THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
409 The Capitol

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DATE	COMM	ACTION
2/2/22	SM	Favorable
2/7/22	JU	Fav/CS
2/23/22	RC	Favorable

February 2, 2022

The Honorable Wilton Simpson
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **CS/SB 58** – Judiciary Committee and Senator Ana Maria Rodriguez
HB 6517 – Representative Aloupis
Relief of Yeilyn Quiroz Otero by Miami-Dade County

SPECIAL MASTER'S FINAL REPORT

THIS IS A SETTLED CLAIM BILL FOR $3.8 MILLION. THE GUARDIAN OF THE PROPERTY OF YEILYN Q. OTERO, A MINOR, SEEKS DAMAGES FROM MIAMI-DADE COUNTY FOR PERSONAL INJURIES CAUSED BY THE NEGLIGENT OPERATION OF A POLICE CAR.

FINDINGS OF FACT:

Yeilyn Quiroz Otero is a 6-year-old paraplegic whose spine was severed in a 2016 car accident. A tracheostomy has been inserted into her windpipe to assist with her breathing. Because of the neurological damage to her spinal cord, her bladder and bowels do not function normally. Three adults contributed to the injuries Yeilyn sustained: Officer Daniel Escarra, the driver of a Miami-Dade police cruiser; Mr. Hector Meraz-Funez, the driver of the vehicle that carried Yeilyn when she was injured; and Fany Otero, Yeilyn's mother who did not place her 13-month-old daughter in a car seat.

Hurricane Matthew

On the evening of October 6, 2016, the outer bands of Hurricane Matthew were approaching Miami. In anticipation of the hurricane, Governor Rick Scott declared a state of emergency for Florida.[1] The mayor of Miami-Dade County

[1] Executive Order Number 16-230 signed on October 3, 2016.

declared a local state of emergency.[2] The hurricane was projected to make landfall in southeast Florida with high velocity winds. Members of the Miami-Dade police Special Patrol Bureau, which consists of specialized response units including the K-9 unit, marine patrol, and tactical units, were in a meeting mobilizing for the hurricane. Officer Daniel Escarra was in the meeting.

Emergency Announcement for Assistance

A Miami-Dade County police dispatcher interrupted the meeting with an emergency announcement that was transmitted over the officers' radios. She stated that a subject had jumped from a stolen vehicle and was running through a residential neighborhood. According to Police Officer Daniel Escarra, who was then a 23-year-veteran of the department, he could hear other officers "screaming" in the background that they needed a K-9 unit immediately. The officers were chasing the subject and attempting to set up a perimeter to contain him. The subject was reportedly holding his waistband as he ran which suggested to Officer Escarra that the subject may have been carrying a gun.

Officer Daniel Escarra

The dispatcher advised that a K-9 was needed immediately. A "Code 3" or "Level 3" emergency response was authorized.[3] Officer Escarra responded by activating the lights and siren on his police car and began driving with his K-9 toward the neighborhood.

Hector Meraz-Funez

At that same time and in another part of town, Mr. Hector Meraz-Funez began driving his 1998 Audi A4 home from Wal-Mart. The car is a compact four-door sedan with five seats.[4] Eight people were riding in the Audi: three adults and five children. According to the Miami-Dade Police Department

[2] The Miami-Dade County Declaration was signed by Mayor Carlos A. Gimenez on October 5, 2016.
[3] According to the Department's Driving Procedures (Chapter 30 – Part 1- Response Modes) a "Code 3 Emergency" is "a situation or sudden occurrence which poses an actual threat of serious injury or loss of human life and which demands swift police action; e.g., seriously ill or injured person, shooting, sexual battery, etc." In Miami-Dade County's Notice of Serving Answers to Plaintiffs' Second Interrogatories, the defendant states that Officer Escarra was responding to an authorized Code 3 emergency.
[4] See Cars.com, Research & Reviews, 1998 Audi A4, https://www.cars.com/research/audi-a4-1998/ for a description of the car model.

Case Summary, Mr. Meraz-Funez did not have a valid Florida Driver License[5] nor was he wearing a seatbelt.

Section 316.613(1)(a), Florida Statutes (2016), required each operator of a motor vehicle, while transporting a child up to 5 years or younger, to provide for the child's protection by properly using a crash-tested, federally approved child restraint device. If the child is "aged through 3 years," the restraint device must be a separate carrier or a vehicle manufacturer's integrated child seat.

Fany Otero and Passengers

Yeilyn's mother, Fany Otero, was riding in the right front passenger seat holding Yeilyn in her lap.[6] Yeilyn was not restrained in a car seat, and Ms. Otero was not wearing a seatbelt.

