December 1, 1997

| SPECIAL MASTER'S FINAL REPORT | DATE | COMM. | ACTION |
|---|---|---|---|
| The Honorable Toni Jennings | 02/03/98 | TR | Favorable/CS |
| President, The Florida Senate | 04/01/98 | WM | Favorable |
| Suite 409, The Capitol | | | |
| Tallahassee, Florida 32399-1100 | | | |

Re: SB 28 by Senator Forman
HB 3041 by Representative Miller
Relief of Frank Roster

THIS IS A VERDICT-BASED EXCESS JUDGMENT CLAIM FOR $7,627,602 IN FUNDS OF THE STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION (DOT) TO COMPENSATE FRANK ROSTER FOR THE INJURIES HE SUSTAINED AS A RESULT OF THE NEGLIGENCE OF THE DEPARTMENT. DOT HAS NOT MADE ANY PAYMENT TOWARD THE $100,000 STATUTORY WAIVER LIMIT.

FINDINGS OF FACT:

1. THE ACCIDENT. On the afternoon of Saturday, April 2, 1988, Frank Roster and his girlfriend Jill were returning from a day at the beach. They were riding their bicycles in the western-most southbound lane of A1A in Hollywood, Florida. Jill rode her bike onto the sidewalk at a curb cut after Frank had told her to do so. Shortly thereafter, Frank, who continued to ride in the street as near to the curb as possible, was struck by a vehicle driven by Donald Moulton, Jr. Moulton was intoxicated beyond the legal limit at the time of the accident. As a result of the accident, Frank Roster was rendered quadriplegic permanently.

   Frank and Jill were married after the accident and are still married. She assists in his care on a daily basis. They have no children.

2. THE ROADWAY. Route A1A where the accident occurred is 60 feet wide from curb to curb. The asphalt pavement is 57 feet wide; the concrete gutter and curb add 3 feet to this width, 1.5 feet on each side, making a total of 60 feet. The

roadway is divided into five lanes--two in a northerly direction, two in a southerly direction, and a turn lane in the middle.

The 1984 DOT plans for resurfacing and restriping A1A called for the westernmost southbound lane, the lane in which claimant was riding, to be 12 feet wide. The record reflects that an investigating police officer measured the width of the lane in which Frank Roster was riding at 11 feet 5 inches. Claimant's expert measured the lane width at 11 feet 1 inch.

The traffic accident report notes the approximate point of contact was 2 feet 1 inch "east of the west road edge." It is unclear whether "road edge" means the curb face, the gutter, or the asphalt pavement.

3. DRIVER'S ACTIONS. There is conflicting evidence as to exactly where Frank Roster was riding. Claimant's contention is that he was riding along the white line which delineates the outermost boundary of the outermost lane. Respondent contends Roster was not riding in the road, but was riding as far to the right, as close to the curb as possible. Thus, it is unclear whether claimant was riding to the left of the solid white line at the right-hand side of the road, on the line, or in the concrete gutter to the right of the solid white line. There was no evidence cars were stopping or swerving to avoid Roster.

   Donald Moulton, Jr. was driving in the same direction in the same lane as claimant, within the white lines marking that lane. According to claimant's expert witness at trial, Moulton was driving pretty much in the center of his lane, not significantly to one side or the other.

   Moulton was driving at or near the speed limit of 35 m.p.h. and he had passengers in the vehicle he was driving. He was arguing with one of the passengers and was looking right at the one with whom he was arguing. It is unclear whether Moulton saw Frank Roster when he hit him. Moulton contends he did not apply the brakes until after he hit him.

There was an eyewitness to the accident who was driving behind Moulton. The eyewitness saw Moulton swerve more than once, and he appeared to be talking and not paying attention. Initially, Moulton contended his car was not weaving, but later he could not remember whether it was or not.

At trial, claimant's expert testified that at the point of impact, Moulton was turning his steering wheel to the left, away from Roster, and at no time did Mouton ever cross over the right-hand, outside boundary of his lane. The expert concluded that the overlap space between Moulton's car and Roster's bicycle was never more than 6 inches.

