

December 1, 1997

<u>SPECIAL MASTER'S FINAL REPORT</u>	<u>DATE</u>	<u>COMM.</u>	<u>ACTION</u>
The Honorable Toni Jennings President, The Florida Senate Suite 409, The Capitol Tallahassee FL 32399-1100	12/02/97 01/05/98	TR WM	Favorable/CS Favorable

Re: SB 2 by Senator Childers
HB 1881 by Representative Ritter
Relief of David Kelley and the Estate of Alto Kelley

THIS IS CLAIM FOR \$1,400,000 BASED UPON A SETTLEMENT AGREEMENT BETWEEN CLAIMANTS AND THE FLORIDA DEPARTMENT OF TRANSPORTATION TO COMPENSATE DAVID KELLEY FOR THE INJURIES HE SUSTAINED AND TO COMPENSATE THE ESTATE OF ALTO KELLEY, JR. FOR DAMAGES IT SUSTAINED FROM AN AUTO ACCIDENT INVOLVING A DEPARTMENT OF TRANSPORTATION VEHICLE. D.O.T. HAS MADE NO PAYMENT TOWARD THE \$200,000 STATUTORY WAIVER LIMIT.

FINDINGS OF FACT:

Near sunset on February 15, 1996, Claimant, David Kelley, and his father, Alto Kelley, were driving north on State Road 87, a state maintained two lane road in Santa Rosa County. There had been rain in the area, and the road was wet.

They were riding in a late model Toyota pick-up truck; each was wearing his seat belt. Claimant was driving and his father was in the passenger seat. There is no evidence David Kelley was exceeding the speed limit.

David Kelley and his father worked together as independent contractors in the dry wall finishing business under the company name of Four Star Dry Wall, Inc.

They did so from October 1993 through the father's death on 2/15/96.

An employee of Respondent, Florida Department of Transportation, was driving in Respondent's late model Ford Ranger pick-up truck. She was authorized by D.O.T. to be driving the truck at the time. She was traveling south on S.R. 87. There is evidence in the record that she allowed her vehicle to drift toward the edge of the pavement in her lane and then off the pavement and onto the west shoulder of the road. She apparently over corrected and swerved into the northbound lane and into the path of the claimant's vehicle.

There is also evidence that there was a 2 to 5 inch difference in height between the edge of the southbound road surface and the shoulder in the area from 200 to 260 feet from the point of impact. Evidence also was introduced that there was standing water on the highway and shoulder. There is no evidence the driver of the D.O.T. vehicle was exceeding the speed limit.

Claimant's and Respondent's respective vehicles collided head-on. Alto Kelley was killed in the accident; he was survived by his daughter, Katina Lynn Kelley, age 23, and Claimant, David Kelley. Katina is David's sister. David was 20 years old at the time of the accident; Katina was 22. David will turn 22 in December 1997. He is married to Regina Kelley and was married to her at the time of the accident. They have no children.

David Kelley suffered serious injuries. These included:

1. Several broken ribs and puncture of left chest wall.
2. Broken left wrist.
3. Significant tearing of flesh of right elbow and forearm.
4. Broken right femur shaft, open overriding, and fracture of femoral neck.
5. Crushing fracture of right foot with separation of ankle from the leg and fracture of right ankle.

Upon admission to the hospital, tests showed no evidence of alcohol in David Kelley's blood, but the result of the test for cannabinoid, i.e. marijuana, was positive and outside the reference range. The test is only a qualitative one for the presence or absence of cannabinoid in the urine beyond a certain reference point. Apparently, no additional tests were performed to determine the specific quantity of cannabinoid. The reports of the law enforcement officers make no reference to the cannabinoid. There is no evidence of any criminal charge being filed against David Kelley based upon the test. In short, there is no evidence that the presence of cannabinoid played any part in the accident.

According to the January 1997 independent medical examination and life care plan introduced by Claimant, David Kelley has:

1. Persistent limitations of left wrist movement associated with pain secondary to post wrist fracture pain.
2. Persistent right hip pain associated with limitations of active movement secondary to post fracture femur pain.
3. Persistent right thigh pain secondary to fracture callous formation and associated muscle mechanical dysfunction.
4. Persistent severe right ankle pain secondary to post fracture ankle dysfunction associated with limitations in active movement of the right ankle.
5. Leg length discrepancy secondary to right ankle fracture.
6. Gait dysfunction secondary to right leg multiple joint pain and leg length discrepancy.
7. Chronic mid back pain secondary to thoracic strain syndrome caused by gait dysfunction.
8. Impaired vocational function secondary to persistent multiple joint pain and dysfunction.

Also according to this report, Claimant will need orthopedic surgery for removal of femoral hardware,

ankle fusion, wrist arthroscopy, and associated medications and supplies. These will require the professional services of an orthopedic surgeon, physical therapist, and psychologist. He also will need home maintenance services and vocational services. There was testimony he may require amputation below the knee to eliminate the ankle problems.

David Kelley has returned to work part-time in the dry wall finishing business. He testified he works about 5 or 6 hours a day. He also testified he continues to experience pain primarily in his leg and ankle which prevents him from working longer hours. He wears a brace while working to take the weight off his ankle. His activities on the job are limited.

LEGAL PROCEEDINGS:

Claimant filed an administrative claim pursuant to s. 768.28, F.S., and subsequently a complaint was filed in the circuit court in and for Santa Rosa County. D.O.T. moved to dismiss the case and for a more definite statement.

