



## THE FLORIDA SENATE

### SPECIAL MASTER ON CLAIM BILLS

**Location**

302 Senate Office Building

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| DATE    | COMM | ACTION           |
|---------|------|------------------|
| 2/28/17 | SM   | Fav/1 amendment  |
| 3/30/17 | JU   | <b>Fav/CS</b>    |
| 4/18/17 | CA   | <b>Favorable</b> |
|         | RC   |                  |

February 28, 2017

The Honorable Joe Negrón  
President, The Florida Senate  
Suite 409, The Capitol  
Tallahassee, Florida 32399-1100

Re: **CS/SB 40** – Judiciary Committee and Senator Bill Galvano  
**HB 6503** – Representative Sean Shaw  
Relief of Sean McNamee by the School Board of Hillsborough County

### SPECIAL MASTER'S FINAL REPORT

This is an uncontested excess judgment claim for local funds in the amount of 1.7 million against the school board of Hillsborough County for damages caused to Sean McNamee after he struck his head on a field striper that was negligently left on a football field during football practice.

#### FINDINGS OF FACT:

On October 9, 2013, on or around 3:20 p.m., Sean McNamee began participating in football practice with the Wharton High School football team in Hillsborough County, Florida. The players were running passing drills with their lower uniforms on but without shoulder pads or helmets. At approximately 3:45 p.m., while participating in a passing drill, Sean lost his balance after colliding with another player and struck his head on a field striper left on the field by the Wharton High school Head Football Coach David Mitchell. Sean's friend, Daniel, saw the collision and noticed that Sean was acting strangely. Daniel alerted Coach Mitchell who directed Daniel to take Sean to the locker room to be seen by the athletic trainer, Timothy Koecher. Daniel took Sean to the school, but did not escort Sean inside or speak to the trainer.

Trainer Koecher stayed with Sean intermittently in the locker room and in the training room. The extent of any examination

that Trainer Koecher conducted on Sean is not clear. The student injury report submitted to the school by Trainer Koecher states that Sean suffered from a bruise and that ice was applied. Trainer Koecher's written statement, taken a year after the incident and submitted as an addendum after the special master hearing, indicates that there was no laceration or visible bleeding in the injured area and that normal protocol was followed when assessing Sean's injury. However, the joint submission presented by both parties states that Trainer Koecher failed to adhere to proper protocol to evaluate Sean's condition and obtain appropriate medical intervention.

On several occasions, Trainer Koecher left Sean alone. Most of these occasions were for approximately 10 minutes, but on one occasion Sean was left alone for approximately 30 minutes. At approximately 4:22 p.m., during the 30-minute period alone, Sean left campus and drove himself home despite being told by the trainer on several occasions not to drive. Sean has little to no memory of driving himself home. On at least one of the occasions, trainer Koecher left Sean to get cell reception to contact Sean's mother, Jody McNamee. When Trainer Koecher contacted her, Jody McNamee was in Brandon, Florida, and she immediately headed to the school to pick up Sean.

After Sean arrived home, he was met by his younger sister who was an elementary student at the time. Upset by Sean's incoherent condition, his sister called their parents and their father, Todd McNamee, returned home and took Sean to the emergency room. Sean was initially seen at Florida Hospital, Tampa, at 6:01 p.m., approximately two and a half hours after first sustaining his injury. Sean's parents stated in the hearing that the hospital could not see him in the emergency room immediately because he was transported to the hospital by his father and not by ambulance.

A CT scan revealed that Sean suffered from a large left acute temporal convexity epidural hemorrhage measuring 5.3 x 3.2 centimeters. After consulting with a radiologist, Dr. Yoav Ritter, the treating surgeon, rushed Sean to surgery where he removed a portion of Sean's skull to relieve the cranial pressure caused by internal bleeding and swelling. Sean was placed in an induced coma while he recovered and he

emerged from his coma on October 18, 2013. He was discharged from the hospital on October 31, 2013.

Sean had a second surgery in December, 2013, to replace the portion of his skull with a titanium plate. In January, 2015, Sean began to suffer from seizures that would occur approximately every one to two months. In April, 2016, Sean suffered from a significant seizure that required an extended period of hospitalization. Testimony at the hearing placed his last known seizure on or around June or July, 2016. Sean's drivers license has been revoked due to his seizures. At the time of the settlement, total health care costs for Sean's injuries totaled approximately \$500,000.

In April, 2015, Sean and his parents filed suit against the School Board of Hillsborough County. On January 7, 2016, as a result of court-ordered mediation, the parties entered into a stipulated judgement against the School Board in the amount of \$2 million. Of the \$2 million, \$300,000 has been paid,<sup>1</sup> with Sean receiving \$200,000 and Todd and Jody McNamee receiving \$50,000 each. Less attorney's fees, costs, and medical liens, Sean has received approximately \$109,000 and each parent has received approximately \$36,000. Currently, there are outstanding medical liens in the amounts of \$150,874 owed to Aetna and \$13,831 owed to Florida Blue. The school board is self-insured for the total amount of the judgment.

