

December 1, 1997

SPECIAL MASTER'S FINAL REPORT

DATE

COMM.

ACTION

The Honorable Toni Jennings
President, The Florida Senate
Suite 409, The Capitol
Tallahassee FL 32399-1100

12/02/97

CA
WM

Favorable

Re: SB 64 - Senator Gutman
HB 3083 - Representative Eggelton
Relief of Jose Pena and Johammes Pena

THIS IS A VERDICT-BASED EXCESS JUDGMENT CLAIM FOR \$1,101,061.14 IN FUNDS OF THE CITY OF HIALEAH TO COMPENSATE JOSE PENNA AND JOHAMMES PENNA FOR THE DEATH OF CARMEN PENNA AS A RESULT OF THE NEGLIGENCE OF THE CITY. THE CITY HAS PAID THE \$200,000 STATUTORY WAIVER LIMIT.

FINDINGS OF FACT:

1. THE ACCIDENT. At dusk on Sunday, October 21, 1990, Carmen Pena was driving a car containing her family west on West 68th Street in the City of Hialeah. She had a learner's driving permit. Riding in the front seat of the vehicle was Jose Pena, her former husband; their three children, Johammes Pena, age 16, Richard Pena, age 12, and Katherine Pena, age 6, were riding in the back seat of the car. Everyone in the car was wearing a seat belt. The day was clear and the road was dry.

Near the intersection of West 68th Street and West 26th Drive, the two right tires of the car left the roadway on which the vehicle was traveling. Carmen attempted to steer the vehicle back onto the roadway; it is unclear whether the two right tires ever returned to the roadway.

The speed limit was 35 m.p.h. There is no evidence Carmen was exceeding the speed limit.

During these maneuvers, the right rear tire was punctured, and the vehicle veered sharply to the right. The car traversed

the north shoulder of the roadway, which shoulder was approximately 35 feet wide, and plunged into and then sank in the canal which runs parallel to West 68th Street.

Jose and Johammes escaped the vehicle, survived, and sustained only very minor injuries. Carmen, Richard, and Katherine were rescued from the vehicle and hospitalized. Each was placed on life support but did not survive. Carmen died 8 days after the accident; she was 38 years of age. Katherine died after 11 days; she was 6. Richard died after 66 days, he was 13.

2. ROADWAY AND SHOULDER. Along the roadway at the scene of the accident, the evidence shows that there was a 3 to 4 inch drop-off between the surface of the roadway and the shoulder. The evidence further shows the city owned, maintained, and controlled the roadway and the shoulder between the roadway and the canal. It had no formal procedures for inspecting and maintaining its roadway system.

There is evidence in the record that the city was aware of the drop-off at the site of the accident but did not repair it. The city had not posted any signs in the area to warn of the condition.

The traffic homicide investigation officer concluded the drop-off contributed to the accident causing the right rear tire to blow out. He identified a scratch mark on the pavement wall where the car attempted to get back on the road and the blowout occurred.

There was no evidence of a mechanical defect in the car other than the right rear tire. The officer found there was no evidence of intoxication or physical impairment.

Respondent attempted to establish the blow out could have been caused by a fist-sized rock. However, the officer observed no such rock at the scene. Finally, the officer was unable to determine the speed of the vehicle at the time of the accident.

Claimant's expert was of the opinion that the city had not properly maintained the relationship between the roadway and

the shoulder. Contrary to the Florida Department of Transportation Manual of Uniform Minimum Standards for Design, Construction, and Maintenance for Streets and Highways, the "Green Book," the city had allowed a 3 to 4 inch difference to develop between the surface of the roadway and the shoulder. This created a hazard to the public. Irrespective of the Green Book, the expert was of the opinion the drop-off was hazardous under reasonable and general engineering principals.

According to this expert, the drop-off, in conjunction with the jagged edge, was the most probable cause for the blowout. According to him, this was a typical drop-off accident. The right tires of the vehicle go off the roadway, an overcorrection is made to the left trying to get the two wheels back onto the pavement. The right rear tire scrubs along the pavement edge. It blows out. The blowout aggravates the situation and forces the car to go back to the right, along with a natural tendency to steer to the right so as not to go into the lane of the oncoming traffic. These steering maneuvers would occur regardless of how long one has been driving.

Claimant's expert was unable to determine the speed of the vehicle. However, he did testify that at 35 m.p.h., a vehicle would be traveling at 50 feet per second.

