



OFFICE OF THE
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THE CITY OF DAYTONA BEACH

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MEMORANDUM

TO: City Commission
FROM: Robert Jagger, City Attorney *RJ*
RE: Settlement in JANICE MAYER AND JAMES MAYER v. CODB, Case No. 2015
31509 CICI
DATE: December 4, 2018

This is a negligence action as a result of Plaintiff's fall on September 5, 2014, at or near the bottom step of the Archway staircase leading to the Boardwalk. The Plaintiff maintains that her fall was due to a shortened riser on the bottom step of the stairway, and that the City knew of this alleged dangerous condition, and failed to correct the situation. The City responds that the Plaintiff was at least partially at fault for her injuries because she failed to keep a proper lookout. In addition, the City filed a third-party action against Zev Cohen & Associates, Inc. ("Zev Cohen") for contractual indemnification. In 2009, the City entered into a contract with Zev Cohen to provide architectural plans for placing pavers over the existing concrete at the Boardwalk. The constructed project caused the bottom step of the Archway to be shorter than the other steps.

On the date of the incident, Plaintiff, Janice Mayer (DOB 4/28/49), her husband, and two other family members went to dinner at Joe's Crab Shack. After dinner, the party proceeded down the steps to the Boardwalk. According to her testimony, Ms. Mayer came down the steps in a usual fashion, but when she stepped off the bottom step, due to the shortened riser, she lost her balance, fell, and severely broke her left ankle requiring surgery which included the insertion of several pins in her ankle and shin. Ms. Mayer testified, and her testimony was confirmed by her husband and other family members, that she did not have any alcohol at the dinner, and that while it was lightly raining, she walked, not ran, down the steps, and that she was wearing either flat or low heeled shoes. Ms. Mayer claims continuing pain in her ankle after surgery, and difficulty walking. Ms. Mayer has incurred approximately \$82,000 in medical bills. Following the incident, the City repaired the stairway by ramping the floor elevation to eliminate the shortened step.

In the course of litigation Zev Cohen filed a motion for summary judgment against the City. The motion relied on what is known as the *Slaven* doctrine, a Florida Supreme Court decision which relieves a contractor from liability if the defect was "patent," meaning that it was open and obvious as opposed to "latent," a defect that was hidden. The court denied the motion for summary judgment due to disputed facts, and the matter was set for jury trial on December 10, 2018.

In November, the case was mediated with all parties, their attorneys and representatives present. After extensive negotiations, a settlement was reached subject to City Commission approval,

wherein Plaintiffs would receive the total sum of \$120,000 including all costs and attorney's fees with the City paying \$60,000 and Zev Cohen paying the same amount, \$60,000.

The City's Incident Review Committee has reviewed the proposed settlement and recommends approval by the City Commission. If this claim is not settled, a jury verdict could result in an award in excess of the settlement amount; accordingly, I concur with the recommendation of the Incident Review Committee. This memorandum is prepared for purposes of client consultation and does not constitute an admission against interest.

cc: James V. Chisolm, City Manager
Letitia LaMagna, City Clerk