



## THE FLORIDA SENATE

### SPECIAL MASTER ON CLAIM BILLS

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November 16, 2000

SPECIAL MASTER'S FINAL REPORT	DATE	COMM	ACTION
President of the Senate Suite 409, The Capitol Tallahassee, Florida 32399-1100	11/16/00	SM CJ FR	FAV/1 amend.

Re: SB 50 – Senator Alex Diaz de la Portilla  
Relief of Oscar Ortiz

THIS \$4.9 MILLION DOLLAR LOCAL CLAIM AGAINST THE CITY OF MIAMI COMPENSATES OSCAR ORTIZ FOR CATASTROPHIC PERSONAL INJURIES HE SUSTAINED AND THE LIFE CARE HE WILL REQUIRE AS THE DIRECT RESULT OF A COLLISION BETWEEN THE VEHICLE IN WHICH HE WAS THE UNBELTED, RIGHT FRONT SEAT PASSENGER, AND A CITY POLICE VEHICLE WHOSE DRIVER FAILED TO STOP AND YIELD THE RIGHT OF WAY AT A CENTRAL MIAMI INTERSECTION. THE AMOUNT OF THE APPROPRIATION IS BASED ON A \$15,718,000 JURY VERDICT THAT WAS FIRST REDUCED 13 PERCENT BY THE TRIAL JUDGE TO \$13,674,660 BECAUSE OF MR. ORTIZ' COMPARATIVE (SEAT BELT) NEGLIGENCE, AND THEN FURTHER REDUCED TO A \$5 MILLION SETTLEMENT AGREEMENT ENTERED IN CONSIDERATION OF THE DISMISSAL BY THE CITY OF MIAMI OF ITS APPEAL. THE STATUTORY CAP OF \$100,000 HAS ALREADY BEEN PAID.

#### BASIC FACTS:

On December 6, 1996, claimant Oscar Ortiz, a 22-year-old, part-time community college student, was riding as the front seat passenger in a 1988 Honda owned and driven by his friend Marcos Valdez, with whom he had just attended a Miami Heat basketball game at the Miami Arena. They were proceeding north, at a legal speed, on NW First Avenue, nearing the intersection with NW 14<sup>th</sup> Street. A few moments before, Miami Police Officer Orlando Borges and his partner, Officer Donald Lago, were headed south on

Biscayne Boulevard, when they responded to their police dispatcher's radio call for backup. They made a U-turn on Biscayne Boulevard and then headed west on NW 14<sup>th</sup> Street. The time was 10:31 p.m. The police cruiser had its emergency equipment on as it approached the scene.

The intersection in question was controlled by a set of traffic signals that were showing a steady flashing red to the oncoming police cruiser and a steady green light to the claimant's driver.

Officer Borges slowed to what he called a "rolling stop" at the intersection, but failed to yield the right of way, as the law required him to do.

Neither vehicle was exceeding the speed limit. The Marcos vehicle's right front and side area collided with the police cruiser in the cruiser's left front door area. The Marcos vehicle spun around and came to rest facing backwards in an adjoining field.

ELEMENTS OF PROOF:

Negligence has four elements:

**Duty** – Faced with a blinking red signal, Officer Borges had the legal duty to stop his cruiser fully before entering the intersection and to enter only when the way was clear. The City of Miami shared that legal duty as Borges' employer because Officer Borges was acting within the scope of his employment at the time of the crash.

**Breach** – I find that Officer Borges breached his duty. An internal affairs investigation by the Miami Police Department came to the same conclusion. Officer Borges formally accepted the police chief's internal administrative finding of negligence.

**Proximate cause** – The precipitating, direct cause of claimant's injuries was the force of the impact.

**Damages** – Oscar Ortiz remains a functional quadriplegic with no significant observable body function below his neck. He is wheelchair bound and lives with his parents and siblings. He has a motorized wheelchair with a joystick that he can operate when his right arm is placed in the cradle attached to the joystick.

Although Ortiz is essentially homebound and passes a lot of his time watching television, he can get out occasionally. For example, he attended the Special Master's hearing on the 10<sup>th</sup> floor of a downtown office building by arranging for 2-way transportation by a local public transit agency that provides on-call van service to wheelchair-bound patients.

But claimant Ortiz faces all the same daily problems as other quadriplegics—he has no bodily functions and all of his routine care must be done for him around the clock. This includes bowel and bladder care, feeding, bathing, and constant attention to rotation and shifting to avoid skin lesions and decubitus ulcerations. His father and mother are currently the primary source of that care—supplemented by a nursing attendant who visits for about a half hour a day, twice a week.

Oscar Ortiz is functionally unemployable. He is now 26 years old and, with proper medical care, he will probably live out his normal life expectancy.

LEGISLATIVE CLAIMS POLICY: Current legislative policy and procedures require a Special Master's redetermination of liability and damages in each claim bill from the first dollar primarily because the expenditure of public funds is involved.

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. At the Special Master's level, each claimant has the burden of proof on each required element and the burden of going forward with it. Each respondent has the opportunity to raise again all the defenses and arguments it had at trial, as well as any others it might have discovered or developed after trial.

After the Master's report and recommendations are filed, a claim bill can be lobbied in the Legislature just as any other measure. 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 or their agents choose.

JUDICIAL HISTORY:

Suit was filed in Miami on August 4, 1997. There was a 7-day jury trial in June 1999. The jury found Ortiz' total damages to be \$15.7 million; however, the jury assessed Ortiz with 13 percent comparative negligence due to his not having his operable seat belt in use. Thus the Circuit Court, on June 15, 1999, entered Final Judgment against the City of Miami for \$13,674,660.

The City filed an appeal to the District Court of Appeal.

