Special Master's Final Report

The Honorable Daniel Perez
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 6519 - Representative Porras
Relief/Estate of Peniel Janvier/City of Miami Beach

SUMMARY

This is a settled claim for $1,700,000 by the Estate of Peniel Janvier ("Estate") against the City of Miami Beach ("the City") for injuries and damages suffered when 28-year-old Peniel Janvier ("Janvier") died after drowning in a crowded City-operated pool after City-employed lifeguards and other City personnel failed to notice and respond to Janvier's distress. The City and the Estate, namely, Janvier's parents, settled the claim for $2,000,000, and the City has since paid the Estate the $300,000 maximum authorized under Florida's sovereign immunity law.

Both the Claimants and the City support the passage of this Claim Bill. For the reasons set out below, the undersigned recommends that HB 6519 be reported FAVORABLY.

FINDINGS OF FACT

The Scene

On the morning of August 16, 2022, the pool of the Scott Rakow Youth Center ("Youth Center"),[1] in and operated by the City of Miami Beach, Florida ("the City"), teemed with school-aged children attending their last day of a City-run summer camp. The record reveals that, ordinarily, the campers used the Youth Center's pool in shifts, alternating with other activities throughout the week, thereby limiting the number of campers in the pool at any given time; however, on this day, the camp's recreational leaders brought all of the campers together for a farewell pool party, resulting in unusual crowding.

Despite the crowding and the presence of four lifeguard chairs around the pool, the record reveals that only two lifeguards supervised the pool at any given time during the pool party,[2] and

[1] The Youth Center's pool is 75 feet long by 47.5 feet wide; at its shallowest, the pool has a depth of 3 feet, 6 inches, while at it deepest, the pool has a depth of 11 feet. Six step ladders provide points of ingress and egress to the pool, three on the northeast side and three on the southwest side.
[2] According to the record, there were six lifeguards on duty that day, each rotating between two lifeguard chairs in 15-minute increments, followed by 30-minutes breaks taken in a room adjacent to the pool. This schedule was meant kept the lifeguards from overheating and from losing focus by sitting too long in one place.

that no pool manager remained on site to oversee operations.[3] Pool supervisors also failed to assign the lifeguards pool zones over which each would have responsibility, as is industry practice, leaving both lifeguards to instead scan the entire pool for signs of swimmers in distress. The record reveals that campers engaging in rough play and using pool toys and flotation devices in violation of pool rules complicated this task, but neither the recreational leaders nor the lifeguards intervened to enforce these rules.[4] Music playing loudly enough that it had to be shut off in order for the lifeguards to be heard by the campers likely also contributed to making the pool an especially chaotic scene that day.

The Incident

28-year-old Peniel Janvier ("Janvier"), an Army Reservist with a masters' degree and a full-time position set to begin that fall, had spent the summer serving as a camp counselor at the Youth Center due to a passion for children. Though not on the schedule for August 16, 2022, the record reveals that Janvier decided to swing by the pool that day to say good-bye to the campers.

Upon arriving at the Youth Center's pool, Janvier interacted with various campers and recreational leaders and voluntarily entered the pool's shallow end at certain points. Janvier also pushed several campers into the pool in the spirit of play, and was himself pushed into the pool's shallow end by two campers without incident. A third camper, J.M.,[5] later attempted to push Janvier into the pool's shallow end without success.