CONCLUSIONS OF LAW:

Liability

Whether or not there is a settlement agreement, as there is here, every claim bill must be based upon facts sufficient to meet the preponderance of the evidence standard.

Claimants presented alternative theories under which D.O.T. may be held liable. The department's liability has been separately established under both theories.

The first is that D.O.T. is vicariously liable for the acts of its employee in driving the D.O.T. truck. In my view, the claimants have provided proof of each of the elements of this theory sufficient to meet the requisite preponderance of the evidence standard. The employee was authorized by her employer to drive the truck at the time of the accident. She breached her duty of due care in operating the vehicle and that breach was the proximate cause of the collision which resulted in the damages to the claimants.

The claimants' alternative theory is that D.O.T. was negligent with respect to maintenance of the roadway and the shoulder, and the difference in height between the two surfaces. *See, Florida Department of Transportation v. Manning*, 288 So. 2d 289 (Fla. 2 DCA 1974). Further, the negligence was at the operational level rather than the planning level.

In my view, the claimants have provided proof of each of the elements of their second theory sufficient to meet the preponderance of the evidence standard. D.O.T. had a duty to properly maintain the roadway and the shoulder, and keep the difference in height between the two surfaces within acceptable limits. The D.O.T. breached that duty and that breach was a proximate cause of the accident which resulted in the damages to the claimants.

Damages

1. *David Kelley*

With respect to damages, Claimant's Demand and Settlement Package for David Kelley included the following:

• Past Medical Expenses	\$120,000
• Future Medical Expenses	69,600
• Past Lost Wages	27,580
• Future Lost Wages	301,000
• Past Lost Services	5,940
• Future Lost Services	179,150
• Disability, Disfigurement, Loss of Capacity for Life, Inconvenience, Pain, and Suffering:	
Past	55,000
Future	290,000
• Loss of Companionship	<u>100,000</u>
TOTAL	\$1,148,270

2. *Estate of Alto Kelley, Jr.*

Section 768.16-.27, F.S., is Florida's Wrongful Death Act. The act defines "survivors" to include the decedent's children; "minor children" to include children under 25 years of age, notwithstanding the age of majority; "support" to include contributions in kind as well as money; and "services" to include tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the decedent's survivors.

Relevant damages that may be recovered under the act include:

- Each survivor may recover the value of lost support and services from the date of the decedent's injury to her or his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered.
- Minor children of the decedent may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury.
- Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them.
- The decedent's personal representative may recover for the decedent's estate the following:

- (a) Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest. Loss of the prospective net accumulations of an estate, which might reasonably have been expected but for the wrongful death, reduced to present money value, may also be recovered if the decedent's survivors include a surviving spouse or lineal descendants.
- (b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against her or his estate or that were paid by or on behalf of decedent, excluding amounts recoverable above.

Katina Lynn Kelley is personal representative of the estate of Alto Kelley, Jr. Claimant's Demand and Settlement Package for the estate included the following:

Support provided to Katina Kelley:

- Vehicle payment \$450.00 per month
- Furniture \$125.00 per month
- Payment of light and water bill
- Payment of insurance
- Paid for mobile home which he and Katina lived in at the time of the accident, paid down payment and monthly payments for mobile home lot, did lawn maintenance, planted trees and flowers on property.
- Performed numerous household services, including cleaning and shopping.

Support provided to David Kelley:

- Provided business guidance
- Procured customers for business
- Gave all training for the job
- Invested in business to help it grow

Loss of support and services to Katina Kelley from February 15, 1996 to December 18, 1998:

- 34 months at \$1,000 per month = \$34,000

Loss of support and services to David Kelley from February 15, 1996 to December 18, 2000:

- 58 months at \$1,000 per month = \$58,000

Pain and suffering for Katina Kelley past and future:

- \$710,000

Pain and suffering for David Kelley past and future:

- \$680,000

TOTAL **\$1,482,000**

3. *Total Damages*

The total of the Demand and Settlement Package for David Kelley and the Estate of Alto Kelley is \$2,630,270. The settlement agreement for \$1,400,000 reached by the parties is a fair evaluation of the damages.

4. *Outstanding Balances*

The following are outstanding and must be paid from the proceeds of any claim bill enacted:

Subrogation Interests

• Health care recoveries for portions of medical bills paid by insurance	\$65,000
• Auto insurance subrogation for vehicle damage payments	13,000
Litigation Expenses	10,488
Back Federal Income Taxes*	<u>27,500</u>

TOTAL (all figures are approximations) **\$115,988**

*Four Star Dry Wall, Inc. furnished 1099's to David Kelley only. David Kelley has outstanding approximately \$27,500 in income taxes from the period 1993 through

1995. It is unknown whether his father filed any tax returns since 1990.

ATTORNEYS FEES:

Limited to 25 percent of recovery under the provisions of s. 768.28, F.S.

RECOMMENDATIONS:

When large sums are involved, the Legislature generally has favored structured payments to a claimant. Given the amount involved here and the ages of David and Katina Lynn Kelley, structured payments are appropriate in this case and the parties should so agree in writing. With this condition, I recommend that SB 2 be reported FAVORABLY.

Respectfully submitted,

Glenn Lang
Senate Special Master

cc: Senator Childers
Representative Ritter
Faye Blanton, Secretary of the Senate
Richard Hixson, House Special Master