OFFICE OF THE CITY ATTORNEY

PHONE: (305) 809-3770
FAX: (305) 809-3771

THE CITY OF KEY WEST

POST OFFICE BOX 1409
KEY WEST, FL 33041-1409
WWW.KEYWESTCITY.COM

To: The City Commission for the City of Key West
From: Ron Ramsingh, Chief Assistant City Attorney
RE: Settlement of Tilghman v. City of Key West v. FDOT 2015-CA-492-K
Date: June 30, 2017

*Disclosure: Any health-related information otherwise protected by the A.D.A. and/or H.I.P.P.A. has been authorized for disclosure by the plaintiff*

# EXECUTIVE SUMMARY

*Background*

Ms. Tilghman is a 63-year-old retired school teacher who lives in Ft. Wayne, Indiana with her husband James in a home that they have owned for 12 years. They have lived in the Ft. Wayne area for 34 years. She has taught nursing, CPR and first aid for 27 years.

Tilghman arrived in Key West for a vacation with her husband, James on 12/30/13. They took a hotel shuttle from the airport to the Doubletree Resort, where they rented bicycles. That evening, they set out to have dinner and rode their rented bikes to TGI Friday's on North Roosevelt Blvd. Tilghman testified that she did not drink alcohol that night, nor does she drink alcohol in general.

At approximately 9pm, the Plaintiff and her husband were riding their rented bikes back from the restaurant. She testified that they had their front and rear lights on[1]. They were on the sidewalk just east of A1A (South Roosevelt Blvd) travelling south. After they passed Thompson Island, they encountered an area of the sidewalk that was largely shaded by one of many coconut trees planted in the swale. The shaded area (picture attached) was perfectly situated to shade a "saw cut" that was on the western edge of the sidewalk. The saw cut is 12 inches wide and 12 feet in length. The overall sidewalk width is 10 feet. Tilghman was riding behind and to the right of her husband. Tilghman passed just parallel

[1] F.S. 316.2065 requires all bicycles to have a front light that projects a white light that is visible from 500 feet away. To the extent that the light was pointed downward to illuminate her path, and to the extent that the battery power was such that the light was operating most effectively, Tilghman could not testify in her deposition. However, she was adamant that the bike did in fact have the required lights.

to the beginning portion of the void, but then veered slightly to the right. Her front tire fell into the void. Tilghman then fell onto the concrete sidewalk face first, then landing on her left shoulder. James called 911. KWPD and an ambulance arrived. Tilghman was taken to Lower Keys Medical Center by ambulance. KWPD Ofc. Helfner took photographs and wrote a report. Tilghman sustained a severe laceration to her upper lip. Basically, her upper lip split in half from the base of her nostrils, through the upper lip. Her 2 front incisors were also severely damaged and had to be removed. Tilghman also suffered a maxillary fracture. At LKMC, Tilghman was admitted and operated on by Dr. Loessin, who repaired her upper lip with stitches. Her jaw was wired shut for approximately 6 weeks to address the maxillary fracture.

Tilghman and her husband cut their vacation short and left Key West as soon as she was discharged from LKMC. When they got back to Indiana, she followed up with her treating dentist, as well as orthopedic physicians for her shoulder complaints. Tilghman received extensive physical therapy and steroid injections for her complaints of pain in her left shoulder. She was diagnosed with calcific tendonitis with arthritis. She has not received an impairment rating for the shoulder and reports it as being 90% better. There was mention by the Plaintiff's attorney that Tilghman had a rotator cuff tear and surgery, but I did not see that reflected in the medical notes that I have. Plaintiff reports having to wear dental braces for a period, and continues to wear a retainer for the foreseeable future.

Since Tilghman's jaw was wired shut for 6 weeks, she testified that her husband and one of her sons cared for her by preparing her meals via blender, and assisting her around the house while in physical therapy[2]. Tilghman reports having difficulty smiling in the wake of her severe lip laceration that continues through today[3].

*FDOT's involvement*

Upon receiving this claim in 2014, our previous risk manager began researching the issue of ownership and control of the area in question. Specifically, there were 2 issues: the sidewalk saw cut, and the shade created by the coconut palm.

<u>Sidewalk Cut</u>

First, there was an obvious cut to the 10-foot sidewalk. The cut was immediately adjacent to a storm water drain called a Downstream Defender. I obtained the 2007 FDOT as-built plans, as well as the landscape design plans. The drain was installed by FDOT as part of their South Roosevelt Blvd. roadbed improvement and storm water project in 2007-2008. The swale that the Downstream Defender was installed into belongs to the city, as well as the sidewalk. The obvious, but unsubstantiated conclusion was that a purposeful cut was made into the sidewalk to accommodate the drain. However, as explained below, it has proven to be very difficult to verify that with FDOT, or their contractor.