A short time later, J.M. spotted Janvier standing by the pool's deep end; while Janvier's back was turned to him, J.M. snuck up behind Janvier and pushed him into the pool in an area with a depth of approximately 9.5 feet. Not a strong swimmer, Janvier immediately began to struggle, thrashing and repeatedly sinking below the surface as he tried to keep his head above water while he drifted further away from the pool's edge. However, lifeguards Adrian Calderon ("Calderon")[6] and Ivan Miskevich ("Miskevich"),[7] the only two lifeguards on duty at the time J.M. pushed Janvier into the water, failed to immediately notice Janvier's distress.[8]

Approximately one minute after Janvier entered the water, recreational leader Anthony Del Rosario ("Del Rosario")[9] spotted Janvier struggling and half-heartedly attempted to get Calderon's attention by waving at him; however, at that moment, surveillance video shows that Calderon is looking not at the pool but at his cellphone, and that he does not react to Del Rosario's wave.[10] Del Rosario later stated that he assumed Janvier was only pretending to drown, as Janvier often joked around with the campers. Because of this belief, Del Rosario testified, he did not attempt any further intervention at this point; instead, he went to the pool's shallow end to interact with the campers gathered there.

Approximately two minutes after Janvier entered the water, surveillance video shows a camper (in other words, a child) attempting to pull Janvier to the pool's edge; all the while, Calderon continues to look at his cellphone, while Miskevich looks to the crowd gathered in the pool's shallow end, where most of the campers were swimming. Over the next few minutes, more

[3] The record reveals that the Youth Center's pool manager, who also served as the City's aquatics coordinator for its Parks and Recreation Department, was, on this day, at a different community center because the pool manager for that facility was on medical leave.
[4] The record reveals that lifeguards made at least one announcement to the campers regarding roughhousing, but ultimately the behavior continued. The lifeguards and recreational leaders evidently took no action as to the presence of the prohibited pool toys and flotation devices.
[5] J.M. is a minor and thus will not be identified in this report.
[6] According to the record, the City employed Calderon as a full-time Pool Guard.
[7] According to the record, the City employed Miskevich as a part-time, seasonal Pool Guard.
[8] The record showed that, at the time J.M. pushed Janvier into the water, Miskevich occupied a lifeguard chair near the pool's shallow end, while Calderon occupied a taller lifeguard chair near the pool's deep end, catty-corner to the place Janvier entered the water.
[9] According to the record, the City employed Del Rosario as a full-time Recreational Leader at the Youth Center.
[10] The City's Pool Guard Manual prohibits possession and use of a cellphone by an on-duty lifeguard, absent an emergency.

campers attempted to aid the now-lifeless Janvier, moving him to one of the pool's ladders and attempting, unsuccessfully, to pull him out of the pool. Calderon, Miskevich, and the recreational leaders at the pool remained apparently oblivious to the efforts of these children.

Approximately nine minutes after Janvier entered the water, campers alerted Del Rosario that Janvier needed help; Del Rosario then proceeded to the pool's deep end, where he lifted the unconscious Janvier's head out of the water and attempted to alert the lifeguards. However, around this time, a lifeguard shift rotation occurred; at this point, Calderon, who persisted in looking at his cellphone during Janvier's entire ordeal, descended from the lifeguard chair to rotate to the chair vacated by Miskevich, while lifeguard Julio Espinosa ("Espinosa") rotated into the chair Calderon had just vacated.

Once in place, Espinosa noticed Del Rosario and the campers attempting to rescue Janvier from the pool and ran over, alerting the other lifeguards and the recreational leaders in the process. Espinosa and Calderon then lifted Janvier out of the pool; by this point, ten minutes had elapsed since Janvier first went under.

Lifeguard Amber Dunn called 911 to request emergency assistance; meanwhile, lifeguards, including Calderon, Espinosa, and Miskevich, took turns administering CPR to Janvier until Miami Beach Fire Rescue ("Fire Rescue") arrived and took over his care. Fire Rescue then transported Janvier to the emergency department of Mount Sinai Medical Center, where he was ultimately admitted to the Intensive Care Unit and placed on life support.

Sadly, on August 23, 2022, Janvier's treating physicians pronounced him brain dead, and on August 26, 2022, at the request of his mother, Nicole Mathurin ("Ms. Mathurin"), and his father, Lucmanne Janvier ("Mr. Janvier") (collectively, "the Claimants"), Janvier's treating physicians removed Janvier from life support and pronounced him dead shortly thereafter. Following Janvier's death, a Miami-Dade County medical examiner conducted an autopsy of Janvier's body, after which he ruled Janvier's cause of death to be drowning, and the manner of death to be accidental.

