

STORAGE NAME: h0451

DATE: February 22, 2001

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SPECIAL MASTER'S FINAL REPORT

The Honorable Tom Feeney
Speaker, The Florida House of Representatives
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: HB 451 - Representative Ritter
Relief of Delfina Benjumea, by and through her legal guardian, Maria Garcia

THIS IS A CONTESTED, VERDICT-BASED EXCESS JUDGMENT CLAIM FOR \$262,954 IN FUNDS OF THE ORANGE COUNTY SHERIFF'S OFFICE TO COMPENSATE DELFINA BENJUMEA AS A RESULT OF THE OPERATIONAL LEVEL NEGLIGENCE OF AN ORANGE COUNTY DEPUTY SHERIFF. THE CLAIMANT, A PASSENGER IN THE OFFICER'S AUTOMOBILE, WAS INJURED WHEN THE AUTOMOBILE STRUCK ANOTHER VEHICLE. THE ORANGE COUNTY SHERIFF'S OFFICE DID NOT APPEAL THE VERDICT AND HAS ALREADY PAID THE UNDERLYING \$100,000 LIMIT SPECIFIED BY LAW.

THIS BILL AUTHORIZES THE SHERIFF'S OFFICE TO PAY THE CLAIM OUT OF ITS OWN REVENUES AND SUCH PAYMENT IS TO BE PLACED IN THE GUARDIANSHIP ACCOUNT OF DELFINA BENJUMEA. UPON THE DEATH OF MS. BENJUMEA, ANY BALANCE OF THIS AMOUNT REMAINING SHALL REVERT TO THE ORANGE COUNTY SHERIFF'S OFFICE.

FINDING OF FACT:

THE ACCIDENT: In the early afternoon of July 11, 1996, in Orlando, Delfina Benjumea, age 82, was a passenger riding in the front seat of a 1995 Ford automobile operated by Orange County Sergeant Robert J. Dow. Ms. Benjumea was wearing a seat belt and was being transported by the officer to adult protective services in order to locate her family. Another passenger

sitting in the rear seat of Sgt. Dow's automobile was Guisippena Garcia, who acted as a Spanish interpreter for the officer with Ms. Benjumea. At approximately 1:50 p.m., Sgt. Dow was driving his marked vehicle westbound on Colonial Drive and stopped for a red light at the intersection of Ferncreek Avenue. The vehicle immediately in front of the officer was a 1992 Lexus driven by James McKenzie. After the light turned green, the Lexus began to proceed but stopped rather than continue on through the intersection. According to Mr. McKenzie, he stopped his car on or about the pedestrian crosswalk so as to avoid blocking the intersection due to traffic congestion. Sergeant Dow then rear-ended the Lexus at a speed significant enough to deploy the officer's two front airbags. The Lexus's rear break lights were operating at the time of the accident. According to the traffic report by the Orlando Police Department officer who responded to the scene, Sgt. Dow was "found at fault for the crash by careless driving." The sergeant was also later reprimanded by his superiors for careless driving.

CLAIMANT'S INJURIES: Following the accident, Ms. Benjumea was taken to the emergency room for neck and back pain evaluation, treated for a nosebleed, and subsequently released. According to her daughter, Maria Garcia, Ms. Benjumea experienced headaches, dizziness and confusion during the 3 weeks following the auto accident. Moreover, on August 3, 1996, Ms. Benjumea fell down on the ground, bracing herself with her hands as she fell, thus avoiding hitting her head. She was taken by ambulance to the emergency room for treatment where a CT Scan of Ms. Benjumea's brain revealed very large bilateral subacute subdural hematomas (blood on the brain). Surgery was performed by Dr. Robert Shear that evening which involved frontal craniotomies to remove (evacuate) the hematomas. One month later, Ms. Benjumea was again hospitalized because she experienced coagulation and clotting problems. She was released 3 weeks later after being treated with blood thinning medication.

According to Ms. Benjumea's two daughters (Maria Garcia and Gladys Rodriguez), their mother was in general good health prior to the automobile accident. Since the accident, their mother's mental condition has deteriorated greatly and she is unable to properly take care of herself, has lost her ability to reason, and cannot communicate meaningfully.

