



THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
12/1/01	SM	Fav/2 amendments
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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 60 (2002)** – Senator Daryl Jones
HB 203 – Representative Ken Sorensen
Relief of Joshua England

SPECIAL MASTER'S FINAL REPORT

THIS IS AN EQUITABLE CLAIM FOR \$2.5 MILLION BASED ON A CONSENT FINAL JUDGMENT SUPPORTED BY A SETTLEMENT AGREEMENT IN WHICH THE DISTRICT SCHOOL BOARD OF MONROE COUNTY AGREED TO COMPENSATE THE CLAIMANT FOR INJURIES SUFFERED DURING AN INCIDENT OF NEGLIGENT SUPERVISION BY SCHOOL PERSONNEL, WHICH RESULTED IN THE NEAR DROWNING OF THE CLAIMANT, A SPECIAL EDUCATION STUDENT.

FINDINGS OF FACT:

The Accident

This case involves an accident in which the claimant, Joshua England, then 14 years old, nearly drowned during a school swimming activity with his class at Key West High School on September 3, 1999. On that date at approximately 9:25 a.m., Joshua's teacher, Grace Willis, took her class of eleven special education students to the school's pool. This swimming activity had been planned earlier in the week, and permission slips, signed by each of the students' guardians, had been obtained.

When Ms. Willis and the students arrived at the pool, Judd Wise, a school lifeguard, and Ms. Willis' two aides, James Sutton and Linda Linewebber, were present. The students

showered in poolside bathrooms, and then entered the pool. Ms. Willis, Mr. Wise, and Mr. Sutton stayed in the shallow end of the pool with nine of the students. Two of the students, who were known to be good swimmers, were in the deep end. Ms. Linewebber stood at the side of the pool. No person sat in any of the lifeguard chairs located poolside.

At approximately 9:40 a.m., Ms. Nancy Thiel, a physical education teacher, arrived at the pool. Ms. Thiel entered the shallow end of the pool and began watching the two students swimming in the deep end.

Shortly after Ms. Thiel arrived, Joshua asked Ms. Willis if it was okay that he was in chest high water. Although Ms. Willis knew Joshua could not swim, she responded yes and told him to stay there.

Ms. Thiel then observed one of the students in the deep end of the pool exit the pool to go to the bathroom. After three or 4 minutes passed, Ms. Thiel became concerned about the fact that the student had not yet returned from the bathroom. Ms. Thiel exited the pool and began to walk to the bathroom. As she walked past the deep end of the pool, she saw Joshua lying at the bottom of the deep end. Ms. Thiel immediately dove into the pool, pulled Joshua to the surface, and yelled for help. Mr. Wise responded and helped Ms. Thiel pull Joshua out of the pool. During the rescue, Joshua's head bumped concrete near the pool.

Mr. Wise checked Joshua's pulse, but could not detect it. Mr. Wise and Ms. Thiel then began CPR. At this same time, Ms. Willis ran around the pool area looking for a telephone to call 911. When she realized there was no phone in the area, she ran toward the school where she saw Chris Valdez, the school's assistant principal. Mr. Valdez used his radio to call 911.

When Ms. Willis returned to the pool area, she saw her aides taking the other students back to their classroom. Jerry Hughes, a fireman who was doing part-time construction work at the school, also just arrived at the pool and took over performing CPR on Joshua.

At 10:02 a.m., the paramedics arrived. The rescue report indicates that Joshua did not have a pulse, and that he was

intubated and resuscitated. At 10:14 a.m., Joshua was transported to the hospital. He arrived at Florida Keys Hospital at 10:19 a.m.

Ms. Willis, Mr. Valdez, and Zerhade Jackson, Joshua's mother, went to the hospital. Doctors stated that Joshua was unconscious and required life support via a ventilator. They also stated that Joshua needed to be airlifted to Miami because appropriate pediatric care was not available at Florida Keys Hospital.

Later that day, Joshua was airlifted to Miami Children's Hospital where he remained until October 29, 1999. Initially, doctors believed that Joshua would permanently require life support via a ventilator; however, 3 weeks after his admission to Miami Children's Hospital, Joshua began breathing on his own.

Claimant's injuries

As a result of the accident, Joshua is in a persistent vegetative state. He has been severely brain damaged, cannot voluntarily move his limbs, suffers from involuntary muscle spasms, and has contractures, optic atrophy and cortical blindness, scoliosis, hypertension, seizure disorder, and gastroesophageal reflux disease. He is unresponsive to external stimuli, except that it appears that he can feel deep pain, and is non-ambulatory. His only movements are due to involuntary muscle spasms. He lies in his hospital bed in a fetal position and is fed through a gastrostomy tube.