In addition to the seizures, Sean suffers from ongoing mental impairment. A psychological evaluation of Sean, based on examinations performed on January 10 and 28, 2014, revealed significant changes in cognitive functions from his severe traumatic brain injury (TBI) that would have an adverse impact on school functioning. The evaluation also found that Sean will need extra help with organizational skills at home and at school and that continued parental involvement in managing his affairs and decisions clearly will be needed. However, the evaluation did not reveal deficits that would interfere with employability with accommodations made under the Americans with Disabilities Act.

Currently, Sean lives with his brother in an apartment they rent together. He is unemployed and is not enrolled in school. An

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<sup>1</sup> Pursuant to s. 768.28, F.S.

irrevocable trust was established for Sean's medical and living expenses on April 11, 2016.

CONCLUSIONS OF LAW:

Florida schools have a special relationship with their students which creates a duty to reasonably supervise the students during all activities that are subject to the control of the school.<sup>2</sup> Specific to student athletes, and as pertinent to the facts of this case, Wharton High School had the duty to ensure that Sean McNamee was adequately supervised when participating in football practice and to ensure that appropriate measures were taken after he was injured to prevent aggravation of the injury.<sup>3</sup>

Duty to Supervise:

The school breached its duty to adequately supervise its student athletes when Coach Mitchell negligently left the field striper on the field within the practice area. By leaving the striper on the field and by having the players conduct warm up activities in the area where the striper was left, Coach Mitchell created a hazard that was the cause of Sean McNamee's injury. Additionally, although TBI is an injury that may be expected while playing football, being injured on a piece of equipment that was negligently left on the practice field is not an injury inherent to playing football.

Duty to Prevent Aggravation of the Injury:

The school breached its duty to ensure that appropriate measures were taken after Sean's injury to prevent aggravation of the injury. The joint submission of both parties indicates that Trainer Koecher failed to adhere to proper protocol to evaluate Sean's condition and obtain appropriate medical intervention.<sup>4</sup> As a result, there was a significant delay in Sean receiving the necessary medical treatment for his TBI. It is probable that the delay in treatment aggravated Sean's injury and may have caused some of the long-term changes in his cognitive functions that are present today.

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<sup>2</sup> *Limonos v. Sch. Dist.*, 161 So. 3d 384, 390 (Fla. 2015).

<sup>3</sup> *Id.*

<sup>4</sup> Although Trainer Koecher in his written statement indicated that he followed protocol when examining Sean McNamee, there are several reasons to disregard this statement. First, the statement was made a full year after the events. Second, the submission stating that Trainer Koecher was negligent was a joint submission with agreed upon facts by both parties. Third, the statement itself was not presented at or before the hearing and, as such, the plaintiffs did not have the opportunity to respond to the statement in the hearing.

Damages:

As can be seen through the established facts, Sean suffers from both acute and chronic effects caused by the TBI he suffered on October 9, 2013. These effects include several hospitalizations and surgeries that accrued nearly \$500,000 in medical expenses, ongoing seizures, loss of his ability to maintain a driver's license, and cognitive changes that will likely affect his ability to succeed in school and to live on his own. The TBI Sean suffered due to Coach Mitchell's negligence and the likely aggravation of his injury he suffered due to Trainer Koecher's negligence in obtaining proper medical care in a timely manner were the direct causes of both the acute and ongoing damages.

ATTORNEYS FEES:

Senate Bill 40 restricts the total amount paid for attorney fees, lobbying fees, costs, and similar expenses relating to this claim to 25 percent of the amount awarded. As such, total attorney and lobbyist fees will be \$425,000 of the \$1.7 million awarded under the bill. However, the limits on lobbying fees, costs, and other expenses should be removed to conform to a recent opinion of the Florida Supreme Court. See *Searcy, Denney, Scarola, Barnhart & Shipley v. State*, 42 Fla. L. Weekly S92 (Fla. 2016).

SPECIAL NEEDS TRUST:

The undersigned recommends that Senate Bill 40 be amended to direct all payment of funds into the Sean R. McNamee Irrevocable Trust, after the deduction of costs and liens. This change will protect Sean's eligibility for means tested government benefits.

RECOMMENDATIONS:

The undersigned recommends that Senate Bill 40 (2017) be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

Daniel Looke  
Senate Special Master

cc: Secretary of the Senate

**CS by Judiciary:**

The committee substitute provides for the proceeds of the claim bill to be paid into a trust for the benefit of the disabled claimant. The amendment also eliminates references to caps on lobbying fees, costs, and other expenses, consistent with a recent Supreme Court Opinion.