On May 5, 1997, an Orange County Circuit Court found

Ms. Benjumea "totally incapacitated" due to "brain damage and hemorrhage from head injury obtained from an automobile accident" and subsequently declared her to be a ward of the Court. The Court's findings were based on the evaluation of a three person medical panel. Her daughter Maria was appointed as her guardian and is paid pursuant to Court Order a sum of \$600 per month to care for her mother. The monies in the guardianship account are from the post-trial \$100,000 sovereign immunity payment tendered by the Orange County Sheriff. Based on the last annual accounting of the guardianship account (June 1, 1999-May 31, 2000), there is a total of \$13,279.99 remaining in the account. (This is after payment of medical bills and attorneys' fees.)

In April 1998, Ms. Benjumea was examined by neurologist, Dr. Victor Roberts, who subsequently testified at the trial. He diagnosed Ms. Benjumea as having sustained a severe brain injury due to the July, 1996, auto accident which, coupled with her advanced age, rendered her totally incapacitated and in need of constant supervision.

DAY OF THE AUTOMOBILE ACCIDENT: On the date of the automobile accident, Ms. Benjumea was driven to the senior center and dropped off by her daughter, Maria Garcia. Ms. Benjumea had participated in a senior citizen program run by the City of Orlando during her visit with her family in Orlando. She attended the program so that she could have activities and socialize with other seniors while her daughter worked. However, unknown to Ms. Garcia, the center was closed that day. When Ms. Benjumea could not get into the center, she accepted a ride from a man who offered to drive her home. However, Ms. Benjumea, who only spoke Spanish, did not know her daughter's address and directed the man to the wrong apartment complex. When she realized she was not at the correct address, the man had already driven away. Ms. Benjumea started walking and eventually reached the Golden Corral Restaurant where she told a Spanish-speaking employee, Guisippena Garcia, that she was lost. Ms. Benjumea was most upset and crying at this point and the police were contacted. Subsequently, Sheriff's Deputy Sam Talton arrived and offered to take Ms. Benjumea in his patrol car to see if she could recognize where she lived. They drove to several different apartment complexes; however, Ms. Benjumea was unable to recognize her daughter's apartment. Deputy Talton then elected to contact his supervisor, Sergeant Robert Dow, for assistance. Sergeant Dow offered to

take Ms. Benjumea in his vehicle to adult protective services in order to locate her family.

BACKGROUND OF CLAIMANT DELFINA BENJUMEA:

Ms. Benjumea was born on July 17, 1914, in Columbia, South America, and subsequently raised 13 children. She speaks Spanish only and made her living as a midwife and rented rooms in her home to tenants in Cali. In the fall of 1995, Ms. Benjumea came to visit her three children in the United States which included a stay with her daughter Maria Garcia in Orlando. Ms. Benjumea intended to return to Cali after visiting with her children.

According to Ms. Garcia, her mother was in good health both mentally and physically prior to the automobile accident. Since the accident, her mother's condition has deteriorated greatly so that she is mentally incompetent and is subject to fits of anger and rage and uncontrolled emotional outbursts. She is unable to properly take care of herself and cannot converse coherently. Ms. Benjumea is a resident alien in this country.

STANDARDS FOR FINDINGS OF FACT:

Findings of fact must be supported by a preponderance of evidence. The Special Master may collect, consider, and include in the record, any reasonably believable information that the Special Master finds to be relevant or persuasive in the matter under inquiry. At the Special Master's level, each claimant has the burden of proof on each required element. However, in the final analysis, this is a legislative measure that, once the Special Master's report and recommendation are filed, can be lobbied in the Legislature, just as any other measure can be. Objections to the Special Master's findings, conclusions, and recommendations can be addressed by either party directly to the members of the Senate, either in committee, or individually, as the parties choose.

LEGAL PROCEEDINGS:

Ms. Benjumea, through Maria Garcia, her legal guardian, brought suit against both the Orange County Sheriff and James McKenzie, the driver of the Lexus that was rear-ended. Suit was filed in the Circuit Court of the 9th Judicial Circuit (Orange County). The action was for personal injury resulting from the alleged negligence of both Sergeant Robert Dow and Mr. McKenzie. The case went to trial in September of 1998. The Court instructed the jury, as a matter of law, that Sgt. Dow was negligent in the operation of his vehicle, and asked the jury to determine whether Mr. McKenzie was also negligent.