Maria Ortiz, an adult female and Fany Otero's sister, sat behind the driver accompanied by four children. She was not wearing a seatbelt nor were any of the children properly secured in restraint devices.[7] One child in the back seat was placed in a child safety seat but it was not secured to the vehicle.[8]

The Collision

As Officer Escarra traveled south on NW 57th Avenue, Mr. Meraz-Funez traveled east on West Flagler Street. At 6:28 p.m., Officer Escarra and Mr. Meraz-Funez simultaneously entered the intersection of those streets. Mr. Meraz-Funez was attempting to make a left-hand turn in the intersection.

Their vehicles collided with tremendous force. Each car spun around and traveled some distance before coming to rest.[9]

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[5] Section 322.03(1), F.S. (2016), provides that a person may not drive a motor vehicle on a highway in this state unless he or she has a valid driver license.

[6] This information was provided in a sworn statement given by Maria Ortiz, the adult passenger riding in the rear left passenger seat, to the Miami Dade Police Department detective while in the hospital after the accident. Yeilyn's location while traveling in the car is contradicted in a Miami-Dade County Memorandum, dated October 19, 2016, but it is unclear who provided that information to the police. However, in the special master hearing, the claimant's counsel confirmed Yeilyn's location in the car as being in the front passenger seat where she was held by her mother.

[7] According to the Miami-Dade Police Department Case Summary, no one in the vehicle was wearing a seatbelt. However, in a sworn statement given to Miami-Dade Police Traffic Detective, Ms. Ortiz stated that she was wearing a seatbelt.

[8] *Id*.

[9] Reports state that Mr. Meraz-Funez intended to make a left turn in the intersection.

Internal data records from Officer Escarra's police cruiser demonstrate that the car had been traveling at 75 mph as he neared the intersection. At the moment of impact, crash data indicates that he applied his brakes but was still traveling at 58 mph. It is unknown how fast Mr. Meraz-Funez was traveling when he entered the intersection. Since the accident, he has remained unable to move and is unable to communicate.

All occupants in both vehicles were taken by ambulance to local hospitals. Yeilyn, who alone had life-threatening injuries, and two children were transported to Nicklaus Children's Hospital. The remaining five occupants were taken to Jackson Memorial Hospital Ryder Trauma Center. Officer Escarra was transported to Doctor's hospital, and his dog was taken to a veterinarian hospital.

Inoperative Traffic Signal at the Intersection

Under normal circumstances, traffic at that intersection is controlled by traffic signal lights. Unfortunately, at the time of the collision, the lights were not operating due to a power failure caused by approaching Hurricane Matthew. The skies were overcast but not dark. The weather was warm, rainy, and windy, and the roads were wet. It was still daylight.

Pursuant to section 316.1235, Florida Statutes (2016), when the traffic signals are not working, each driver at the intersection is required to stop before proceeding into the intersection. Neither driver abided by this statute. Both entered the intersection without stopping and the impact was horrific.

Litigation History

A lawsuit was filed in 2018 on behalf of Yeilyn Quiroz Otero and other passengers against Miami-Dade County.[10] Yeilyn's case was settled through court-ordered mediation on February 26, 2021. Under the terms of the settlement agreement, Miami-Dade County did not admit fault, but it

[10] The case was originally styled *Fanny Gonzalez-Otero, Maria Elena Ortiz, Belkys Gonzalez, Genesis Gonzalez, Jonathan Cordova, Sherlyn Cordova, and Yeilyn s. Quiroz-Otero, as individuals, v. Board of County Commissioners of Miami-Dade County, a political subdivision of the State of Florida, and Miami-Dade Police Department, Defendants,* Case No. 2018-03667-CA-01. The pleadings were later amended to add Hector Enrique Meraz-Funez as a defendant. When Heather Hasandras was appointed guardian for Yeilyn, on June 15, 2021, Heather Hasandras was substituted in place of Fany Otero, as guardian of the property of Y.Q.O., a minor.

agreed to pay the statutory cap of $200,000, and it agreed not to contest a claim bill for the amount of $3,800,000.

Claim Bill Hearing

A remote claim bill hearing was conducted on November 5, 2021, before the House and Senate special masters. A claim bill hearing is conducted "de novo" which means that the hearing is held anew, without giving consideration or deference to any previous assumptions, conclusions, or settlement agreements.

Francisco Maderal appeared on behalf of his client, Yeilyn Quiroz Otero, and presented the claimant's case. Testimony supporting Yeilyn's future living and medical care needs was presented by Anne Koerner, a life care plan advisor. Heather Hasandras, who is Yeilyn's court-approved guardian of the property, answered questions about Yeilyn's current circumstances and the future disbursement of funds held in trust on her behalf.

Richard Schevis, an attorney who represents the respondent Miami-Dade County, also appeared on behalf of his client. Because Miami-Dade County agreed that it would not oppose the claim bill, Mr. Schevis did not present any theories, arguments, witnesses, or evidence on the County's behalf. He did not object to any portion of Mr. Maderal's presentation. Mr. Schevis stated that the County supports the settlement agreement and the claim bill, but he was otherwise silent throughout the hearing.