Internal Investigation

The City undertook an internal investigation after Janvier's accident, immediately placing Miskevich, Calderon, and Del Rosario on administrative leave pending the investigation's completion. On August 19, 2022, the City terminated Miskevich from his lifeguard position, retroactively effective to August 16, 2022. On August 11, 2023, Del Rosario resigned from his recreational leader position, effective as of that date, which resignation the City accepted; other recreational leaders present at the Youth Center at the time of Janvier's accident received reprimands from the City. Finally, on December 11, 2023, the City terminated Calderon from his lifeguard position, finding, among other violations, that, with respect to the incident that resulted in Janvier's drowning and death, Calderon committed "gross negligence or gross inefficiency in the performance of [his] duties," and labelling his conduct "disgraceful."

Litigation and Settlement

The Claimants, as co-personal representatives of Janvier's Estate ("Estate"), filed a lawsuit against the City, amending their complaint on April 25, 2023; therein, the Claimants alleged that the City was negligent through the actions of its employees, and that such negligence resulted in Janvier's death and the resultant loss to the Claimants. On June 1, 2023, the City filed an Answer disputing the allegations in the amended complaint and raising several affirmative defenses, including a workers' compensation immunity defense.[11]

[11] Under s. 440.11, F.S., employers generally must have workers' compensation insurance, which provides financial compensation to any employee injured on the job. Such compensation may cover medical costs, lost wages, and other recovery-related costs, as well as funeral and burial costs in the event of the employee's death. Employers who secure such insurance are generally immune from being sued by the injured employee or, in the event of the employee's death, his or his estate, for damages related to the workplace injury. In the instant matter, the City determined that, although Janvier was not technically working at the time of his accident, his estate would receive

On June 11, 2024, the Claimants and the City entered into a settlement agreement in which the City agreed to pay the Claimants $2,000,000 to resolve their dispute, and the case closed with a consent judgment on June 13, 2024. The City then paid the Claimants $300,000 of the $2,000,000 settlement amount, which is the maximum amount the City was statutorily authorized to pay under Florida's sovereign immunity law, codified in s. 768.28, F.S., without the passage of a claim bill. This leaves in question the remainder of the settlement amount, totaling $1,700,000.

Testimony on Damages

The testimony elicited in the January 29, 2025, Special Master Hearing held in this matter revealed two parents grieving deeply over the untimely and tragic death of their second-born son, known to them affectionally as "PJ,"; the cost of Janvier's funeral amounted to $11,395, which the Claimants paid, but of more significance was the pain and suffering now a part of their daily reality. Ms. Mathurin testified that the loss of Janvier, whom she described as "light" and "love" with a heart so big he would not kill stray lizards in their home, made her "go crazy" for a time; panic attacks caused her to suffer heart problems, and she can no longer watch the news in case the report involves something bad happening to a child. Similarly, Mr. Janvier testified that he and Janvier, with whom he shared a birthday, were exceptionally close, speaking every day, including the day of Janvier's accident; he had to seek a doctor's care to deal with the extent of his grief over Janvier's death, whom he described as "the best son."

Finally, Daniel Janvier, Janvier's elder brother, testified about the loss for the family as a whole. He spoke first of his own loss, testifying that he and Janvier, separated in age by only 15 months, did everything together from the time they were small children. He also spoke proudly about how Janvier was the first college graduate in the family, how Janvier surprised them all by enlisting in the Army Reserves, and about the important role Janvier played in caring for their parents, which care included occasional financial support. Daniel Janvier then testified that he and his wife had to move in with Ms. Mathurin for months after Janvier's death, as she was unable to work or live alone due to her grief, and that Lucmanne Janvier took even longer to move forward through his own grief. It is the family's faith, he said, which now sustains them.

