



THE FLORIDA SENATE
SPECIAL MASTER ON CLAIM BILLS

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November 22, 1998

<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, Florida 32399-1100	11/25/98	SM TR FR	Fav/1 amend

Re: SB 14 - Senator Betty S. Holzendorf
Relief of Trey Anthony Alls and Heather C. Alls

THIS IS AN EXCESS JUDGMENT CLAIM FOR NEGLIGENCE OF THE DEPARTMENT OF TRANSPORTATION IN THE MAINTENANCE OF THE METAL GRATING ON THE MAIN STREET BRIDGE WHICH WAS THE CAUSE OF SEVERE INJURY TO TREY ANTHONY ALLS. JUDGMENT WAS ENTERED ON AUGUST 5, 1998, APPROVING A SETTLEMENT AGREEMENT FOR \$1,975,000 TO BE PAID BY THE FLORIDA DEPARTMENT OF TRANSPORTATION. THE DEPARTMENT OF TRANSPORTATION HAS PAID \$100,000 TO THE CLAIMANT AND \$100,000 TO CLAIMANT'S MOTHER AND THE CLAIMANT IS SEEKING THE \$1,775,000 BALANCE OF THE EXCESS JUDGMENT.

FINDINGS OF FACT:

This case involves a motor vehicle accident on the Main Street Bridge in Jacksonville, Florida on June 1, 1994. The accident occurred when a van driven southbound by Tiny Rones Thomas lost control on the wet steel center span of the bridge, slid into the northbound traffic and was hit by the car in which Trey Anthony Alls was a passenger.

At the time of the accident Trey Anthony Alls, then 18 months old, was under the supervision of Kerri Bresnahan, his babysitter in a vehicle operated by Ms. Kristina E. Cora. Ms. Bresnahan was approximately 15 years old and Ms. Cora was 20 years of age at the time of the accident. There were four passengers in the vehicle in which Trey was

riding in addition to the driver. There were four seat belts in the vehicle. Ms. Bresnahan did not use a child seat for Trey but instead placed him on the seat between her legs in the front passenger seat of the vehicle and buckled the seat belt around herself and Trey.

The driver of the motor vehicle, who was wearing her seat belt, suffered a fractured neck. Ms. Bresnahan suffered a bruised chest from the shoulder strap. One rear seat passenger suffered broken front teeth and a cut lip and the other rear passenger had no injury. Neither rear seat passenger was restrained by a seat belt.

The Jacksonville Fire and Rescue treated Trey at the scene and then transported him to the Baptist Medical Center for treatment. The report prepared by the Emergency Medical Technician indicates that at the scene Trey was moving and crying but had reduced lung function due to injury to his chest.

At Baptist Medical Center Trey was treated on an emergency basis for blunt trauma to the chest and a closed head injury. At Baptist's emergency room it was determined that Trey's chest cavity was filling with air as a result of punctures to his lungs and that his lungs had collapsed. The air in his chest put pressure on his heart and lungs reducing their ability to function properly. The hospital staff inserted tubes into each side of Trey's chest to alleviate pressure from air escaping from his ruptured lungs into his chest cavity. The chest tube was not properly placed in the right chest cavity and thus did not provide a complete resolution of the air escaping into the chest cavity. While receiving emergency treatment Trey's heart slowed dangerously and his blood oxygen level was critically low.

As a result of the accident and the treatment at Baptist Hospital Trey is severely brain damaged. He has extremely limited verbal skills and he will be dependent throughout his life. Trey can speak only about 20 words, he beats his head and is unable to walk or provide any personal care. He can roll over on the floor and sit up. He can feed himself finger foods and eat with a spoon when provided assistance in guiding his hand.

The long term prognosis is that Trey will remain non-ambulatory and non-verbal, except for a few words, for the remainder of his life. He will require round the clock care and his size is currently normal for his age and nothing in his prognosis would indicate a physical size other than that of a normal adult male at maturity. Trey will require special wheel chairs and other specialized equipment, housing adapted for his needs, wheel chair equipped transportation, and special personal care items. He will also need medical care and medications in excess of the requirements for a normal healthy child and adult.

Heather Alls, Trey's mother, was approximately 15 years old when Trey was born. She did not graduate from high school and she is currently employed only part-time and receiving public assistance. Trey's father, who had never contributed to Trey's support, was killed in a motor vehicle accident approximately one month after this accident. Since the accident, Trey has been predominantly cared for by his mother and his grandmother. Trey attends the Mt. Herman Exceptional Student Center in Jacksonville, Florida which is a public school for developmentally disabled students and maintains the hours and school term of all public schools in the county. At Mt. Herman, Trey receives physical, occupational, and speech therapy.

Mr. Joseph F. Duszlak is the court appointed guardian for Trey Alls.

In June of 1992, the Department of Transportation replaced the steel decking on the Main Street Bridge because a 1990 study indicated that the bridge decking was slick during wet weather. From the date of replacement in June of 1992, until this accident on June 1, 1994, there were nine accidents reported on the bridge with only five of those reported as occurring on the metal grating. None of the accidents were reported in 1992, six were reported in 1993, and three up until June 1, 1994. From the date of the accident through 1994, an additional four accidents were reported, 18 were reported in 1995, and 18 were reported in 1996. Most of the accidents occurred when the road surface was wet. In 1997, the metal grating of the bridge was ground to increase friction. During the 3 months following the grinding there was only one accident. Data was not provided beyond that 3-month period.