CONCLUSIONS OF LAW:

Under the legal doctrine of *respondeat superior*, Miami-Dade County is responsible for the wrongful acts of its employees when the acts are committed within the scope of their employment. Because Officer Escarra was operating a police vehicle in the course and scope of his employment at the time of the accident and because the vehicle was owned by Miami-Dade County, the County is responsible for any wrongful acts, including negligence, committed by Officer Escarra.

Elements of Negligence

When a plaintiff seeks to recover financial damages in a negligence action, he or she must prove that the injury was caused by the defendant's negligence. Negligence is defined

as the failure to use reasonable care. It is the care that a reasonably careful person would use under like circumstances.[11]

The plaintiff bears the burden of proving, by the greater weight of the evidence, that the defendant's action was a breach of the duty that the defendant owed to the plaintiff. The "greater weight of the evidence" burden of proof means the more persuasive and convincing force and effect of the entire evidence in the case.[12] Some explain the "greater weight of the evidence" concept to mean that, if each party's evidence is placed on a balance scale, the side that dips down, even by the smallest amount, has met the burden of proof by the greater weight of the evidence.

To establish liability, Yeilyn's attorney must prove these elements, by the greater weight of the evidence:

(1) Duty -That the County owed a duty, or obligation, of care to her;

(2) Breach -That the County breached that duty by not conforming to the standard required;

(3) Causation -That the breach of the duty was the legal cause of Yeilyn's injury; and

(4) Damages -That Yeilyn suffered actual harm or loss.

In this case, the County's liability depends on whether the County breached its duty of care to Yeilyn and whether that breach caused her damages. Stated slightly differently, the issues are whether the police officer negligently operated the police vehicle and whether that negligent operation caused Yeilyn's resulting physical injuries.

Duty

<u>Officer Escarra's Duty to Exercise Reasonable Care</u>
Officer Escarra was responsible for exercising the duty of reasonable care to others while driving his police vehicle. Even though Officer Escarra was driving an authorized emergency vehicle en route to an existing emergency, he was not absolved of his duty to exercise reasonable care to others.

[11] Fla. Std. Jury Instr. (Civ.) 401.4, *Negligence*.
[12] Fla. Std. Jury Instr. (Civ.) 401.3, *Greater Weight of the Evidence*.

The police department's Driving Procedures state than when responding in an emergency mode, the three primary elements that must be considered in every situation are "safety, expeditious arrival, and protection of life and property." The Driving Procedures further state that "extreme care and caution must be exercised whenever an emergency response is initiated."[13]

The posted speed limit on NW 57th Avenue was 40 miles per hour. In an emergency situation, internal department procedures authorize an emergency vehicle to exceed the speed limit by no more than 20 miles per hour.[14] Accordingly, Officer Escarra was not authorized to exceed 60 miles per hour en route to the emergency.

As discussed above, the statutes prescribe driving procedures when a traffic signal is not operational in an intersection. Officer Escarra had a duty pursuant to section 316.1235, Florida Statutes (2016), to stop before proceeding through the intersection where the traffic lights were not working.

Breach

Based upon the facts stated above, it is evident that Officer Escarra breached the duty of care owed to Yeilyn.

Officer Escarra

Exceeded the Permissible Speed Limit

As noted above, Officer Escarra was authorized to drive at 60 miles per hour and no faster. However, the internal crash data retrieved from the police vehicle demonstrates that Mr. Escarra was traveling at 75 miles per hour as he approached the intersection. In a split second before the collision, he immediately applied his brakes and collided while traveling at 58 miles per hour. In his deposition testimony, Officer Escarra was surprised to learn that he had been driving at 75 miles per hour. The speed at which he was driving was not authorized, even under emergency circumstances, and was a breach of his duty.

[13] Miami-Dade County, Chapter 30 – Part I – Driving Procedures; Response Modes, Responding in an Emergency Mode.
[14] *Id*.

Section 316.072(5), Florida Statutes (2016), provides that the driver of an authorized emergency vehicle, when responding to an emergency call, may exceed the maximum speed limit as long as the driver does not endanger life or property. This exception does not relieve the driver "from the duty to drive with due regard for the safety of all persons" and the provision states that it does "not protect the driver from the consequences of his or her reckless disregard for the safety of others."[15]

Failed to Stop at the Intersection Where the Traffic Lights Were Not Working

A video surveillance camera captured live footage of the accident. The video footage shows that Officer Escarra failed to stop at the inoperative traffic signal, which is a violation of section 316.1235, Florida Statutes. (2016). When the traffic lights in an intersection are not working, each driver must stop before determining it is safe to enter.[16] He stated that he was not aware that he was entering an intersection because there were no lights signaling that it was an intersection.