CONCLUSIONS OF LAW

House Rule 5.6(b)

Pursuant to House Rule 5.6(b), settlements are not binding on the Special Master or the House or any of its committees of reference. Thus, each claim is heard *de novo*, and the Special Master must make findings of fact and conclusions of law which support the claim.

Negligence

In the instant matter, the Claimants raise a negligence claim, the elements of which are duty, breach, causation, and damages. The Claimants further argue that the City was negligent through the actions of its employees under the *respondeat superior* doctrine.

Duty

For a defendant to be liable for negligence, there must be either an underlying statutory or common law duty of care with respect to the conduct at issue; this is true whether the defendant is an individual, a private business, or a government entity.[12] When dealing with a government entity, however, the duty inquiry does not stop there; to determine whether liability may attach,

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some workers' compensation benefits as he was a valued employee who suffered an accident which was at least connected to his City employment; these benefits ultimately covered Janvier's accident-related medical bills, totaling approximately $142,000. The City could then have raised a technical workers' compensation immunity defense had the matter gone to trial, but chose instead to settle the claim.

[12] *Trianon Park v. Condo Assoc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985).

courts must also look to whether the conduct at issue constitutes a "discretionary function" (that is, a quasi-legislative decision involving some measure of judgment or discretion, to which sovereign immunity generally attaches) or an "operational function" (that is, a decision or action implementing policy, to which sovereign immunity generally does not attach).[13]

The Florida Supreme Court has determined that the decision of whether or not to operate a public swimming facility falls into a government entity's discretionary functions; in other words, a government entity is immune from suit on the issue of the decision itself.[14] However, the Court also held that, once a government entity decides to operate a public swimming facility (that is, the government entity implements a policy decision through an operational function), it assumes a common-law duty to operate the facility safely, just as any private person must do under like circumstances.[15]

Based on the foregoing, once the City chose to open the Youth Center's pool, it had a common-law duty to the Youth Center's patrons, including Janvier, to operate the pool safely. Thus, the undersigned finds the first element of negligence proven.

Breach

The existence of a duty of care is alone insufficient to sustain a negligence claim.[16] Once the existence of such a duty has been established, it merely "opens the courthouse doors"; a plaintiff must still prove the remaining elements of negligence, the next of which is a breach of the duty of care.[17]

In considering what might constitute a breach of the duty of care owed to patrons of a public swimming area, Florida courts consider the mere allegation that a lifeguard failed to adequately supervise and monitor the area in which someone drowns insufficient; instead, the plaintiff must allege specific facts which, if true, constitute acts of negligence on the part of the lifeguards, which acts amount to a breach of the duty of care.[18]

In the instant matter, the Claimants first allege that the City, through its employees, breached the duty of care owed to Janvier by failing to properly staff the Youth Center's pool with a sufficient number of lifeguards, and by failing to assign them zones of responsibility. Florida courts have found that, while there is no duty even to post a lifeguard in a private swimming area of limited public access (such as a hotel pool), the standard of care may require the provision of a reasonably sufficient number of lifeguards for the protection of swimmers at designated swimming areas of general public access (such as the Youth Center's pool).[19] Here, the record reveals that, on the day of Janvier's accident, only two lifeguards supervised the swimmers at the Youth Center's pool at any one time, despite the exceptionally-crowded conditions of the pool and the fact that most of the swimmers present that day were children with varied swimming abilities. Further, the pool itself was of such a size as to accommodate four lifeguard chairs around its perimeter, suggesting that it might not be possible for two lifeguards to adequately supervise the entire pool from their respective positions. While the undersigned will not presume to opine on the definitive number of lifeguards that would have been reasonably sufficient in this instance, it is clear from the record that, on this particular day, two lifeguards, each responsible for observing the entire pool, were not enough to guarantee the safety of the Youth Center's patrons.