4. SEQUENCE OF RELEVANT EVENTS. The following timetable sets out when events relevant to this case occurred.

| DATE | EVENT |
|---|---|
| 4/1/82 | DOT publishes revised Bicycle Facilities Planning and Design Manual, Official Standards, Prepared for the Division of Planning, Florida Department of Transportation. |
| 9/83 | Original plans for repaving and restriping of A1A by DOT in the vicinity of the accident sent to Tallahassee. |
| 1/13/84 | DOT memorandum relating that Federal Highway Administration agreed to new striping policy for urban resurfacing projects that will allow restriping to provide wide curb lanes by using 11 feet interior lanes |
| 1/23/84 | Plans approved. |
| 3/16/84 | DOT memorandum.<br>To: District Engineers, District Design Engineers and Consultants |

From: Thomas E. Drawdy, Director of Preconstruction and Design

Subject: Policy for Incorporation of Bicycle Facilities in Design- Wide Curb Lanes, Bicycle Lanes, and Paved Shoulders.

6/4/84 Work begun on the 3-month project on A1A.

7/2/84 Plans revised during construction.

9/84 Project completed.

11/84 DOT accepts project.

4/2/88 Accident occurs.

5. DOT BICYCLE POLICY.

*a. The Manual.* The Florida Department of Transportation published the Bicycle Facilities Planning and Design Manual, [hereinafter Manual]. The stated purpose of the Manual was to provide state agencies with information necessary to plan, locate, select, and design bicycle facilities and transportation systems. Manual at 1-1. It was prepared for the Division of Planning within the DOT, apparently by private consultants, provided "Official Standards," and was revised in 1982.

The Manual recognized three categories of bicycle facilities: wide curb lanes, bicycle lanes, and bicycle routes. Wide curb lanes are the focus of this case.

According to the Manual, wide curb lanes are:

- Placed along streets in corridors where there is significant bicycle demand.

- For shared use by bicycle and motorized traffic.

- Appropriate where traffic speeds and volumes are tolerable for shared roadway facilities.

- Selected when there is insufficient room for a separate bike lane, yet significant demand exists for providing a facility of some kind.

- Created by widening roadways or by narrowing traffic lanes.

- The subject of comments by the Association of State Highway Transportation Officials and the National Advisory Committee on Uniform Traffic Control Devices in favor of reducing vehicle lanes from 12 feet to 11 feet for the purpose of widening the rightmost curb-lane for bicycle use. Manual at 4-3 (citations omitted).

The manual presented guidelines "to help design and construct...roadway improvements...that accommodate the operating characteristics of bicycles...." Id. at 5-1. The Manual states that "[m]inimum standards must be strictly adhered to." Id. (emphasis in original). Because most highways have not been designed with bicycle travel in mind, it was suggested that roadways should be improved to more safely accommodate bicycles. Id.

Roadway conditions should be examined, and where necessary, safe drainage grates...[and] smooth pavements...should be provided. In addition, the desirability of adding facilities such as bicycle lanes...and wide curb lanes shall be considered. Manual at 5-2 (emphasis in original).

The Manual noted the following design criteria with respect to wide curb lanes:

> On highway sections without bicycle lanes, a right hand lane wider than 12 feet...can better accommodate both bicycles and motor vehicles in the same lane and this is beneficial to both....

...
In general, a lane width of 14 feet...of usable pavement is desired. Drainage grates, parking, and longitudinal ridges between pavement and gutter sections are not considered usable pavement.
...
Restriping to provide wide curb lanes can be accomplished on most existing multi-lane facilities by making the remaining travel lanes and left-turn lanes narrower.

*b.* *The Memo.* On March 16,1984, 3 months after the plans for the A1A project were approved by the department, the Director of Preconstruction and Design sent a memorandum to all district engineers, district design engineers, and consultants. [hereinafter Memo]. The subject of the Memo was "Policy for Incorporation of Bicycle Facilities in Design - Wide Curb Lanes, Bicycle Lanes, and Paved Shoulders."

The Memo acknowledges the department has a policy with respect to accommodating bicyclists' needs, but also acknowledges that the policy may not be feasible in certain situations.