The jury verdict, entered on September 24, 1998, found Sgt. Dow 100 percent negligent, and found no negligence on the part of Mr. McKenzie. No appeal was filed.

CLAIMANT'S MAIN
ARGUMENTS:

- There is no issue of liability. The judge found Sgt. Dow to be negligent as a matter of law, and the jury likewise found Sgt. Dow to be 100 percent liable. The Sheriff's Department did not appeal.
- The collision was the proximate cause of the injury. Any confusion Ms. Benjumea suffered prior to the collision, as argued by the Sheriff, was a result of cultural differences, in that she is an elderly lady with very little formal education, who was visiting a foreign country (the United States) and did not know the language. Further, both Dr. Victor Roberts and Dr. Robert Shear, in sworn testimony, stated that the accident was the cause of the claimant's brain injury, and that her fall was not an intervening cause of her brain damage. Furthermore, the Sheriff offered no medical testimony at trial as to Ms. Benjumea.
- The jury award has already been reduced by Remittitur for past medical care that was in fact provided by the family. While this care was provided for free to Ms. Benjumea, there was a resultant cost to her family in lost wages. The jury was also told to reduce the award by \$8,000 in a PIP set-off that was paid to Maria Garcia for lost wages.
- Dr. Roberts testified that the claimant would require home health care for the remainder of her life and testimony showed that the claimant's life expectancy was 7 years in 1998. The jury awarded \$172,000 for future medical care to cover this expense.

RESPONDENT'S MAIN
ARGUMENTS:

- Sovereign immunity should protect the Sheriff and the statutory cap (\$100,000) has already been paid. The Sheriff should not be forced to pay more.
- The jury should have apportioned some negligence to the driver (Mr. McKenzie) of the car that was rear-ended.

- Ms. Benjumea was already lost and confused when the Sheriff's officer came to her aid and the accident did nothing more than aggravate her pre-existing dementia.
- Ms. Benjumea's fall after the collision was an intervening cause of her injuries, for which the Sheriff should not be responsible.
- The claimant doesn't need more than \$600 per month; which amount is allowed pursuant to the Order Authorizing Periodic Payments to the Guardian, dated May 12, 1998.

CONCLUSION OF LAW:

Rather than the subjective, time-worn "shock the conscience" standard used by courts, for purposes of a claim bill, a respondent that assails a jury verdict as being excessive should have the burden of showing the Legislature that the verdict was unsupported by sufficient credible evidence; or that it was influenced by corruption, passion, prejudice, or other improper motives; or that it has no reasonable relation to the damages shown; or that it imposes an overwhelming hardship on the respondent out of proportion to the injuries suffered; or that it obviously and grossly exceeds the maximum limit of a reasonable range within which a jury may properly operate; or that there are post-judgment considerations that were not known at the time of the jury verdict.

No evidence was presented to the Special Master sufficient to overturn the jury verdict in this claim.

Section 316.1925, F.S., provides that any person operating a vehicle upon the streets shall drive in a safe and prudent manner.

Section 316.2061, F.S., provides that no driver shall enter an intersection unless there is sufficient space on the other side of the intersection to accommodate the vehicle the driver is operating without obstructing the passage of other vehicles or pedestrians, notwithstanding any traffic control signal indication to proceed. Further, section 316.0895, F.S., requires drivers not to follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon, and the condition of, the highway. Florida courts presume negligence of the driver who runs into the rear of another automobile which is lawfully stopped in traffic. Chiles v. Beaudoin, 384 So.2d 175 (Fla. 2nd DCA 1980).

There is no pre-existing special duty of a sheriff to a particular citizen, however, once having assumed the duty, the sheriff has an obligation to carry it out with reasonable care. Hartley v. Floyd, 512 So.2d 1022 (Fla. 1st DCA 1987).

LIABILITY: From my review of the evidence, I find that Sergeant Dow had a duty to operate his vehicle in a safe and careful fashion. Even though the officer offered to help Ms. Benjumea by transporting her to adult protective services, that act did not relieve Sgt. Dow from his duty of care in operating the vehicle in a proper manner. Sergeant Dow breached that duty and that breach was a proximate cause of the crash that resulted in the incapacity of Ms. Benjumea.