Received a Disciplinary Report

The Special Patrol Bureau of Miami-Dade County issued a Disciplinary Action Report on October 25, 2016. The Crash Review Panel determined that the accident was preventable on Officer Escarra's part, and he received a written reprimand. While the report noted that his 14-year driving history in the K-9 unit was worthy of recognition and consideration, it stated that "the outcome of the crash cannot be overlooked." The report further stated that the poor visibility, inclement weather, and non-operating traffic signal were more reasons for Officer Escarra to exercise greater caution. The report concluded that his actions were "neither intentional nor reckless, but rather an unintended consequence of timing and judgment."

Comparative Negligence

Comparative negligence is the legal theory that a defendant may diminish his or her responsibility to an injured plaintiff by demonstrating that another person, sometimes the plaintiff and sometimes another defendant or even an unnamed party, was also negligent and that negligence contributed to the plaintiff's injuries. The goal of proving a successful

[15] Section 316.072(5)(c), F.S. (2016).
[16] See s. 316.123(2)(a), F.S. (2016).

comparative negligence defense is to hold other people responsible for the injuries they cause to a plaintiff. By apportioning damages among all who are at fault, it will ultimately reduce the amount of damages owed by a defendant.

If this case had proceeded to trial, it would likely have been disputed that Officer Escarra was solely at fault in the collision or solely responsible for Yeilyn's injuries and damages. The County raised the affirmative defense of comparative negligence in its Answer to the Plaintiffs' Second Amended Complaint in an effort to reduce Officer Escarra's liability in causing the accident and his responsibility for Yeilyn's damages.[17] It is evident from the facts of the collision that Officer Escarra was not alone in breaching the duty of care owed to Yeilyn.

Mr. Hector Meraz-Funez

While the bill seeks damages solely from Miami-Dade County, it should be noted that the civil lawsuit was amended to add Mr. Meraz-Funez as a defendant who was also responsible for Yeilyn's injuries by negligently operating his vehicle.

It is apparent that Mr. Meraz-Funez[18] also breached his duty to exercise reasonable care towards Yeilyn and was partially responsible for her injuries and damages. By violating four separate statues, Mr. Meraz-Funez failed to operate his vehicle in a safe manner. It is not disputed that Mr. Meraz-Funez operated a vehicle without a valid driver's license.[19] He violated section 316.126, Florida Statutes (2016), when he did not yield the right-of-way to the approaching emergency vehicle where the emergency lights and siren were activated.[20] Based upon the surveillance video, Mr. Meraz-Funez also proceeded into the intersection where the traffic signal was not operating. He did this without slowing or stopping in violation of the statute.[21] It seems likely that Mr.

[17] Section 768.81, F.S., is the comparative fault statute. The apportionment of damages is established in section 768.81(3), Florida Statutes.
[18] No evidence was submitted to demonstrate that a blood alcohol test was ever administered to Mr. Meraz-Funez after the accident.
[19] Section 322.03, F.S. (2016). If Mr. Meraz-Funez had possessed a driver license, there would at least be evidence that he was familiar with the rules for safely operating a vehicle at an intersection where the lights were not working and that a child car seat was required for Yeilyn and other small children in the car. However, driving without a license is not the same thing as driving negligently.
[20] Section 316.126, F.S. (2016).
[21] Section 316.1235, F.S. (2016).

Meraz-Funez would have heard the siren or would have seen the approaching lights of the police car.

Finally, Mr. Meraz-Funez operated a vehicle in which children were not restrained by seat belts or by the use of child car seats as required by law.[22] The use of a child car seat might well have prevented Yeilyn's injuries or significantly reduced them.

The child restraint statute, section 316.613, Florida Statutes (2016), also contains an evidentiary provision[23] which states:

"The failure to provide and use a child passenger restraint shall not be considered comparative negligence, nor shall such failure be admissible as evidence in the trial of any civil action with regard to negligence."

At first glance, this evidentiary provision would appear to prohibit the introduction into evidence of the fact that children were not properly restrained and bar a claim for comparative negligence.

However, the statute was construed by the Fifth District Court of Appeal in 2008 to clarify its application.[24] In *Quarantello v. Leroy*, a factual situation similar to this case, a court-appointed guardian filed a personal injury lawsuit against a child's grandmother to recover damages for the grandchild's injuries that were sustained in a car accident in which the child was thrown from a booster seat. The booster seat was designed for an older child and was not an appropriate device to insure the young child's safety. The child became a quadriplegic from the accident.

After noting that the statute was not a model of good legislative draftsmanship, and was poorly worded and ambiguous, the court construed the statute to mean that the Legislature only intended "to prohibit evidence of comparative negligence and evidence of negligence *that may be similarly used to reduce an injured child's recovery."*[25] The court held that the statute did not provide a grant of immunity to a

[22] Section 316.613, F.S. (2016).
[23] Section 316.613(3), F.S. (2016).
[24] *Quarantello v. Leroy*, 977 So. 2d 648 (Fla. 5th DCA 2008). On appeal, the Florida Supreme court declined to accept jurisdiction and denied the petition for review. *Leroy v. Quarantello*, 987 So. 2d 1210 (Fla. 2008).
[25] *Quarantello* at 653.

caretaker who did not properly secure a child in a vehicle. The court concluded that the jury should be able to consider that evidence and give it whatever weight the jury felt was appropriate in determining the cause of a child's injuries and make an informed decision whether the injured child was due compensation from the defendant.