The department's current policy is to provide for the needs of bicyclists... . This policy will generally provide for the construction of wide curb lanes...in conjunction with other planned roadway improvements. The lack of adequate right of way and the costs associated with acquisition in built up areas will not allow us to provide this additional width on all projects.

One of the benefits noted in providing wide curb lanes was that they will allow a motorist to pass a bicyclist without delay.

With respect to wide curb lanes, the Memo stated:

Wide curb lanes (normally 14 feet wide) are to be provided as the minimum treatment in conjunction with other roadway improvements (curb and gutter construction)...unless right of way is inadequate and the cost associated with acquisition for this purpose is not feasible...With severe right of way limitations, 11 feet interior lanes, 11 feet continuous two-way turn lanes, or painted medians may be used under interrupted-flow operating conditions at low speeds up through 40 m.p.h. Memo at 2.

While not absolutely clear, up to this point the Memo appears to address solely new construction projects or road widening projects. The A1A project was neither of these, rather it was a resurfacing project. With respect to resurfacing projects, the Memo states:

> The FHWA [Federal Highway Administration] recently agreed to a new striping policy for urban resurfacing projects that will allow restriping to provide wide curb lanes by using 11 feet interior lanes. (See DM10008 dated January 13, 1984.) This policy is to be applied on all future appropriate urban and urbanized area (curb and gutter) State and Federally funded resurfacing projects. Id.

Finally, the Memo makes reference to the Manual and sets out time frames for the implementation of the policy contained in the Memo.

Additional Design Criteria for bicycle facilities is given in the department's "Bicycle Facilities Planning and Design Manual- 1982". The Manual shall be used to determine the best treatment for a given project.

This policy is to be implemented on projects at the earliest possible date without impacting letting schedules. Full implementation on all appropriate projects will begin with January 1985 letting.

LEGAL PROCEEDINGS

On March 2, 1992, claimant filed his Third Amended Complaint for damages in the circuit court of the 17th Judicial Circuit (Broward County). Claimant named as defendants: the Florida Department of Transportation; Donald Moulton, Jr., the driver of the car; Donald Moulton, Sr., the owner of the car; Nick's Bar, the bar at which the driver had been drinking; the City of Hollywood; and various corporations engaged in the design, manufacture, assembly, distribution, marketing, and sale of Frank Roster's bicycle. The City of Hollywood obtained a summary judgment in its favor. All of the other defendants were voluntarily dismissed by the claimant, except DOT, Donald Moulton, Jr. , Donald Moulton, Sr., and the bar.

The case went to trial on October 17, 1994. After the trial, which lasted more than a month, the jury rendered a verdict. The jury's verdict found negligence on the part of DOT was a legal cause of the damage to Frank Roster. The jury assigned negligence as follows: 80 percent to the driver of the car, Donald Moulton, Jr., and 20 percent to the Florida Department of Transportation.

DOT appealed to the Fourth District Court of Appeal on numerous grounds. Without opinion, the appellate court affirmed the trial court rulings.

On December 14, 1988, Donald Moulton, Jr. pled guilty to Felony Driving Under the Influence. He was sentenced to the following:

- 104 days in jail to be served by spending weekends in county jail; one day jail time served was credited.
- Driver's license revocation for 1 year with ability to apply for work permit following program completion
- $250 fine in the interest of restitution
- 5 years probation on the following conditions:

- Payment of restitution in the amount of $1.5 million. The sentencing court acknowledged it could not conceive of how Mr. Moulton could pay this amount within 5 years. Per order of 8/2/89, restitution set at $225.00/mo. with certified copy of order to Frank Roster to record the judgment as a lien.

- Continuous attendance at AA meetings no less than 4 times per week

- Continue to attend therapy

- 100 hours of community service each year for 5 years to be performed at the Miami Project

- No drinking of alcohol

- Random urine testing

Over the 5 years of his probation, Donald Moulton, Jr. paid $12,265 in restitution. His payments ceased in December 1993 when his probation ended.

CONCLUSIONS OF LAW

1. LIABILITY Whether or not there is a jury verdict, as there is here, every claim bill must be based upon facts sufficient to meet the preponderance of the evidence standard. From my review of the evidence, I find the Florida Department of Transportation had a duty to resurface and restripe A1A in accordance with its plans and with its bicycle facilities standards and policy. DOT breached that duty and that breach was the proximate cause of the accident which resulted in the damages to the claimant.

