# THE FLORIDA SENATE

**SPECIAL MASTER ON CLAIM BILLS**

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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 66 (2002)** – Senator Ron Klein
**HB 375** – Representative Edward Bullard
Relief of Mary Nell Dent Harley as guardian of Ariel Alexus Dent, a minor

## SPECIAL MASTER'S FINAL REPORT

THIS IS A $600,000 EXCESS JUDGMENT CLAIM PAYABLE FROM LOCAL FUNDS BASED ON A TOTAL SETTLEMENT FOR THE SUM OF $800,000 BETWEEN THE CLAIMANTS AND THE PALM BEACH COUNTY SCHOOL BOARD, UNDER WHICH THE SCHOOL BOARD AGREED TO PAY THE STATUTORY LIMIT OF $200,000 AND TO SUPPORT A CLAIM BILL FOR THE $600,000 BALANCE, TO COMPENSATE THE CLAIMANTS FOR DAMAGES RESULTING FROM INJURIES INFLICTED ON ARIEL ALEXUS DENT, A MINOR, WHEN A SCHOOL BUS DRIVEN BY A SCHOOL BOARD EMPLOYEE RAN OVER THE 6-YEAR OLD.

FINDINGS OF FACT:

On the afternoon of March 2, 1999, Ariel Alexus Dent, a 6-year-old first-grader, was riding home from school on a Palm Beach County school bus. Although Wayne Ricketts had been employed by the county as a school bus driver for several months, he had been driving the route involved in this incident for less than a week. On that day, he stopped and let Ariel out at the wrong stop and on the wrong side of the street; consequently, her great-grandmother, Mary Nell Dent Harley, who had gone to the correct stop to meet Ariel, was not at the site where Ariel got off the bus, which left Ariel to fend for herself.

While children, including Ariel, were exiting from the bus, several adults were talking to the bus driver about some other children who rode on that bus. The driver admitted in his deposition that he was distracted by those conversations. After he had finished talking, the driver closed the doors of the bus, checked his mirrors, and put the bus in motion. Right away, he heard a noise that he described in his deposition as sounding like the click of a stone. Mr. Ricketts did not immediately apply the brakes; however, very shortly after Mr. Ricketts heard the clicking sound, the driver of an automobile that was stopped in the lane facing the bus gestured frantically for Mr. Ricketts to stop the bus. When he did so and got out of the vehicle, Mr. Ricketts found Ariel lying on her side behind and to the right of the rear wheels of the bus.

The deposition testimony of the attending law enforcement officer and of the automobile driver, the Rev. Mr. James R. McFadden, established that the front bumper of the bus had hit Ariel and that both the right front and the right rear wheels had then run over her. The Rev. Mr. McFadden's statement reads: "The bumper knocked her down. The front wheel ran over her. Then the rear wheel ran over her…. And then I jumped out of my car at that point and tried to stop the bus driver."

Other bystanders who viewed the incident told the investigating officer that Ariel initially walked away from the bus but then ran back into its path, apparently in pursuit of either a balloon or a piece of paper.

Emergency medical personnel arrived promptly and took Ariel to St. Mary's Medical Center in West Palm Beach, where she was diagnosed as having a fracture of the pubis, acute blood loss, a fracture of the distal radius of the left femur, an abrasion of the head, a wound to her hand, a contusion of the thigh, and abrasions to her hip, leg, and right eye. Ariel underwent surgery for the displaced fracture of her left femoral shaft (i.e., the bone had broken completely into two parts, and one part overlapped the other) and for the closed fracture of the left distal radius and the closed fracture of her pelvic ring. Her orthopedic physician performed a closed reduction and applied an external fixator to her left leg. (The fixator was a metal rod

about 2 feet long, which was screwed into her bone in three places.)

Ariel was hospitalized from March 2 to March 8, 1999, then underwent rehabilitation and extensive physical therapy. She was released from St. Mary's Hospital Rehabilitation Unit on March 23, 1999. Since the date of the initial trauma, Ariel has undergone six surgeries because of a persistent chronic seroma (fatty tumor) of her right thigh.