Respondent produced a tire expert. According to this expert, the damage to the right rear tire illustrates a "rim nip" condition. It occurs when the lip of the wheel rim cuts through the tire. According to him, for the rim nip to occur the tire had to be almost flat. He found no tire scrubbing, which would indicate there was no contact with a drop-off. He also pointed out that there was browning on the tire, which was indicative of running the tire while underinflated.

Given the length of the rim nip, damage adjacent to the tread, damage adjacent to the tire body, and damage to the rim, he concluded the tire ran over something two inches long while in a deflated condition. It was his opinion that the scratch observed by the traffic homicide investigation officer could not have been caused by the right rear tire. It was further his opinion that the road drop-off did not cause the rim nip in this case.

At trial, on cross examination, Respondent's expert ultimately testified he had no opinion as to what caused the accident. He could not tell what caused the tire to become deflated, nor could he determine the speed of the vehicle.

Respondent produced an eyewitness at trial. The eyewitness was standing about a block away from where the car went off the road. He saw the car go onto the shoulder and dirt come up. He did not see the wheels that went off the roadway come back near the roadway. However, he did see the car turn left "just a tiny bit" trying to come back up onto the roadway.

3. JOSE PENA'S CREDIBILITY. While not relevant to the issue of liability, at the jury trial, on appeal, and at the special master hearing, respondent vigorously sought to discredit claimant Jose Pena by introducing evidence of his marital status when he took certain actions.

a. Carmen Pena As Jose Pena's "Wife". The following chronology will assist in summarizing this evidence.

<u>DATE</u>	<u>EVENT</u>
11/10/73	Jose married Carmen in Dominican Republic.
1/13/88	Jose divorced Carmen in Dominican Republic.
1/29/88	Jose married Patsy Ann Hall in Dade County.
11/25/89	Jose's Petition for Dissolution of Marriage to Pasty Ann Hall in Dade County
10/1/90	Final Judgment for Dissolution of Marriage of Jose and Patsy Ann Hall in Dade County
10/21/90	Accident occurred.
10/29/90	Carmen died.

4/23/96 Jose obtained United States citizenship.

At the jury trial, the city introduced the following actions by Jose Pena:

- Filed a notice of claim for life insurance proceeds on the death of Carmen Pena indicating Carmen as his spouse, even though he was not married to her at the time of her death.
- Claimed Carmen as his wife on his 1989 federal income tax return, even though he was not married to her.
- On marriage certificates, he misstated the number of previous marriages he had.

b. Jose Pena's Immigration. Mr. Pena indicated his marriage to Patsy Ann Hall was a sham; he never met her, and there was no marriage ceremony. He did not recall participating in a marriage ceremony. The trial transcript reflects the following colloquy between counsel for the City of Hialeah (Q) and Mr. Pena (A):

Q. If I showed you a marriage license to Patsy Hall, which indicated that you participated in a marriage ceremony with Patsy Ann Hall, would that refresh your recollection.

A. No. I paid a person because I was going to get my residency. I was told to give them \$3,000. That they were going to get me the residence. They asked me for my passport and to go next week. I gave them \$1500 then when I went back the next week. He said you're already married. Here's a work permit. Give me the rest of the money and the next week you will have your residence.

And he gave me the passport. He said, or the person said, come early Monday morning so you can go to immigration and they'll give you your residence. And they asked me for the rest of the money. All I had was

\$500 on me, and I gave it to the person. When I came back, when I returned, the person that I had dealt with was no longer there. And they started asking me a lot of question and going. And I spent over \$500 investigating. At the ends they told me they didn't know this person that was there, and I lost my money.

Trial transcript at 133-34. The record reflects Mr. Pena testified he did not get his residency through the marriage to Patsy Ann Hall, but rather he qualified for residency through an amnesty program.

LEGAL PROCEEDINGS:

On July 15, 1991, the claimants filed a complaint for damages against the City of Hialeah in the circuit court of the 11th Judicial District (Dade County). The action was for the wrongful death of Carmen, Richard, and Katherine Pena, and was brought by Jose Pena as Personal Representative and Administrator of the Estates of Carmen, Richard, and Katherine, and Jose Pena individually and as the father of Johannes. On July 13, 1993, Letters of Administration for the estates of Carmen, Richard, and Katherine were issued by the court to Jose Pena as personal representative and administrator. The complaint alleged Jose Pena was the lawful husband of Carmen at the time of the accident.

