 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 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.

Had Miss Ferguson lived the projected life span of 25 years the settlement agreement would have been below even the present value of Miss Ferguson's economic damages as estimated by the claimant's experts. With the addition of her parent's claims and an indeterminate claim for pain and suffering from the date of the injury, the amount of the settlement appeared to be within a range that could be found to have taken into consideration any negligence on the part of Miss Ferguson.

Under the wrongful death act the damages would be in the range of $1,446,087 to $10,507,598 using the verdict ranges of recent cases to estimate her parents claims for pain and suffering. However, in a court of law, the plaintiff's would be precluded from arguing a wrongful death action by virtue of the court-approved settlement entered prior to Miss Ferguson's death. While the parties are precluded from bringing a wrongful death action the Legislature can evaluate the damages in accordance with that statute when

reviewing the claim bill thus an analysis of damages based on the pre-death settlement and the wrongful death statute is provided.

Since the settlement and release agreement did not allocate the settlement proceeds between Miss Ferguson and her parents the claimant's attorney was requested to provide a recommendation for distribution. At the request of claimant's attorney, on November 2, 2000, prior to Miss Ferguson's death, the Guardian Ad Litem provided a recommended percentage distribution of 20 percent of the proceeds for each parent and 60 percent for Miss Ferguson. The Guardian further recommended that the 60 percent of the proceeds for Miss Ferguson be placed in a special needs trust. Absent some contrary direction from the Legislature, at Miss Ferguson's death any funds remaining in a special needs trust would be used to repay any liens such as a Medicaid lien and then would be distributed to her parents as beneficiaries of her estate.

Under the wrongful death statute Miss Ferguson's estate would receive no more than the $446,087 to $507,598 in economic losses and the remainder would be allocated to her parents for lost support and services and for pain and suffering.

ATTORNEYS FEES:

The claimant's attorney has certified that attorney fees are limited to 25 percent of the award. The settlement agreement approved by the court provides that no attorney fees will be paid until a claim bill is approved by the Legislature.

LEGISLATIVE HISTORY:

Senator Rossin filed SB 32 (2001) for consideration at the 2001 regular session. A special master hearing was held and the final report was issued in March 2, 2001 recommending the bill with 3 amendments. The three amendments were adopted in the criminal justice committee on April 2, 2001, and the Finance and Tax Committee passed the bill on April 10, 2001. The bill then died on calendar.

Senate Bill 36 was filed again by Senator Rossin and incorporates most of the 2001 session amendments. In

accordance with local bill requirements it was noticed on July 9, 10, and 11, 2001, in a newspaper of general circulation.

RECOMMENDATIONS: I recommend that SB 36 be reported favorably as to the $1,800,000 award to Miss Ferguson's estate and to Mr. Ferguson and Ms. Jones, but that the bill be amended to provide for the payment of all Medicaid liens prior to distribution of the remaining funds to the claimants.

Accordingly, I recommend that Senate Bill 36 be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

Dorothy S. Johnson
Senate Special Master

cc: Senator Tom Rossin
Representative Mark Mahon
Faye Blanton, Secretary of the Senate
David Greenbaum, House Special Master