The Claimants also allege that the City, through its employees, breached its duty of care by failing to supervise lifeguard staff and to enforce its internal policies and procedures, specifically

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[13] *Id.*
[14] *Avallone v. Bd. of County Comm. Of Citrus County*, 493 So. 2d 1002 (Fla. 1986).
[15] *Id.*; *Breaux v. City of Miami Beach,* 899 So. 2d 1059 (Fla. 2005).
[16] *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001).
[17] *Id.* at 221.
[18] *Cutler v. City of Jacksonville Beach*, 489 So. 2d 126 (Fla. 1st DCA 1986).
[19] *Pickett v. City of Jacksonville*, 20 So. 2d 484 (Fla. 1945); *Kamal-Hashmat v. Loews Miami Beach Hotel Operating Co., Inc.*, 300 So. 3d 270 (Fla. 3d DCA 2019).

relating to the prohibitions against rough play, the use of pool toys and flotation devices, and the possession and use of cell phones by lifeguards on duty. Florida courts have found that, while the internal policies and procedures set by a defendant to govern its employees' conduct are relevant evidence of the standard of care, such rules do not by themselves create a legal duty; rather, the standard of care is that care which a reasonably prudent person would exercise under like circumstances.[20] Here, it stands to reason that allowing pool patrons to engage in pushing and other rough play, or to use pool toys in the water, heightens the risk of injury and harm to such patrons, who might engage in riskier play, slip on the hard pool deck, or indeed fall into the pool, as Janvier did. Further, a reasonable person could assume that the presence of flotation devices in the water may, in some cases, induce pool patrons with limited or no swimming ability to enter the water or proceed to a deeper part of the pool in the misguided reliance on such a device. Finally, logic dictates that a lifeguard who is looking not at the pool but instead at a cellphone for nearly his entire rotation would not be alert to dangers in the pool and might miss signs of a swimmer in distress, as happened in the instant matter; it is also telling as to the level of Youth Center employee supervision that Calderon felt comfortable enough to openly use his cellphone in flagrant violation of the Youth Center's policies. Based on the foregoing, the undersigned finds that the City's employees breached the duty of care they owed to Janvier.

Causation

Once a duty and a breach thereof are established, causation must be determined. In making such a determination, Florida courts follow the "more likely than not" standard, requiring proof that the negligence proximately caused the plaintiff's injuries.[21] In turn, in determining proximate cause, the factfinder must analyze whether the injury was a reasonably foreseeable consequence of the danger created by the defendant's negligent conduct.[22] This analysis does not require the defendant's conduct to be the exclusive, or even the primary, cause of the injury suffered; instead, the plaintiff must only show that the defendant's conduct was a substantial cause of the injury.[23]

In the instant matter, campers of varied swimming ability crowded the Youth Center's pool on August 16, 2022, while only two lifeguards sat on duty. These lifeguards, and the recreational leaders in charge of supervising the campers, permitted Youth Center patrons to utilize pool toys and flotation devices, further crowding the pool, and to engage in rough play, including pushing; meanwhile, one of the two lifeguards spent the majority of his rotation looking at his cellphone instead of the pool. In light of the foregoing, the undersigned finds that it was reasonably foreseeable that a Youth Center patron (such as Janvier) might come to harm from the pushing and rough play or otherwise encounter difficulties staying afloat in the pool, and that his or her distress might go unnoticed by the distracted lifeguards and recreational leaders, as Janvier's did. Indeed, part of the very purpose of positioning lifeguards at a pool is to prevent the type of accident that befell Janvier. Thus, the undersigned finds that the negligence of the City's employees proximately caused Janvier's injuries.