Accordingly, the statute as interpreted in *Quarantello* recognizes that fault and liability for damages to a child who should have been secured in a car seat are to be apportioned among those responsible. In this matter, the evidence showed that Officer Escarra, Mr. Meraz-Funez, and Ms. Otero all bear responsibility for Yeilyn's injuries.

Ms. Fany Otero

As Yeilyn's mother, Ms. Otero had a duty to exercise reasonable care to supervise and protect her daughter. Florida courts have recognized that the state imposes this responsibility upon parents whose children are too young to care for themselves.[26] In the case of *Machin v. Walgreen Co*., the Third District Court of Appeal held that a person chargeable with a duty of care and caution toward a child must take the precautions available to them to protect the child. Accordingly, Ms. Otero had a "constant and continuous duty" to watch over, supervise, and protect Yeilyn who was too young to exercise judgment to care for herself.[27] Ms. Otero breached this duty of care to Yeilyn by not placing her in a car seat that could have prevented or reduced her injuries. Therefore, Ms. Otero is partially responsible for Yeilyn's injuries.[28]

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[26] *Ramos v. State*, 89 So. 3d 1119 (Fla. 1st DCA 2012).

[27] *Machin v. Walgreen Co*., 835 So. 2d 284 (2002). The mother brought an action on behalf of her daughter against a pharmacy that incorrectly dispensed the wrong medicine for the daughter. The court found that the mother was comparatively negligent in not checking the pharmacy's data sheet and the container of the medication before giving it to her daughter. The court upheld the lower court's judgment that assessed 45 percent comparative negligence against the mother.

[28] The law is somewhat complicated when the issue involves the comparative negligence of a parent who contributed to his or her child's injuries. While the parent's negligence may not be imputed or assigned to the child, if it is determined that one of the parents was negligent in causing the injury to the child, the parent's name may be added to the jury verdict form so that others will not be held responsible for that parent's proportion of fault. (Thomas D. Sawaya, *Personal Injury and Wrongful Death Actions*, s. 5:7, *Imputed Comparative Negligence* (2021 edition)).

Additionally, a defendant may reduce his or her liability in a negligence action by demonstrating that the actions of a third person, who might not be named as a party in the lawsuit, contributed to the injuries sustained by the plaintiff. A defendant who successfully argues this defense will reduce his or her responsibility by the amount of negligence assigned to the non-party. (Sawaya s. 5:5, *Comparative Negligence of Third Persons Who Are Not Parties to the Suit* (2021 edition)).

Similarly, case law allows the guardian of a child to name a parent as a defendant in a lawsuit. If a jury had found that Yeilyn's mother breached her duty of care to Yeilyn, the jury could have further apportioned fault among the three defendants in a manner that would have further reduced the damages that Miami-Dade County would have been responsible for paying to Yeilyn.

Causation

I find that the greater weight of the evidence demonstrates that Officer Escarra, as an agent of the County, failed to use reasonable care and is responsible, in part, for causing the injuries that Yeilyn sustained in the collision. Officer Escarra operated the police vehicle in a negligent manner and his actions were a legal or proximate cause of the accident. I also find that Mr. Meraz-Funez and Ms. Otero were comparatively negligent because they breached the duty of care owed to Yeilyn. As such, they contributed to Yeilyn's injuries and bear partial responsibility for her damages.

Damages

A plaintiff's damages are computed by adding these elements together:

Economic Damages:
- Past Medical Expenses
- Future Medical Expenses

Non-Economic Damages
- Past Pain and Suffering and Loss of Enjoyment of life
- Future Pain and Suffering and Loss of Enjoyment of Life

The claimant's attorney presented financial data and projected Yeilyn's total damages to be $13,050,002.62

Economic Damages

Yeilyn's Past Medical Expenses - $1,772,320.52

2016 - 2019
The medical bills submitted by the claimant's attorney are extensive. From the time of the accident on October 6, 2016,

through the last submitted medical record dated April 8, 2019, Yeilyn was hospitalized or received outpatient treatment at Nicklaus Children's Hospital at least 25 times. The medical records contain 7,841 pages of information. Because Yeilyn is a Medicaid recipient, the bills have been reduced and paid by Medicaid.[29] As a result, it does not appear that Yeilyn and her family have paid for any of the services incurred at Nicklaus Children's Hospital.

