



**Request for City Council Committee Action
From the City Attorney's Office**

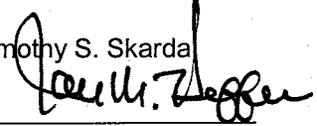
Date: August 30, 2007
To: Ways & Means/Budget Committee
Referral to:

Subject: Alfredo and Jean Cataldo and Auto-Owners Insurance Co. v. City of Minneapolis v. Aerko International
Court File No. 27-CV-06-12695

Recommendation: That the City Council approve the settlement of this case by payment of \$100,000.00, payable to Alfred and Jean Cataldo and their attorney, Thomas Harrigan; by the payment of \$100,000.00, payable to Auto Owners Insurance, Co. from Fund/Org. 6900 150 1500 4000 and authorize the City Attorney's Office to execute any documents necessary to effectuate the settlement.

Previous Directives: None.

Prepared by: Timothy S. Skarda Phone: (612) 673-2553

Approved by: 
Jay M. Heffern
City Attorney

Presenter in Committee: Jay M. Heffern, City Attorney

Financial Impact (Check those that apply)

- No financial impact (If checked, go directly to Background/Supporting Information).
 Action requires an appropriation increase to the _____ Capital Budget or _____ Operating Budget.
 Action provides increased revenue for appropriation increase.
 Action requires use of contingency or reserves.
 Business Plan: _____ Action is within the plan. _____ Action requires a change to plan.
 Other financial impact (Explain): Payment from Fund/Org. 6900 150 1500 4000
 Request provided to department's finance contact when provided to the Committee Coordinator.

Community Impact: Build Community

Background/Supporting Information

This is a lawsuit by the Cataldos for damage to property occurring as part of Minneapolis Police Department Operation 100 where officers were attempting to apprehend a homicide suspect. Auto-Owners Insurance Company paid insurance benefits to the Cataldos and intervened in the lawsuit. The City joined the manufacturer of Clear Out gas, Aerko, International, the chemical aerosol used during the operation. The City stipulated to liability for the damages caused. A trial on the issue of damages with the Cataldos is scheduled for October, 2007. A trial on the liability of Aerko is scheduled for March, 2008.

On December 18, 2004, the house, a duplex that Plaintiffs Alfred and Jean Cataldo owned and rented out at 4623 Lyndale Avenue North burned to the ground as a result of the Operation 100. The son of one of the tenants was suspected in a homicide. The son reportedly went to the address. Officers deployed numerous canisters of tear gas into all floors of the property on two separate occasions. In a separate event, officers deployed several canisters of Clear Out gas in the basement. A fire broke out shortly after the Clear Out gas was discharged into the basement and the home was destroyed.

Clear Out is manufactured by Aerko International and marked as not being flammable. The police department test the gas and found that it burned when the canister was exposed to an open flame.

It is clear that under *Wegner v. Milwaukee Mutual Insurance Company*, 479 N.W.2d 38 (Minn. 1992) the City is responsible for damages suffered by innocent third parties as the result of police actions. The Cataldos were innocent third parties. They had no involvement in the underlying event and there is no evidence that the Cataldos were culpable for any of the damages through their own actions or through the manner in which they selected tenants or managed their property. The City has previously paid claims made by the tenants at the property. At issue is the determination of the value of the property damaged by the City. The Cataldos initially demanded \$300,000.00 in settlement of their claim, including total loss of the property and damages associated with clean up and loss of rental income.

Auto-Owners Insurance demanded \$118,820.00 as compensation for the payments made to the Cataldos.

We have examined financial and real estate records and estimate the value of the property between \$199,000.00 and \$234,000.00. The estimates of the value of the property are based on the purchase price, replacement cost, mortgage amount, documented improvements to the property, resale value and loss of rental income.

Regarding the claim asserted against Aerko International, the City asserted that given the representations that the product would not burn, the fact of the fire and the tests of the gas, Aerko International is responsible for a portion of the damage to the property. Aerko International defended the litigation by asserting that the product was labeled according to federal guidelines and contains warning providing immunity from liability; that the product was used contrary to instructions in that gas sufficient for 69,000 cubic feet were dispensed into a 560 cubic foot area; and that the substantial amount of tear gas dispensed into the house prior to the fire caused most of the damage. Essentially, Aerko asserts that without the fire the house would have been a total or near total loss.

On August 20, 2007, mediation was conducted attended by Assistant City Attorney Timothy S. Skarda and Captain Otto Wagenfeil, Commander, Special Operations Division. A tentative settlement was reached at mediation in which the City will pay \$200,000.00 to be equally divided between the Cataldos and Auto-Owners Insurance. Aerko International will make a payment in a confidential amount to be equally divided between the Cataldos and Auto-Owners Insurance. The City has not attempted to recover any costs from the Cataldos associated with cleaning the site after the fire and has agreed to waive any such costs. The proposed settlement includes all claims for damages, costs and fees associated with the incident and disposes of the litigation in its entirety. The proposed settlement amount has been reviewed and approved by the City Attorney Litigation Committee. Chief Dolan has reviewed the proposed settlement and recommends its approval. All parties believe that the proposed settlement is in the best interest of the City and recommend approval by this Committee and the City Council.