In 1998, the state contracted for a review of accidents on the Main Street bridge. In the draft report of that study the contractor recommended remedial action such as lane delineators, increased signage, painting of lane edges and separations for improved clarity, and grinding of the metal portion of the bridge to increase friction for a short term solution to accidents.

CONCLUSIONS OF LAW:

The claimant alleges the Department of Transportation was negligent in the maintenance of the Main Street Bridge and further that the department failed to warn motorists of the hidden dangerous condition of the metal grating which was slippery when wet. The department's negligence was the cause of the accident in which Trey Anthony Alls was injured.

The claimants also alleged negligence against Ms. Thomas in the operation of her motor vehicle and against Baptist Medical Center and the health care providers at that facility for their negligence in deviating from the standard of care in treating Trey after the accident. Settlement was reached with Ms. Thomas in the amount of \$25,000 which represented the limits of her liability coverage. Settlement was reached with Dr. Lori Nunley and Emergency Physicians, Inc., in the amount of \$175,000 and with Nemours Foundation in the amount of \$25,000.

The respondent, Department of Transportation, argued that the condition of the bridge was not a factor in the injury to Trey. The DOT further asserted that the design of the bridge and the decision to use metal grating was a planning level function for which sovereign immunity bars recovery. The department's position was that the number of accidents on the bridge between the time the bridge deck was replaced in June 1992, and the date of the accident did not put the department on notice that the bridge was slippery when wet or that a hidden dangerous condition existed.

The department also contended in the pleadings that Ms. Thomas was the proximate cause of the accident in losing control of her vehicle and that loss of control along with the improper use of an adult restraint was the cause of the injuries to Trey. The court ruled that evidence relating to the failure to use a child restraint or the improper use of an adult restraint was inadmissible in the trial of this case. The court

relied in part on the language of §316.613, F.S., which states:

(3) The failure to provide and use a child passenger restraint shall not be considered comparative negligence, nor shall such failure be admissible as evidence in the trial of any civil action with regard to negligence.

CONCLUSIONS:

The selection of the metal grating as a road surface for the Main Street Bridge was clearly a planning level function to which sovereign immunity would apply. However, once the material for the roadway surface was installed, the DOT had a duty to maintain the surface and improper maintenance of a roadway may give rise to liability. The 1990 study of accidents on the bridge which resulted in the replacement of the metal grating in 1992, clearly indicated that the surface of the metal did wear down and that the bridge then became slick during wet weather. In spite of this knowledge, the DOT did not put in place any process, such as annual or biennial friction tests, for evaluating the wear on the new decking. Further, the DOT did not place warning signs or take other available steps to provide notice to the public of the potential for sliding on the metal grating when it is wet.

Ms. Thomas's loss of control of the vehicle on the wet and slick road surface brought about this crash which caused the injury to Trey Alls.

SETTLEMENT:

The Department of Transportation settled with claimant as follows:

1. The DOT will pay \$200,000 as its limits of liability under §768.28, F.S., with \$100,000 paid to a trust for Trey Alls and \$100,000 paid for the benefit of Heather Alls;
2. The \$100,000 payable to Heather Alls must be used to purchase a home in which Trey will live as long as he is able to live at home with the trust retaining a life estate in the house for Trey, the remainder to Heather;
3. The DOT agreed to cooperate in seeking a claim bill in the amount of \$1,775,000 to be paid to the special needs trust for Trey Alls. Upon the death of Trey, any assets remaining in the trust, including accrued and

undistributed income, after distribution for benefits paid by the state, shall revert to DOT.

4. The trust must be a special needs trust established to provide for the medical needs of Trey Alls and to enhance his quality of life. The proceeds of the trust must be used solely for the benefit of Trey. Further, the trust and its terms must be approved by DOT and the Agency for Health Care Administration prior to any payments being made into the trust.

The amount of the settlement of this case covers only economic damages to Trey and the amount requested in the claim bill added to the amounts already received from the DOT and other defendants do not equal the full amount of the claimed economic damages. No damage amounts are included to cover noneconomic damages such as loss of enjoyment of life, or pain and suffering. Because the damages covered by the settlement are all economic damages there is no need to address issues of joint and several liability under the law.

The claimant also alleges that if this case had gone to trial, a jury verdict in the range of \$10,000,000 would not have been out of line. Given such a verdict, the amount paid by the state with the passage of the claim bill would equate to a liability on the part of the DOT of 20 percent.

ATTORNEY'S FEES:

Attorney fees are capped at 25 percent in accordance with §768.28, F.S.

RECOMMENDATIONS:

Based on the findings and conclusions set out above, and subject to an amendment to place the award in a special needs trust (after deduction of attorney's fees and costs), I recommend SB 14 FAVORABLY, AS AMENDED.

Respectfully submitted,

Dorothy S. Johnson
Senate Special Master

cc: Senator Betty S. Holzendorf
Faye Blanton, Secretary of the Senate

Brad Thomas, House Special Master