According to the claimant's attorney, two Medicaid liens were initially asserted by lienholders:

Equian	$ 819,204.55
Conduent	$1,772,320.52
Total	$2,591,525.07

2020 Bills
The claimant's attorney submitted a list of Medicaid lien items that were paid for 2020 which show that Medicaid has paid an additional $302,815.47 for Yeilyn's bills.

2021 Bills
No bills were submitted by the claimant's attorney for 2021.

Yeilyn's Future Medical Expenses - $11,277,682.10

The vast majority of Yeilyn's economic damages are projected to come from future medical and living expenses. To support Yeilyn's future expenses, the claimant's attorney hired a physiatrist to establish Yeilyn's medical disabilities and future needs and a life care planner to calculate the costs for those needs.

Disability Rating by Dr. Craig Lichtblau, Physiatrist
Dr. Craig Lichtblau is a physiatrist[30] who performed a physical examination of Yeilyn on September 9, 2019, almost 3 years after the accident and more than 2 years before the hearing.

[29] It should be noted, in an abundance of transparency, that *before the accident, and in her first 10 months of life,* Yeilyn was hospitalized at Nicklaus Children's Hospital on five separate occasions totaling 25 days at a cost of $159,049. The admissions appear to be due to asthma-related issues and were paid by Medicaid.
In the admissions that occurred after the accident, the records often note that Yeilyn has a history of asthma and the asthma was "poorly controlled." It would be virtually impossible to discern and apportion which of those hospitalizations were initially due to complications from Yeilyn's pre-existing asthma condition and which were the result of, or complicated by, the accident and the tracheostomy.
[30] A physiatrist is a physical medicine and rehabilitation physician. A physiatrist works to rehabilitate injured people and return them to their highest functioning level.

He has estimated that Yeilyn's life expectancy, because of the accident, is 35 years of age.

Dr. Lichtblau assigned to Yeilyn an American Medical Association impairment rating of 87–97 percent permanent partial impairment of the whole person based upon:

Complete Paraplegia	36 – 50 percent
Traumatic Brain Injury	21 – 35 percent
Neurogenic Bowel[31]	21 – 50 percent
Neurogenic Bladder	21 – 30 percent
Gastrostomy[32]	10 – 15 percent
Open Tracheostomy	45 – 58 percent
Autonomic Dysreflexia[33]	11 – 20 percent

However, I was unable to find any evidence in the hospital records or home health care records to support the existence of a traumatic brain injury or gastrostomy. In contrast, Yeilyn is not reported to be developmentally delayed due to a traumatic brain injury, but is reported to be a verbal, expressive, fully mentally functioning young girl who interacts with visitors, moves about independently in her wheel chair, and plays games on an electronic tablet. Additionally, there was no evidence that she has had a permanent gastrostomy feeding tube. The home health care nurses' records from 2021 report that Yeilyn is fed a "regular diet" supplemented with two cans of Pediasure. No mention is made in the nurses' notes of the presence, or need for care, of a gastro feeding tube. Because of the lack of support for a traumatic brain injury and the presence of a gastrostomy, it appears that the impairment rating should be reduced for accuracy.

Life Care Plan by Ann Koerner

Ann Koerner is a consultant with National Care Advisors, a company that develops life care plans for injured people to substantiate their future needs. Although Ms. Koerner has never met or personally interviewed Yeilyn, Ms. Koerner

[31] Neurogenic bowel means the loss of someone's normal bowel function, often caused by a spinal cord injury or other nerve-related condition. Source: https://www.cedars-sinai.org/health-library/diseases-and-conditions/n/neurogenic-bowel.html

[32] A gastrostomy is a surgical opening made through the abdomen into the stomach. It provides a method to insert a gastrostomy tube to send nutrition directly to the stomach. Source: https://kidshealth.org/en/parents/g-tube.html

[33] Autonomic dysreflexia is a syndrome that develops in people with spinal cord injuries. It often results in uncontrolled hypertension or high blood pressure. Source: https://emedicine.medscape.com/article/322809-overview

assessed Yeilyn's current income and benefits and compiled an analysis of what she believes her future medical, nursing, transportation, and living care costs will be based upon information from Dr. Lichtblau.[34]

Yeilyn's Current Benefits

Yeilyn currently receives $794 each month for Supplemental Security Income. All of her medical needs are paid through Medicaid and will be until she turns 18 years of age. Medicaid services include medical care, dental services, diagnostic tests, possible surgical procedures, therapeutic evaluations, and outpatient therapy. Yeilyn currently lives in a home with her father and extended family. Medicaid has authorized payment, through a Children's Medicaid Services Waiver, for a skilled nurse, her primary caregiver, who is with her 24 hours each day.

According to Ms. Koerner, this waiver will end when Yeilyn turns 18 years old. At that time, the only available Medicaid service with 24-hour skilled nursing care is an assisted living facility. The claimant's attorney asserts that this is not an appropriate setting for an 18-year-old and will be a dramatic change in the assistance Yeilyn needs.