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[2] A claim for a loss of consortium was not initially filed. The Plaintiff's attorney wanted to file a motion to amend the complaint to include consortium, for which the city objected and the effort was abandoned. Nevertheless, Plaintiff's husband has signed the contingent settlement agreement and will also sign a waiver as well.

Coconut Trees

Secondly, was the issue of the coconut tree and who was responsible for their maintenance and trimming. The lawsuit claims a count for negligent maintenance of the trees, which is alleged to have contributed to the Plaintiff's fall by creating a perfectly shaded area, thereby concealing the void. Upon speaking to the city urban forester Karen DeMaria, as well as the previous urban forester Cynthia Coogle, as well as former FDOT employee Patty Ivy and other FDOT staff, it was apparent that there is a long and tortured history as to what portions of A1A the State of Florida owns, vs. the city. FDOT has at times asserted control over the maintenance of the trees, streetlights, and sidewalks. As recent as 2017, there are emails from FDOT representatives regarding their perceived control over these areas. I can personally attest that in the past 10 years advising the Tree Commission and city maintenance personnel, FDOT's prior maintenance company (Transfield) has trimmed the coconut palms along A1A, including the area in question. At times, the Tree Commission would get upset regarding the way the trees were being trimmed and the city would ask them to stop trimming and take over[4]. Therefore, initially there were a lot of discussions between the city, FDOT, and the Plaintiff's attorney as to whether the city and/or FDOT are proper parties. Ultimately, it was determined that although there is a long and complicated history of *maintaining* the trees between the city and state, the city owns that portion of the sidewalk and swale. Therefore, FDOT was not initially sued by the Plaintiff.

Based on my numerous interviews with past and present city staff, my review of the as-built plans, and my consultation with the city engineer, I brought a 3rd party suit against FDOT regarding the sidewalk cut. I believed that DeMoya Construction, on behalf of FDOT made the conscious decision to cut our sidewalk either to accommodate the drain, or to clean up the sidewalk from cracking after operating a backhoe on the sidewalk. After numerous attempts to speak to someone at DeMoya without success, I sent a subpoena to DeMoya in Miami. I received a letter from their attorney a couple of weeks later indicating that they have no records or recollection of this saw cut from 2007/2008, but would try to track down any employees from that time and get back to me. Those efforts have not proved to be fruitful.

I also deposed Jacqueline Hart. Ms. Hart works for RS&H, who are the design consultants for FDOT. She was assigned to the 2007/2008 A1A project, but does not have an independent recollection of the saw cut, why it was made, or who performed the cut. She is an engineer and I asked her about the as-built and landscape plans that show the cut. I also asked her if she had been advising DeMoya about the particular drain, if she would have recommended such a cut to accommodate it. She would not commit to a solid answer.

The city's former risk manager, Lisa Borzy was deposed. She testified about the results of her research and the confusing history regarding ownership and maintenance of the area.

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[4] I spoke to numerous past and present city employees and directors and no one could point to a set, written agreement with FDOT or Transfield regarding their maintenance of our trees, despite the past practice. In another personal injury case last year, Transfield and the city were sued regarding an injury on Whitehead Street from an old tree stump on a planter. Whitehead St. is owned by the state, but the sidewalk belongs to the city; similar to this case. In that case, there were maintenance records covering the trimming of trees on that block, despite the sidewalk being owned by the city. FDOT testified that there was an "agreement" with the city to do same, however a written agreement was never produced.

She also agreed that the picture taken on the night of the injury by Ofc. Helfner presented a dangerous condition.

*Comparative Negligence*

The city has pled comparative negligence by the plaintiff as an affirmative defense. This is based on her deposition regarding the likelihood that Plaintiff passed by the same alleged defect on her bike on the way to dinner that night. There is no other logical way to get to TGI Friday's from her hotel without riding the entire length of South Roosevelt, unless she rode right by the void. But since she did not admit that in her deposition, that is an educated guess at best. Additionally, if her headlight was powerful enough to meet the standards set in F.S. 316.2065, a reasonable person would have seen the void and avoided it completely. Also, since Plaintiff testified that although there were no other pedestrians or cyclists in the immediate area, she elected to ride her bike on the extreme right side edge of the sidewalk, despite that side of the sidewalk being notably more shaded by the coconut tree than the left side. All of these allegations are certainly helpful in a vacuum, but that is contrasted by the fact that the sidewalk was in this condition for approximately 6 years prior to the Plaintiff's fall in a very open and obvious state. A jury can certainly impute constructive knowledge onto the city for this void; irrespective of who made the saw cut. The significant gap in time is a problem for the city and can negate any comparative negligence claims.