Damages

To sustain a negligence claim, the plaintiff must prove actual loss or damages resulting from the injury, and the amount awarded must be precisely commensurate with the injury suffered.[24] Actual damages may be "economic damages" (that is, financial losses that would not have occurred but for the injury giving rise to the cause of action, such as lost wages and costs of medical care) or "non-economic damages" (that is, nonfinancial losses that would not have occurred but for the injury giving rise to the cause of action, such as pain and suffering, physical

[20] *Metropolitan Dade County v. Zapata*, 601 So. 2d 239 (Fla. 3d DCA 1992).
[21] *Gooding v University Hosp. Bldg., Inc.*, 445 So. 2d 1015 (Fla. 1984); *Ruiz v. Tenent Hialeah Healthsystem, Inc.*, 260 So. 3d 977 (Fla. 2018).
[22] *Ruiz*, 260 So. 3d at 981-982.
[23] *Id.* at 982.
[24] *McKinley v. Gualtieri*, 338 So. 3d 429 (Fla. 2d DCA 2022); *Birdsall v. Coolidge*, 93 U.S. 64 (1876).

impairment, and other nonfinancial losses authorized under general law).[25]

In the instant matter, the record reveals that the Claimants suffered economic damages, as they paid $11,395 for Janvier's funeral and lost the occasional financial support Janvier provided them. However, the Claimants allege that they primarily suffered non-economic damages, specifically pain and suffering, over the untimely and seemingly preventable death of their son. In light of their testimony at the Special Master Hearing held in this matter, in which their grief was evident, the undersigned finds that the Claimants suffered actual damages resulting from the injury caused by the City's negligence.

Respondeat Superior

Under the common law *respondeat superior* doctrine, an employer is liable for the negligence of its employee when:

- The individual was an employee when the negligence occurred;
- The employee was acting within the scope of his or her employment; and
- The employee's activities were of a benefit to the employer.[26]

For conduct to be considered within the course and scope of the employee's employment, such conduct must have:

- Been of the kind for which the employee was employed to perform;
- Occurred within the time and space limits of his employment; and
- Been due at least in part to a purpose serving the employment.[27]

The record shows that the City employed Calderon, Miskevich, Del Rosario, and others pertinent to this claim bill on August 16, 2022, that each was acting within the course and scope of his or her employment at the time of Janvier's accident as either a lifeguard or a recreational leader, and that their activities benefitted the City by allowing the City to operate the Youth Center and its affiliated summer camp. Based on the foregoing, the undersigned finds that the City is liable for the negligence of Calderon, Miskevich, Del Rosario, and others under the *respondeat superior* doctrine.

POSITIONS OF CLAIMANT AND RESPONDENT

Claimants' Position

The Claimants assert that they are entitled to the balance of the settlement amount, totaling $1,700,000. In support of their position, the Claimants assert that the City was negligent through the actions of its employees, causing Janvier's death and their own pain and suffering.

Respondent's Position

The City supports the passage of this claim bill. At the Special Master Hearing held in this matter, counsel for the City indicated that:

- The City does not contest the facts, and, had the matter gone to trial, it would have raised only a technical workers' compensation immunity defense.
- Janvier was a valued and well-loved employee and the City decided to settle this matter quickly out of consideration for his family.
- The City has already reserved the $1,700,000 requested in the claim bill, so passage of the claim bill would not impact the City's operations.

ATTORNEY AND LOBBYING FEES

Under the terms of the claim bill, attorney fees may not exceed 25 percent of the total award (that is, $425,000). Further, lobbying fees are limited by agreement of the Claimants to five

[25] FLJUR MEDMALP § 107.
[26] *Iglesia Cristiana La Casa Del Senor, Inc. v. L.M.*, 783 So. 2d 353 (Fla. 3d DCA 2001).
[27] *Spencer v. Assurance Co. of Am.*, 39 F.3d 1146 (11th Cir. 1994) (applying Florida law).

percent of the total award (that is, $85,000).

RECOMMENDATION

Based on the foregoing, the undersigned recommends that HB 6519 be reported FAVORABLY.

Respectfully submitted,

CAITLIN R. MAWN,
House Special Master