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

Damages	Jury Award	Final Judgment
Past medical Expenses	\$ 87,745.00	\$ 58,142.47
Future medical Expenses	\$172,000.00	\$172,000.00
Past pain and suffering	\$ 28,875.00	\$ 28,875.00
Future pain and suffering	\$ 95,813.00	\$ 95,813.00
Taxable costs		\$ 8,124.04
Total	\$384,433.00	\$362,954.51

The claimant agreed to a remittitur post-trial of \$29,602.53, which represented past unbilled attendant care. On November 2, 1998, a final judgment, including taxable costs, was entered for the claimant for \$362,954.51. The verdict was not appealed and the Orange County Sheriff has tendered the \$100,000 sovereign immunity limits.

The past medical expense portion of the award is clearly supported. As far as the future medical expenses component of the damages, the claimant's attorney at trial asked for \$296,380 for attendant care utilizing actuarial tables based on Ms. Benjumea's life expectancy. The jury

reduced that amount to \$172,000. This sum is within reason. Ms. Benjumea's \$124,688 claim for pain and suffering is the component of damages most under attack by the Sheriff's Department. How should the Legislature measure it?

For decades, a company called Jury Verdict Research has collected, classified, and analyzed virtually all reported personal injury and wrongful death cases in the United States. Based on my review of their data, and a comparison of similar cases, the verdict in this case is well within reason.

It is my view that because the amount of damages sought by the claimant is 1) within reason and well within the range of verdicts noted above, and 2) no evidence was presented to the Special Master to contradict the award for pain and suffering, the total award should be confirmed by the Legislature and the Orange County Sheriff should be ordered to pay it.

HISTORY OF THIS CLAIM BILL: 2000 Session: This claim was filed as SB 14 and HB 233. The undersigned Special Master held an evidentiary hearing on HB 233 and recommended it favorably in the amount of \$262,954. The bill passed the Senate, but died in House messages. House Bill 233 died in the Committee on Claims.

SUPPLEMENTAL INFORMATION: Both parties to this dispute had the opportunity to provide supplemental information regarding the 2001 claim bill, however, they waived the opportunity for a further special master hearing.

The claimant presented the annual accounting of guardianship report for Ms. Benjumea (from June 1, 1999 to May 31, 2000), which indicated a balance of \$13,279.99. A report from the physician who recently examined Ms. Benjumea stated that she suffers from Alzheimer's Dementia, is depressed and exhibits aggressive behavior. Her condition is stable, but her prognosis is guarded, given that she is 86 years old. A medical report for Maria Garcia (Ms. Benjumea's daughter and her guardian) was also offered which stated that Ms. Garcia suffers from progressive cirrhosis of the liver.

The respondent provided current actuarial information which is presented below.

RESPONDENT'S ABILITY TO
PAY:

At the time of the automobile accident (July 1996), the Orange County Sheriff was in the Orange County Self-Insured Risk Management program, but in October 1996, joined several self-insurance pools of the Sheriffs in Florida. According to the latest actuarial documents, there is currently \$2,798,787 in the pool of funds that were set aside to pay claims that existed at the time the Sheriff left the county risk program. However, the current actuarial estimates of the present value of reserves for remaining claims pending against the Sheriff which occurred prior to October, 1996, is approximately \$3,063,000. Thus, at the present time it appears that the funds which have been set aside to pay these claims is under-funded by approximately \$264,213. It should be noted that upon separation from the County, the Sheriff was required to accept these anticipated reserves with a deficit due to prior underestimated reserves.

In the event the funds set aside to pay claims are depleted, the Sheriff would have to obtain funding from his regular budget.

ATTORNEYS FEES:

Section 768.28(8), F.S., limits claimant's attorneys' fees to 25 percent of claimant's total recovery by way of any judgment or settlement obtained pursuant to §768.28, F.S. Claimants' attorneys have acknowledged this limitation and verified in writing that nothing in excess of 25 percent of the gross recovery will be withheld or paid as attorneys' fees.

RECOMMENDATIONS:

ACCORDINGLY, I recommend that House Bill 451 be reported FAVORABLY.

Respectfully submitted,

Stephanie Birtman
House Special Master

cc: Rep. Ritter, House Sponsor
Senator Dyer, Senate Sponsor
Kathie Emrich, Senate special master
House Claims Committee