After settlement negotiations, Ortiz and the City of Miami agreed to a settlement of \$5 million, without interest, to be paid over a 3-year period.

The Miami City Commission formally approved the settlement.

The Financial Oversight Committee that oversees all the financial operations of the City of Miami has also approved the settlement.

The City of Miami has the contractual obligation not to oppose the \$5 million claim bill, and to give limited assistance in its passage. However, because the city is still in litigation with Mr. Ortiz' driver, Mr. Valdez, the settlement agreement does not admit the city police officer's liability. That issue is preserved for defense of Mr. Valdez' case, if necessary.

LEGISLATIVE HISTORY:

This claim was filed as SB 24 by Senator Campbell in the 2000 session, in the amount of \$13,574,660. No Special Master's hearing was held prior to the 2000 legislative session because of Senate Rule 4.81(f) that stays all claim bill activity where the matter is under appeal.

It was for that reason that SB 24 (2000) received an unfavorable Special Master's recommendation. The prior Special Master expressed no opinion on the merits of the claim.

OTHER ISSUES:

1. Seat Belt Defense

Although Oscar Ortiz conceded that he was not wearing his seat belt at the time of this crash, the absence of restraint had a minimal impact on the ultimate injury pattern resulting in his quadriplegia. This crash was essentially a side impact crash causing Ortiz' head to strike the passenger door panel of the vehicle, fracturing his neck and resulting in his permanent quadriplegia. A seat belt is not designed nor intended primarily to protect occupants from interior body impacts caused by this kind of side crash.

Further, the \$5 million settlement reached in this case is slightly less than one-third of the jury assessment of total damages. In short, the amount to be paid to Ortiz reflects a substantial reduction attributable to Ortiz' failure to use his seat belt.

2. Alcohol

At trial, the claimant's driver admitted drinking "a beer" in the arena, toward the beginning of the basketball game, perhaps two hours before the collision.

Shortly after the collision, a City of Miami police officer, working an off-duty job at the Omni Mall about 3 blocks from the collision scene, heard about the nearby crash on his police radio. Officer Greer left the Mall, went back on official duty, and drove to the crash scene to see if he could render assistance.

Once there, he went over to the claimant's driver who was awaiting transport to a hospital, and observed what he later described as the driver's very red bloodshot eyes. The officer later testified that he "could smell an odor of alcoholic beverage on his breath." The officer then took it upon himself to go to the hospital where the driver was being treated and attempted to get someone on the medical staff to draw a blood sample. Officer Greer, at around 2:00 a.m., finally got a nurse to draw some of the driver's blood. Officer Greer took the sample to the police department where, at about 2:30 a.m., he put it in a police evidence refrigerator where it apparently remained for about 10 days. The evidence concerning

the actual time and date of the blood alcohol analysis was vague, but the blood alcohol reading was reported to be 0.06 grams, a reading which is below the statutory standard for driving under the influence.

No proper chain of custody of the blood sample was ever established.

Neither the blood evidence nor any action of this interloping police officer was ever made a part of the official police investigation of this crash. In fact, when the City of Miami Police Department's Crash Review Board conducted an internal investigation and unanimously found Officer Borges negligent and that his negligence was the cause of the crash in question, the board never mentioned or even considered any of the observations of this interloping police officer or the blood alcohol reading.

Moreover, it is uncontested that Marcos Valdez, the driver of the Ortiz vehicle, was at all times operating his vehicle at a speed equal to or less than the posted speed limit and that his driving was in no way erratic, inappropriate, or evidencing any impairment.

Finally regarding the alcohol, the standard to be applied in Valdez' case will be different, in the event that his case gets to the Legislature. Mr. Valdez' alcohol-impaired state, if any, was not imputable to Ortiz, but it may become an issue in Valdez' own case.

STIPULATED SETTLEMENTS: Because they are sometimes entered into for reasons that may have very little to do with the merits of a claim or the validity of a defense, stipulations or settlement agreements between the parties to a claim bill are not necessarily binding on the Legislature or its committees, or on the Special Master assigned to the case by the Senate President. However, all such agreements must be evaluated. If found to be reasonable and based on equity, then they can be given effect, at least at the Special Master's level of consideration.

Such is the situation in this claim bill.

I find that the settlement agreement is reasonable, is not inequitable to either side, and should be given effect.

COLLATERAL SOURCES: There are no collateral sources for the legislature to consider as a set-off in this case.

In fact, the total amount of the outstanding liens in the Ortiz matter is reported to be \$118,496.72 (\$54,021.25—Agency for Health Care Administration, Medicaid Third Party Liability; and \$64,575.47—Florida Department of Health, Brain and Spinal Cord Injury Program) both of which the claimant will have to pay (in whole or in part) out of his proceeds.

ATTORNEY'S FEES: Upon affidavit filed in this case by claimant's attorney, the total amount of attorney's fees, both for trial and appeal, will not exceed the statutory 25 percent limit of \$1.25 million.

SPECIAL NEEDS TRUST: Because the Legislature generally favors structured payments, guaranteed-term annuities, or special needs trusts in large claims and in claims on behalf of those who have suffered serious or permanent injuries that are likely to require substantial or long-term medical care, I recommend that after the payment of attorney's fees and costs, medical bills and other immediate needs, that the remaining proceeds be required, by law, to be placed in a special needs trust created exclusively for the benefit of Oscar Ortiz.

One of the terms of the trust would have to be a reverter of the balance in the trust to the City of Miami upon the death of Oscar Ortiz, and after full reimbursement to Medicaid.

RECOMMENDATION: Accordingly, I recommend that Senate Bill 50 be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

D. Stephen Kahn  
Senate Special Master

cc: Senator Alex Diaz de la Portilla  
Faye Blanton, Secretary of the Senate  
House Claims Committee