   *a*. *Duty*. Claimant offered that four different duties were imposed on DOT. They are:

      1. DOT must follow the plans it prepared for resurfacing and restriping A1A.

2. DOT must follow the guidelines it established in the Manual and the Memo for bicycle facilities.

3. DOT must implement the project in accordance with the guidelines.

4. DOT created a non-obvious trap for bicyclists.

Any one of the duties, if supported by the evidence, and if operational and not planning in nature, would be sufficient to establish the duty element of the case. According to the record, DOT's plans for the A1A project called for the lane in which Roster was riding to be 12 feet wide. Similarly, the guidelines established in the Manual and the Memo require at least a 12 foot lane width under the circumstances. Thus, DOT established a duty for itself, which was operational in nature, to provide a 12 foot wide lane. Therefore, the other two duties need not be reached.

*b.* *Breach.* The plans for the A1A resurfacing and restriping called for the lane in question to be 12 feet wide. The guidelines under the Manual and the Memo require a lane at least 12 feet wide. The measurements by police and claimant's expert showed the lane to be 11 feet 5 inches and 11 feet 1 inch, respectively. Thus, there is evidence that DOT breached its duty to provide a 12 foot wide lane.

*c.* *Proximate Cause.* Proximate cause is composed of two elements: 1) causation in fact and 2) foreseeability.

1. Causation in Fact. The record reflects that claimant's expert testified at trial that the overlap of Roster's bicycle and the passenger side front bumper of Moulton's car was no more than 6 inches. The record also reflects that even though he was weaving some, Moulton generally was driving in the center of his lane.

The expert testified that assuming all other facts except lane width were the same, another foot of lane space would have prevented the accident. Respondent did not object to the testimony, and therefore, it constituted independent, substantive evidence on the point for which it was offered. Respondent also did not introduce contradictory evidence.

Further, claimant's position is that if respondent had objected to the testimony at trial, there would have been no basis for precluding it as inherently speculative or unreliable. The expert calculated the location and direction of the car and the bike at the time of the collision and the extent of overlap between them; he concluded that all else being equal, a 12 foot wide lane would have made the difference.

It also can be concluded that all else would have been equal, i.e., Roster would have ridden at the far right of the lane regardless of how wide the lane was. He was an experienced bicyclist, and he rode as far to the right as possible.

Thus, I find DOT's failure to make the lane in question 12 feet wide was the cause in fact of the accident.

2. Foreseeability. The issue here is whether DOT could foresee that a bicyclist would be injured by a driver such as Moulton who was legally drunk or who, regardless of being drunk, was not paying attention. Stated a different way, the issue is whether Moulton's conduct was an independent, efficient intervening cause sufficient to break the chain of causation established up to this point.

With respect to evaluating foreseeability in the context of proximate cause, the Florida Supreme Court has said:

> [H]arm is "proximate" in the legal sense...if the same harm can be expected to recur if the same act...is repeated in a similar context,...[h]owever, it is immaterial that the defendant could not foresee the precise manner in which the injury occurred or its exact extent.

...

On the other hand, ...[t]he law does not impose liability for freak injuries that were utterly unpredictable in light of common human experience.

*McCain v. Florida Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992)(citations omitted)(emphasis in the original).

Applying these principles to the facts, I find that DOT could foresee that an accident such as the one at issue here could occur as a result of marking lane in question 11 feet wide instead of 12 feet wide as called for in the plans. DOT established a policy of creating wide curb lanes for bicycles so as to promote safety for bicyclists. DOT could foresee that by marking this lane 11 feet wide, instead of 12 feet wide, it was enhancing the risk of just such an accident occurring; cars and bicycles would be put in closer proximity. It is immaterial that DOT could not foresee the precise manner in which this accident and injury occurred.