*Summary Judgment & Severance*

FDOT filed a Motion for Summary Judgment, alleging that the city failed to properly follow the prerequisite notice conditions of F.S. 768.28. I argued that motion on May 3, and Judge Jones ruled in the city's favor and denied the motion. Immediately thereafter, FDOT again filed a Motion for Summary Judgment alleging that they are not responsible for the saw cut, and therefore for the resulting injuries to Tilghman. The Plaintiff has also filed a Motion for Summary Judgment regarding the city's Fabre defense (the defense that the city has asserted that FDOT in fact cut the sidewalk and therefore created the alleged dangerous condition). I also researched the possibility of the city's own Motion for Summary Judgment asserting design immunity. The premise of the motion has not changed since I first asked FDOT to join in this motion and they promptly refused. Municipalities enjoy immunity from suit for negligence lawsuits that are brought as a result of a valid construction design. This is based on the fact that even with the saw cut, the sidewalk still meets and exceeds the minimum width for a sidewalk. The problem with this motion is that the city was not the entity that designed this project, nor was it the entity that constructed it. I believe that we have an issue with that immunity being available to the city as a result because so far, FDOT has refused to join in this motion. Certainly, if FDOT joined in the motion and provided all of the missing pieces by way of the design engineers, and construction information, the motion would have a far better chance of survival. Another problem is that the design immunity is not available to the city if the Plaintiff can show that despite the minimum width still being met with the saw cut, the change in direction required some warning such as a painted stripe, or reflectors. That would be an issue of fact for a jury to determine and by definition, would extinguish a Motion for Summary Judgment.

Nevertheless, even if a city Motion for Summary Judgment on design immunity is successful, it is only applicable to the alleged defective sidewalk as a static improvement. There is another count in the complaint for negligent maintenance of the trees that had cast the shadow on the saw cut in the sidewalk. Design immunity would not be applicable to that part of the complaint, so in my opinion, there is potential exposure for that count.

*Damages*

Plaintiff claims to be able to prove $86,000.00 medical expenses thus far. This number is comprised of past dental, endodontics, orthopedic, emergency room care. Plaintiff projects that figure to swell to $123,000.00 which includes $30,000.00 for future medical care and $12,000.00 in out of pocket expenses. If the city were to be unsuccessful at trial, assuming these figures are accurate against a 3.5 multiplier for pain and suffering, it is possible that a verdict could reach in the $250,000.00 range. This only accounts for past medical expenses. That figure increases to $430,500.00 if the plaintiff can prove future medical expenses and need. Of course, there is a statutory cap on damages of $200,000.00, absent a special act of the Florida Legislature. Considering these facts and an inability to work with FDOT on a possible summary judgment, an above statutory cap verdict is possible, although getting an award approved by the FL Legislature against the city above the cap is unlikely.

*Mediation*

A mediation was conducted on June 12, 2017. The parties ended in an impasse, but with continued to negotiate in the subsequent days. Since the city is self-insured for the first 100,000.00 of negligence claims, the excess insurance carrier was notified of the negotiations and excess insurance carrier ultimately agreed to offer an additional $60,000.00 to tender a final offer of $160,000.00 from the city to settle this claim. FDOT has committed to an additional $20,000.00 to make the settlement happen. The agreement is contingent on approval from the city commission. Because this case was handled in-house from its inception, I estimate that the city has saved approximately $45,000.00 in legal fees to date, and even more if the case goes to trial.

*Recommendation*

Although a $160k settlement may seem high against a $200k cap on a case like this, considering this Plaintiff, the unlikelihood of a successful Summary Judgment in the city's favor without the cooperation of FDOT, the count of negligence regarding the coconut tree, and the chances of a comparative negligence argument with a sympathetic plaintiff with a facial injury with nerve damage, I think that the current settlement proposal is defensible. I therefore recommend approval of this settlement. $100,000.00 will be paid by the city, $60,000.00 by the city's excess insurance carrier, and $20,000.00 from FDOT. All parties bear their own legal expenses and costs.