Medical experts engaged by claimant's attorney have testified that Ariel will in the future need further care and treatment, including surgeries for scar revision of her left lower extremity and of the web space on her left hand. Andrew Schneider, M.D., an orthopedic physician, stated his finding from an examination performed March 13, 2001, that Ariel has "approximately 1.5 cm limb length discrepancy[,] longer on the left side compared to the right side" and that "it is possible that this [limb length discrepancy] could increase over time although it is not likely to increase significantly." He recommended follow-up in 6 months "and depending on the discrepancy and whether or not she has symptoms, consideration for correction of limb lengths via shoe correction." However, a doctor who was engaged by the defendant to perform an independent medical examination of Ariel on February 23, 2001, Dr. Mark Rubenstein, said in his report that he could not determine for certain, from examining Ariel while she was lying down, that there is a discrepancy in the respective lengths of Ariel's legs.

At the time of the Special Master's hearing on November 6, 2001, I observed the child walk for several minutes. I did not observe a limp; however, my inability to see any hitch in Ariel's gait does not mean that she never limps or that she won't limp in the future.

Claimant's attorney, in the case summary, describes Ariel's scars as "grossly disfiguring." The child's great-grandmother, Mary Nell Dent Harley, who is her guardian, and the child's mother, Shawnta Dent, testified at the Special Master's hearing that Ariel is extremely unwilling to have her scars exposed to the view of others and that she, therefore, will no longer wear shorts or other apparel that reveals the scars. I have not seen those scars first-hand, but photographs provided by claimant's attorneys show a

lengthy (23-cm.-long) raised scar on her right thigh and three indentations that resemble deep smallpox vaccinations on her left leg, where the external fixator was attached.

During the months following the incident, Ariel was unable to attend school for so many days that, as a result of her absences, she was retained in 1st grade. She is currently in the 2nd grade at age 9. Before March 1999, she had achieved a satisfactory record of attendance and academic achievement, and there is no indication that her retention was due to anything other than the injuries sustained in this incident and the extensive medical treatment that it necessitated.

The Palm Beach County School Board has paid the medical bills that have accrued to date as a result of the incident and has agreed to pay, for the remainder of Ariel's life, any and all medical expenses she incurs which arise out of the incident.

CONCLUSIONS OF LAW:

Duty; breach of duty—The school bus driver was not charged with careless driving. However, a few days after the incident, he was encouraged to resign in lieu of being dismissed, an action that would have been easy for the school board to take, since Mr. Ricketts was still in his probationary-employment period. In his deposition, Mr. Ricketts denied that he was at fault; however, he admitted that the day was sunny, that the bus had no mechanical problems, and that he had checked his mirrors to see whether anything was in front of the bus before he began to move forward but had not, on that occasion or any previous occasion, leaned forward and looked down to see what was in front of the bus. It seems apparent that it is a breach of duty for the driver of a school bus to run over a child who is in his care and, by his own testimony, neither the visibility due to weather nor the condition of the bus provides mitigating circumstances. That breach of duty was, inarguably, the cause of Ariel's injuries described above.

Liability—The Palm Beach County School Board, as the employer of Mr. Ricketts, has admitted liability. When the possibility of comparative negligence on the part of the child was raised, claimant's attorney and respondent's attorney agreed that, under Florida law, comparative negligence cannot be attributed to a minor who is under 7 years of age.

That statement is not strictly a correct statement of the case law. The case of *Metropolitan Dade County v. Dillon*, [305 So.2d 36 (4th DCA 1975) certiorari denied 317 So.2d 442 (Fla. 1975)], holds that comparative negligence cannot be attributed to a minor who is under 6 years of age.

In the Dillon case, the deceased child who was the basis for the wrongful-death action had been slightly under 6 years and 3 months old when a garbage truck hit her and killed her as she walked on a path commonly used by pedestrians. The Fourth District Court of Appeal also held that "one who is not in a position to appreciate or apprehend the danger to which he is exposed can hardly be deemed guilty of contributory (comparative) negligence." The court refused to find the child contributorily negligent.

I find it persuasive to argue that, on March 2, 1999, Ariel Dent was not in a position to appreciate the danger involved in running in front of the parked school bus, since she was at that time only 6 years plus 5-1/2 months old, and since the bystanders who told the investigating officer that Ariel ran back into the path of the bus agreed that the little girl's actions were entirely normal for a 6-year-old child. I concur in that assessment.