Further, Moulton's conduct was not an independent, efficient intervening cause sufficient

to break the chain of causation. This was not a freak accident utterly unpredictable in light of common human experience. DOT could foresee that an intoxicated or inattentive person may swerve toward the curb. In fact, DOT could foresee any number of other situations wherein a driver may swerve toward the curb. For example, a driver could swerve in reaction to a loud, startling noise. Thus, it is not unforeseeable that compressing cars and bicycles in to an 11 foot wide lane, instead of a 12 foot wide lane, will result in a similar accident under similar circumstances. A difference of one foot may make all the difference.

*d. Appeal.* On appeal to the Fourth District Court of Appeal, DOT raised two issues: 1. the trial judge erred in concluding that DOT was not immune from tort liability arising from the design and implementation of the A1A resurfacing project, and 2. alternatively, the trial judge erred in denying DOT's motion for directed verdict, because DOT was not actionably negligent, even if the design and striping of the roadway at the accident scene was defective in that it did not comport with the design criteria for accommodating bicycles. The appellate court was not persuaded by DOT's arguments, nor am I.

2. DAMAGES. Damages as found by the jury and in the Final Judgment were as follows:

| **Damages** | **Jury Award** | **Final Judgment Against DOT** |
|---|---|---|
| Past Medical Expenses | $430,000.00 | $5,727,602.00 minus $325,000 set off from settlement with Nick's Bar & Grill (11/94) = $5,402,602.00 jointly and severally with Donald Moulton, Jr. and Donald Moulton, Sr. |
| Past and Future Lost Earnings or Earning Ability (present money value) | $897,602.00 | |
| Future Medical Expenses (present money value) | $4,400,000.00 | |
| Past and Future Pain and Suffering, Disability, Physical Impairment, Disfigurement, Mental Anguish, Inconvenience, and Loss of Capacity for Enjoyment of Life | $10,000,000 | $2,000,000 (80% reduction- comparative negligence of Donald Moulton, Jr.) |
| Punitive Damages Assessed Against Donald Moulton, Jr. | $10,000 | Not applicable |
| **TOTAL** | $15,737,602.00 | $7,402,602.00 |

I find these damages to be fair.

COLLATERAL SOURCES: As noted above, Nick's Bar settled with claimant for $325,000 in November 1994. Frank Roster received $65,000 from the settlement. The table below shows entities with liens and the outstanding balances thereon. Payments from the settlement are noted.

| ENTITY | LIEN | OUTSTANDING BALANCE |
|---|---|---|
| 1. Hollywood Memorial | $150,023.00 | $83,356.34 ($66,666.00 paid from settlement with Nick's Bar & Grill) |
| 2. Jackson Memorial | $268,933.02 | $180,044.13 as of 9/25/97 ($88,888.89 paid from settlement with Nick's Bar & Grill. Judgement for $174,009.77 + interest accruing at $34.66/day and $6,034.36 in other bills not covered by the judgment) |
| 3. State of Florida, Department of Vocational Rehabilitation, Department of Labor and Employment Security | ≈ $105,120.47 pursuant to s. 413.445, F.S. | $60,676.02 ($44,444.45 paid from settlement with Nick's Bar). Since 1994, Frank Roster has been attending classes at Miami Dade Community College. The Division of Vocational Rehabilitation estimates it will spend ≈ $16,000 over the next 15 months for Mr. Roster to continue taking such classes. This amount includes attendant care, transportation, clothing, and wheel chair repairs. |
| 4. Medicare | Undetermined, but substantial. Over last 9 years, Medicare has paid most costs related to accident. $42,828.56 as of 11/24/97. | Undetermined full amount. $42,828.56 as of 11/24/97. |
| 5. Medicaid | $22,659.23 | $22,659.23 as of 12/23/97 |
| 6. Sheldon A. Schlessinger, P.A. | ≈ $141,000 in costs | ≈ $141,000 as of 9/23/97 (received $60,000 toward attorney's fees from settlement with Nick's Bar) |

ATTORNEYS FEES: Limited to 25 percent of recovery under provisions of §768.28, F.S.

RECOMMENDATIONS: The amount of the claim should be reduced from $7,627,602 to $7,302,602 to reflect the $325,000 settlement which Nick's Bar has paid. Accordingly, I recommend that SB 28 be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

Glenn Lang
Senate Special Master

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