The case went to trial on October 24, 1994. Several months before that date respondent discovered Jose was not married to Carmen at the time of the accident or at the time of her death. Shortly before trial, claimant, Jose Pena, formally waived any claim he had as legal spouse of Carmen. Before trial, Jose Pena also waived his claim for his own bodily injuries, as did Johannes Pena.

The jury's verdict found negligence on the part of the City of Hialeah which was the legal cause of death of Carmen and the two children. The jury assigned negligence as follows: 75 percent to the city, 25 percent to Carmen, and 0 percent to Jose.

The City appealed to the Third District Court of Appeal. Per curiam, i.e., without opinion, the appellate court found no error.

CONCLUSIONS OF LAW:

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 city had a duty to maintain the roadway/shoulder area near the scene of the accident in a safe condition. The city breached that duty and that breach was the proximate cause of the accident which resulted in the damages to the claimant.

There is evidence in the record that there was a 3- to 4-inch drop-off between the roadway and the shoulder. The city owned, maintained, and controlled the roadway and the shoulder between the roadway and the canal. It had no formal procedures for inspecting and maintaining its roadway system. There is evidence in the record that the city was aware of the drop-off at the site of the accident, but did not repair it or post warning signs. Thus, duty and breach are established.

From all of the evidence, it can never be determined with certainty why the Pena vehicle left the road, the speed of the vehicle, exactly when the right rear tire blew out, and whether the blow out resulted from rim nip occurring because the tire and wheel rim came into contact with the exposed 3- to 4-inch pavement wall or because of some other object. Nevertheless, based upon all of the evidence including testimony from investigating law enforcement officers, expert witnesses, and an eyewitness, the jury found the city was liable and allocated 75 percent of the negligence to it. I find no basis for altering the jury's verdict. Thus, proximate cause is established.

The city sought to discredit Jose Pena by introducing evidence of his marital status at the time he took certain actions. Even if it is assumed that he totally misrepresented his marital status when he took the specific actions, this fact would have no effect on whether or not the city was liable.

Respondent raised a number of issues on appeal including insufficient evidence to support the jury's verdict, jury instructions, and failure to grant defendant's motion to dismiss the case as a sham based upon Jose Pena's marital status and abuse of the legal system. The appellate court was not persuaded by respondent's arguments, nor am I.

DAMAGES. Damages as found by the jury and in the amended final judgment were as follows:

Damages	Jury Award	Amended Final Judgment
Medical and Funeral Expenses: Carmen	\$46,093.38	\$34,570.34 (25% reduction- comparative negligence- Carmen Pena)
Katherine	\$104,527.78	\$78,395.84 (25% reduction- comparative negligence- Carmen Pena)
Richard	\$322,932.87	\$242,199.65 (25% reduction- comparative negligence- Carmen Pena)
Past and Future Loss of Parental Companionship, Instruction, and Guidance and Pain and Suffering by Johammes Pena	\$250,000.00	\$187,500.00 (25% reduction- comparative negligence- Carmen Pena)
Past and Future Pain and Suffering by Jose Pena for: Katherine Pena	\$500,000.00	\$750,000.00 (25% reduction-comparative negligence- Carmen Pena)
Richard Pena	\$500,000.00	
TOTAL	\$1,723,554.00	1,292,665.53

The Amended Final Judgment also taxed costs against the City in the amount of \$8,395.61. Thus, under the Amended Final Judgment, the total amount awarded to claimants was \$1,301,061.14. I find these damages to be fair.

COLLATERAL SOURCES:

Cigna Healthcare has paid \$424,214.68 in medical expenses arising from this accident. They claim a lien for that amount.

ATTORNEYS FEES:

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

RECOMMENDATIONS:

Jose Pena has remarried and has two young children. Johammes Pena is now 23 years of age. When large sums of money are involved, as they are here, the Legislature generally has favored structured payments to a claimant. Such structured payments are appropriate in this case and should be required. With this condition, I recommend that SB 64 be reported FAVORABLY.

Respectfully submitted,

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Glenn Lang
Senate Special Master

cc: Senator Gutman
Representative Eggelletion, Jr.
Faye Blanton, Secretary of the Senate
Richard Hixson, House Special Master