According to his physician, Joshua's long-term prognosis is poor. His physician believes that Joshua's contractures and hearing may improve, and that Joshua may live into his forties if he receives optimum medical care.

Legal Proceedings

On March 16, 2000, Ms. Jackson filed a lawsuit against the District School Board of Monroe County on behalf of herself and Joshua in the circuit court for Monroe County. On June 8, 2000, prior to trial, the parties entered into a settlement agreement providing that respondents agreed to pay a total of \$3.5 million for the benefit of Joshua and Ms. Jackson in exchange for a release and indemnity agreement that discharges the school district from further liability for any claims, e.g., Joshua's claims and all filial

consortium claims, arising from the September 3, 1999 incident.

Specifically, the agreement provided that \$1 million from the county's insurance funds would be paid immediately in full satisfaction of Ms. Jackson's filial consortium claims, and in partial satisfaction of Joshua's medical bills. The agreement further provided that the remaining \$2.5 million award would be sought in a claims bill that would be affirmatively supported by the respondents. Of the \$2.5 million award, \$1.5 million would be paid into a Special Needs Trust (SNT) for Joshua 30 days after passage of the claims bill, and the remaining \$1 million would be paid in five annual \$200,000 installments beginning July 1, 2002. Finally, the settlement agreement specified that if Joshua should die before the payment of any sums due that the sums would be forfeited on a prorated basis for the year of death, and the school board would not be obligated to make any additional payments.

A Guardian Ad Litem (GAL) reviewed the settlement agreement. The GAL's report dated July 19, 2000, recommended that \$100,000 of Ms. Jackson's proceeds from the initial \$1 million payment be placed into an interest bearing account pending resolution of the claims bill. If the bill is passed by the Legislature, the report stated that the \$100,000 should be returned to Ms. Jackson, and if it is not passed, it recommended that the \$100,000 be placed in a SNT for Joshua. The report concluded by finding that even though the settlement amount was a reduction of the actual value of the claims involved, it was reasonable and in the best interest of Joshua, given Joshua's tenuous medical situation and respondent's inability to pay a greater amount of damages without jeopardizing the fiscal well-being of Monroe County schools.

On July 21, 2000, the District School Board of Monroe County passed a resolution which approved the settlement agreement and indicated that the board would actively assist the claimant in seeking passage of the claims bill. The resolution also stated that the board has the ability to pay the settlement sums. Additionally, the board, in its 2000-2001 budget, appropriated the sum of \$2.5 million from its unencumbered funds balance for payment of the settlement amount.

Thereafter, the parties filed a Stipulation and Joint Motion for Approval of Settlement in the circuit court. On July 25, 2000, the circuit court in Monroe County, after reviewing the proposed settlement agreement and the GAL's report, granted the motion, and entered a consent judgment approving the settlement agreement.

The closing statement filed in circuit court on July 25, 2000, indicates that the initial \$1 million payment was disbursed as follows: (a) \$250,000 for attorneys' fees; (b) \$14,566 for costs; (c) \$250,000 in partial satisfaction of the North Shore Hospital lien; (d) \$163,224 in full satisfaction of Medicaid's lien; (e) \$100,000 to an interest bearing account to be held pending resolution of the claims bill; and (f) \$222,210 in full satisfaction of Ms. Jackson's filial consortium claim.

The parties entered an amended stipulation of settlement on October 24, 2001. In substance, the new settlement agreement was the same as the first agreement, except that it restructured the payment schedule for the \$2.5 million settlement in order to insure the school district's ability to pay without jeopardizing any county programming. The new agreement provided that: (a) on the first July 1st after passage of the claim bill, \$800,000 would be placed in a Special Needs Trust (SNT) for Joshua; (b) one year later on the next July 1st after the \$800,000 payment, a payment of \$700,000 would be made; and (c) one year later beginning on the next July 1st after the \$700,000 payment, the remaining \$1 million due would be paid in five annual \$200,000 installments.

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:

Liability

Notwithstanding whether there is a settlement agreement, as there is here, every claims bill must be based upon facts sufficient to meet the preponderance of the evidence standard. In order for the claimant in this case to prevail on his theory of negligent supervision by a teacher, it was necessary for him to prove: (a) the existence of a teacher-student relationship giving rise to a legal duty to supervise the student; (b) negligent breach of that duty; and (c) proximate causation of his injuries by the teacher's negligence. *Roberson v. Duval County School Bd.*, 618 So.2d 360 (Fla. 1st DCA 1993).