Ms. Koerner states:
"In the event that the current level of Medicaid benefits is no longer available to Yeilyn or does not continue to provide for the 24/7 skilled nursing care that she requires, the cost of 24/7 [licensed vocational nurse] level care, in her private family home, over her lifetime will, at a minimum, will approximately be $6,676,967 (2021 dollars)."

The claimant's attorney estimates that Yeilyn's future medical damages will be $11,277,682.10. He computed the following four elements for future medical damages:

[34]While many items seem reasonable, some of Ms. Koerner's values seem quite generous. For example, her projection includes $450,000 for the purchase of a wheelchair accessible home and an additional $174,000 to cover the property taxes, insurance, and maintenance on the home over Yeilyn's life expectancy to age 35. If Yeilyn, at age 18, is moved into a facility, it is unclear what happens to title to the home. A wheelchair accessible van with modifications, that would be replaced every 7 years, is also included for $172,500. An additional $145,000 is allotted for insurance, maintenance, gas, AAA membership, a cell phone with AT&T, and a handicap parking permit. Approximately $500 is allotted each month for maintenance on the van, an amount that appears quite liberal.

Medicaid Expenses (2020 Medicaid expenses multiplied by 12 years)[35]	$3,633,785.64
Skilled Nursing Services (From age 18 – 35 years)[36]	$2,856,928.73
Out-of-Pocket Skilled Nursing Services (From age 18 – 35)	$3,591,000.00
Additional Out-of-pocket expenses	$1,195,967.73
Total	$11,277,682.10

Total Economic Damages

Past Medical Damages	$1,772,320.52
Future Medical Damages	$11,277,682.10
	$13,050,002.62

Non-Economic Damages

Past and Future Pain and Suffering and Loss Of Enjoyment of Life

At the special master hearing, the claimant's attorney did not provide a specific dollar amount for these categories. He noted that the Florida Standard Jury Instructions 501.2a[37] state that there is no exact standard for measuring these damages. The jury instructions state that the amount should be a "fair and just" amount in light of the evidence presented to the jury. He suggested that the amount could exceed $5,000,000 or even $10,000,000.

Conclusion

The settled claim amount of $4,000,000 to be paid by the County seems reasonable based on the evidence presented, including the comparative negligence of Mr. Meraz-Funez and Ms. Otero, and in taking into consideration the unpredictable nature of juries.

[35] The 2020 Medicaid paid expenses for 2020, $302,815.47 X 12 years, or ages 6 – 17 years. The claimant's attorney and Ms. Koerner stated that Yeilyn will no longer qualify for 24 hours per day care when she turns 18 year old.
[36] 2020 Medicaid paid expenses from age 18 – 35, or $150,364.67 X 19 years.
[37] 501.2 Personal Injury and Property Damages: Elements.

Settlement Agreement

The parties agreed to settle this clam for:

(1) The $200,000 statutory cap, which the County paid on August 11, 2021, to the Colson Hicks Eidson, P.A. Trust Account for the benefit of Yeilyn Q. Otero and

(2) The right to pursue a claim bill for $3,800,000 which would not be contested by the Board of County Commissioners of Miami-Dade County.

Settlement Agreement Distribution
To understand what Yeilyn has received from the initial $200,000 settlement and what she would receive if the $3,800,000 claim bill should pass, it is necessary to explain two separate closing statements.

The Initial $200,000 Settlement with Miami-Dade County

Pursuant to s. 409.910(11)(f), F.S., when there is a recovery in a tort action and Medicaid has provided medical goods and services to a plaintiff who is a Medicaid recipient, the amounts recovered are distributed as follows:

- First, the attorneys are authorized to take their attorney fees and taxable costs[38] from the gross proceeds.
- Second, one-half of the remaining recovery will be paid to the agency up to the total amount of assistance paid by Medicaid, and the remaining one-half is paid to the recipient. In other words, the lien holders and the client evenly split the proceeds after attorney fees and allowable costs are paid.

According to the statutory formula when a Medicaid lien is involved, the recovery in the initial settlement is as follows:

Recovery		$200,000
Attorney Fees of 25%		
Colson Hicks Eidson	75%	$37,500.00

[38] Taxable costs are limited to those costs as defined in the Florida Rules of Civil Procedure. See s. 409.910(11)(f)1., F.S.