Damages—Bernard F. Pettingill, Jr., Ph.D., a consulting economist, prepared a "Present Value Economic Analysis In The Matter of Miss Ariel Dent," which was dated February 16, 2001. In preparing his analysis, Dr. Pettingill extracted from the report of Dr. Craig H. Lichtblau, M.D., Board-Certified Physical Medicine and Rehabilitation Specialist, the opinion that: "According to AMA Guidelines, Miss Dent has suffered a 22% impairment of the whole person and a 30% permanent functional impairment." Dr. Pettingill also noted that, according to specified documents in the Current Population Reports, Special Studies, "someone with a permanent disability rating will suffer a loss of earning capacity in future, estimated at approximately 13%."

On that basis, Dr. Pettingill constructed two models of Ariel's projected lifetime earning capacity. The first model is based on the premise that Ariel will graduate from high school only and will enter the work force at age 18, in which case her projected losses would include $58,367 described as present value future loss of earning capacity, $111,146 in

past medical expenses (from the incident date to the date of Dr. Pettingill's report), and $417,317 described as present value [of] future medical care, for a projected total economic loss of $586,830.

The second model is based on the premise that Ariel will graduate from college and will enter the work force at age 22, in which case her projected losses include $96,338 in present value future loss of earning capacity and the other two figures quoted for model 1, for a projected total economic loss of $624,801.

These models for future loss of earning capacity were based, respectively, on a 13% reduction of the average annual salary of all high school graduates, estimated at $18,071, and on a like reduction of the estimated annual salary for a college graduate, which was $34,116.

Claimant's attorney, at the request of the House Special Master, provided us with summaries of cases from the Jury Verdict Reporter for the area around Palm Beach County. The case that most nearly resembles Ariel's involved a 49-year-old woman, who worked as a professional tour guide, and who was run over by an airport shuttle van when she was a pedestrian in a parking lot at Orlando International Airport. After the shuttle struck the woman, the driver "continued forward driving the shuttle's front tire over Plaintiff's chest and abdomen." That woman sustained several fractures for which she underwent surgery, and there was a dispute between her and the defendant as to whether she would require future medical treatment and, if so, who should pay for it. The defendant offered $750,000 in settlement, but the jury awarded the plaintiff $1,191,089.09. In other cases involving adult victims, the damages awarded by verdict or settlement were in amounts comparable to the $800,000 that the plaintiff and the defendant have agreed to in the instant case. The school board has already paid the $200,000 that is allowable under §768.28, F.S., $100,000 for Ariel and $100,000 to her mother, who was a named plaintiff in the legal action.

As Ariel's attorney commented in her cover letter accompanying the Jury Verdict Reporter excerpts: "…none of the injuries in these cases were to a child who will require a lifetime of care." In view of her estimated lifespan of

approximately 67 more years (per Dr. Pettingill's report), Ariel will have a long time to live with her impairment and scars and to be at risk of experiencing further medical treatment and losses stemming from this incident.

ATTORNEYS FEES: Claimant's attorney has provided an affidavit attesting that the attorney's fees that have been and will be charged in connection with this matter will not exceed the statutory limit of 25 percent of the amounts recovered.

RECOMMENDATIONS: I recommend that SB 66 (2002), be amended to authorize and direct the Palm Beach County School Board to pay Ariel Alexus Dent, by and through her guardian, Mary Nell Dent Harley, the sum of $600,000. After attorney's fees and authorized costs are paid, the net balance is to be invested in a court-supervised annuity of which Mary Nell Dent Harley, Ariel's guardian, will receive, solely for Ariel's benefit, funding beginning at age 18 consisting of $25,000 per year guaranteed for 5 years; lifetime monthly income of approximately $2,000 per month guaranteed for 360 months beginning at age 22; and guaranteed payments at ages 25 and 30, in the amount of $50,000 at age 25 and $93,000 at age 30.

Based upon the foregoing, I recommend that Senate Bill 66 be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

Mary-Ellen Mockbee
Senate Special Master

cc: Senator Ron Klein
Representative Edward Bullard
Faye Blanton, Secretary of the Senate
House Claims Committee