Here there is no question that Joshua's teachers had a legal duty to supervise him during the school sponsored swimming activity held on school grounds during regular school hours. See *Vesperill v. School Bd. of Orange County*, 641 So.2d 883 (1994) (holding that state law requires school board personnel to supervise students when the students are on school premises even if the student is not engaged in a school-sponsored activity). Further, there is no question that it constituted a breach of that duty for the teachers to fail to supervise Joshua's activities in the pool, and thereby allow him to nearly drown, particularly in light of the fact that the teachers knew he could not swim. Finally, as discussed below, it is clear from the evidence presented that Joshua's physical injuries were proximately caused by his near drowning resulting from the teachers' negligence. Accordingly, each element of liability has been proven to the Special Master's satisfaction.

Damages

The claimant introduced expert testimony indicating that prior to his accident he suffered from mild retardation, attention deficit hyperactive disorder, and obsessive/compulsive behaviors. Joshua was, however, in good physical health, and according to his mother's testimony, he enjoyed many activities, including school, church, and playing with his siblings.

Joshua, as a result of the near-drowning accident, is now in a persistent vegetative state, has suffered severe brain damage, is non-ambulatory, blind, and must be fed through a feeding tube. Additionally, he has scoliosis, hypertension, a seizure disorder, and gastroesophageal reflux disease.

The rehabilitation expert retained by the claimant completed a life care plan for Joshua. The plan indicates that Joshua will require 24-hour-a-day medical care for the remainder of his life, which includes specialized treatment by pulmonologists, urologists, and infectious disease doctors. Additionally, he will require physical and inhalation therapy, and will have to be fed via a gastro tube and kept in a sterile environment to prevent infections. The expert does not believe that Joshua will ever be able to return home because it would be impossible to provide the necessary care in a home setting.

When the expert initially estimated the cost of Joshua's medical care based on Joshua's condition in November 1999, he projected the annual cost as approximately \$260,195. The present value of this care if Joshua lives to age 45 is \$8 million. More recently, the expert testified in October 2000, that his original estimation was too low because it had become apparent that Joshua would require permanent hospitalization due to his need for a sterile environment. This development nearly doubles the original projected annual medical cost.

There are no collateral sources of payment in this case. Currently, Medicaid covers the cost of all of Joshua's medically necessary expenses; however, when Joshua becomes 21 years of age, his Medicaid coverage, pursuant to current regulations, will be more limited. Joshua may require funds to pay for medical expenses not covered by Medicaid when he becomes an adult.

Assets placed in SNTs do not affect Medicaid eligibility. Accordingly, the bill's requirement that each payment of the \$2.5 million settlement be placed in a SNT exclusively for the benefit of Joshua is desirable. Doing so will preserve Joshua's Medicaid eligibility, while providing him with the means to ensure that he receives optimum medical care. Additionally, the bill's specification of certain qualifications for the SNT trustee will help to ensure appropriate investment of the funds and objectivity in the determination of appropriate expenditures.

In conclusion, I find that the settlement amount of \$2.5 million is reasonable and supported by a preponderance of

the evidence. With proper investment, this amount should provide an adequate supplement to public assistance coverage for Joshua. Moreover, these monies will be paid from the school board's unencumbered funds account, and will not result in any reduction in school programming, nor require any tax increase.

ATTORNEYS FEES:

The claimant's attorneys have provided documentation that attorney fees are capped at 25 percent in accordance with §768.28, F.S.

LEGISLATIVE HISTORY:

This claim was filed last session by Senator Jones as SB 30 (2001). The undersigned Special Master recommended that the bill be amended to specify the payment schedule for \$2.5 million settlement to require that the SNT trustee possess certain qualifications, and to require forfeiture and reversion clauses. The bill received a favorable recommendation by the Senate Education Committee and a favorable recommendation by the Senate Finance and Taxation Committee, both consistent with the Special Master's recommendations. The bill passed the Senate and died in House Messages.

No further Special Master's hearings have been held in this claim. The parties submitted supplemental material which was reviewed and considered by the undersigned Special Master.

RECOMMENDATIONS:

I recommend that Senate Bill 60 (2002) be amended to specify that:

1. the initial \$800,000 payment, less sums due for attorneys' fees and costs, and any outstanding medical liens, shall be placed into a SNT established for Joshua England on July 1st following passage of the bill;
2. a payment of \$700,000 shall be paid to the SNT on the July 1st occurring one year after the \$800,000 payment; and
3. the remaining \$1 million shall be paid to the SNT in five annual \$200,000 installments beginning on the July 1st occurring one year after the \$700,000 payment.

Accordingly, I recommend that Senate Bill 60 be reported
FAVORABLY, AS AMENDED.

Respectfully submitted,

Tina White
Senate Special Master

cc: Senator Daryl Jones
Representative Ken Sorensen
Faye Blanton, Secretary of the Senate
Stephanie Birtman, House Special Master