Aigen Law Firm	25%	$12,500.00
Total Attorney Fees		$50,000.00
Costs Incurred		
Colson Hicks Eidson		$12,256.41
Aigen Law Firm		$ 0
Total Costs		$12,256.41
[Medicaid Liens		
Equian (lien waived)[39]		$819,204.55
Conduent[40]		$1,772,320.52]

Therefore,	$200,000.00 settlement
	$50,000.00 attorney fees
	$12,256.41 costs
	$137,743.59

Pursuant to statute, the remaining $137,743.59 was divided equally between Medicaid recovery and the client. The net recovery is:

Total Lien Proceeds	$68,871.80
Yeilyn's Proceeds	$68,871.80

The Proposed $3,800,000 Settlement

Recovery	$3,800,000.00
Attorney and Lobbying Fees of 25%	($950,000.00)
Colson Hicks Eidson	$522,500.00
Aigen Law Firm	$237,500.00
Ballard Partners, Lobbyist	$190,000.00
	$950,000.00
Costs Incurred	
Colson Hicks Eidson	$12,272.05
Aigen Law Firm	$ 0

[39] Equian was retained by WellCare, a Medicaid plan, to represent WellCare with its subrogation rights and recovery for the medical claims paid on Yeilyn's behalf. Correspondence was provided showing that Equian did not assert its lien in this settlement because the Agency for Health Care Administration lien (Conduent) exceeded what was recoverable in this case and the AHCA/Conduent lien took priority ahead of the Equian lien.
[40] Conduent Payment Integrity Solutions, a subcontractor to Health Management Systems, is the authorized agent of the Agency for Health Care Administration and operates the Florida Medicaid Casualty Recovery Program.

	$12,272.05	($12,272.05)
		$2,837,727.95

Medicaid Liens	
Equian	$819,204.55
Conduent	$1,772,320.52

Pursuant to statute, the remaining $2,837,727.95 is divided equally between Medicaid and the client.

Medicaid Liens	$1,418,863.98
Yeilyn's Proceeds	$1,418,863.98

Court Approval of Minor's Settlement

When a case involves a financial settlement for a minor, it requires court approval to ensure that the minor's interests are protected.[41] The Circuit Court in Miami-Dade County approved the proposed settlement after receiving testimony from Jonathan Friedland, the guardian ad litem who determined that the proposed settlement was fair, a reasonable resolution of the matter, and was in Yeilyn's best interest, and from Heather Hasandras, the guardian of the property.[42] The court authorized Heather Hasandras to collect the proceeds of the settlement and execute any instruments necessary to finalize the settlement. The court approved the distribution of funds as set forth in the closing statement and approved the allocation of Yeilyn's net proceeds into a special needs trust[43] created solely for Yeilyn's benefit.[44]

A special needs trust, and in this case, a pooled special needs trust, is a legally recognized tool that creates a safe harbor[45] to protect the assets of mentally or physically disabled people. In order for Yeilyn to continue to qualify for Medicaid, the assets from a settlement must be protected, so that they will not be counted against her needs-based eligibility and disqualify her from receiving Medicaid in the future.

[41] Section 744.387(3), F.S.
[42] The hearing was held July 1, 2021. Case No. 2018-003667-CA-01.
[43] A special needs trust is a trust, or sheltered arrangement, established to protect the eligibility of a disabled person to receive government benefits that are need-based. Medicaid or Supplemental Security Income are common examples of need-based benefits paid by the government.
[44] The guardianship of the property was established in Case No. 2018-004040-GD-02.
[45] AGED Master Trust Declaration, Article 1.7.

The court authorized Ms. Hasandras to execute a Pooled Trust Joinder Agreement on October 15, 2021.[46] In this case, the Aged Pooled Special Needs Trust will be the trustee of the funds.[47] Ms. Hasandras must report the value of the pooled trust assets in an annual accounting to the court and the court will retain jurisdiction over the case.

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ATTORNEY FEES: Section 768.28, Florida Statutes, limits the claimant's attorney fees to 25 percent of the claimant's total recovery reached by any judgment or settlement in a sovereign immunity claim. The claimant's attorney has acknowledged this limitation and verified in writing that nothing in excess of 25 percent of the gross recovery will be withheld or paid as attorney and lobbyist fees. This translates into total attorney fees of $50,000 in the initial $200,000 settlement and $950,000 in the $3,800,000 claim bill, if the claim bill should pass, for a combined total of $1,000,000. Lobbying fees of $190,000 are included in the attorney fees for the claim bill, but not in the initial settlement.

RECOMMENDATIONS: Based upon the foregoing, I recommend that SB 58 be reported FAVORABLY but that certain factual representations in the bill be amended for accuracy.

Respectfully submitted,

Eva M. Davis
Senate Special Master

cc: Secretary of the Senate

CS by Judiciary:
The committee substitute replaces a provision of the underlying bill which limited attorney fees to 25 percent of the claim bill award with specific dollar amounts that may be used for attorney fees, lobbying fees, and costs.

[46] Upon Yeilyn's "demise" and after repayment of any Medicaid liens, Yeilyn's estate will be the beneficiary of the account.
[47] In the Master Trust Declaration, Article I.7 provides that purpose of the trust is to provide supplemental care to disabled beneficiaries and "is created with the express intent that the beneficiaries. . . qualify or continue to be eligible for needs-based governmental or quasi-governmental assistance, including Medicaid, SSI, housing assistance and other need-based programs."