



THE FLORIDA SENATE
SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
11/27/02	SM	Favorable
	CA	
	FT	

November 27, 2002

The Honorable James E. "Jim" King, Jr.
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 40** – Senator Howard E. Futch
Relief of Richard Ebner and Denise Ebner

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNCONTESTED EQUITABLE SETTLEMENT IN THE AMOUNT OF \$50,000 FROM ST. LUCIE COUNTY FUNDS TO COMPENSATE RICHARD EBNER AND DENISE EBNER FOR INJURIES CAUSED BY THE NEGLIGENCE OF ST. LUCIE COUNTY IN OPERATING A MOTOR VEHICLE. ST. LUCIE COUNTY HAS COMPENSATED THE CLAIMANTS IN THE AMOUNT OF \$200,000 PURSUANT TO S. 768.28, F.S.

FINDINGS OF FACT:

On February 6, 1996, at approximately 1:35 p.m., Mr. Richard Ebner and Ms. Denise Ebner were standing alongside the road when a dump truck driven by Wendell Rennolds, an employee of St. Lucie County, traveling southbound on County Road 711, crossed the center line and sideswiped a vehicle, driven by Paul Anesko, traveling northbound on County Road 711, causing Mr. Anesko's vehicle to run onto the shoulder and strike the claimants.

County Road 711 is a north and south, two-lane, undivided highway. The roadway is straight and level at the site of the crash. It was a clear, dry day with no visibility problems. There were no roadway defects or environmental conditions that contributed to the accident.

The claimants had pre-arranged a meeting to take place on

County Road 711 for Ms. Ebner to drop off supplies to Mr. Ebner. After passing each other on County Road 711, the claimants made separate U-turns and parked their vehicles on the side of the road. There is some dispute as to how far off the road the claimants parked their vehicles. There is no evidence in the record that Mr. Ebner's vehicle was in the roadway. Accordingly, Mr. Rennolds was not required to enter the northbound lane to avoid hitting Mr. Ebner's vehicle. The claimants' testimony that they were not standing in the roadway is unrebutted.

The evidence is uncontroverted that Mr. Rennolds crossed the centerline and sideswiped Mr. Anesko's vehicle. Mr. Anesko lost control of his vehicle and struck the claimants.

Upon impact, Mr. Ebner was thrown approximately 60 feet. He lost consciousness for several minutes. He was taken to Columbia Medical Center and presented with complaints of headaches, head pain, neck pain, swelling in the right eye, and scalp lacerations. Because of his injuries, Mr. Ebner was admitted into the hospital. Radiographs revealed a right pneumothorax that required Mr. Ebner to be inserted with a chest tube. Upon examination, it was noted that Mr. Ebner suffered from short-term memory loss. He was diagnosed with a right basilar skull fracture, multiple maxillary and ethmoid sinus fractures, right greater than left, right occipital and supraorbital laceration, right-sided pneumothorax, and a concussion. He was discharged four days later.

Mr. Ebner presented to Dr. Richard B. Allen, M.D., an otolaryngologist, who recommended that Mr. Ebner undergo surgery to include an open reduction and internal fixation of the floor of his orbit and right maxillary fractures with the possibility of arch bars to help correct his bite deformity. On August 8, 1996, Dr. Andrew B. Slavin, D.D.S., an oral and maxillofacial surgeon, and Dr. William M. McLeish, M.D., a plastic and reconstructive surgeon, performed surgery on Mr. Ebner comprising of LeFort I osteotomy, mid face osteotomy, orbital osteotomies with orbital, maxillary, zygoma repositioning, decompression of infraorbital nerve, and placement of an alloplastic orbital implant. Postoperative diagnosis was malunion of the right zygomaticomaxillary orbital fracture, post-traumatic diplopia, and vertical dystopia. Following surgery, Mr. Ebner continued to have problems with his mouth and eating. He

has lost a significant amount of weight. He is 5'10 and weighs only 108 pounds as of October 2002. Dr. Slavin has noted myalgia/myositis of the muscles of mastication, malocclusion, mild capsulitis, and pulpitis of several of his teeth.

Mr. Ebner has treated with Dr. Jerry E. Berland, M.D., an ophthalmologist. Dr. Berland diagnosed Mr. Ebner with a complex esotropia and left hypertropia. Dr. Berland prescribed prism spectacles to improve Mr. Ebner's diplopia.

Mr. Ebner continues to treat with Dr. Mark Borchelt, M.D., an internist for depression, chronic migraines, trigeminal neuralgia and temporomandibular joint dysfunction all secondary to the motor vehicle accident.

Mr. Ebner continues to treat with Dr. Michael Newberry, M.D., a psychiatrist, for right temporal headache pain, status post multiple skull fractures, diplopia secondary to head trauma, history of post-concussive syndrome, pain disorder associated with post psychological factors and a general medical condition, mood disorder secondary to chronic pain, and cognitive disorder, NOS. Dr. Newberry reports that Mr. Ebner is dying, primarily because of pain related to injuries he received in the motor vehicle accident. Dr. Newberry relates that Mr. Ebner has constant severe pain with severe spasms of pain that are unresponsive to high doses of medication. Finally, Mr. Ebner has trouble voiding and is frequently constipated. Dr. Newberry attributes Mr. Ebner's gastrointestinal problems to severe side effects from the medications.

Mr. Ebner has followed up with additional physicians. A complete copy of his medical history is provided in the claim's bill file.

As a result of his injuries, Mr. Ebner's tree nursery has lost revenue. Mr. Ebner testified that his nursery lost several trees when he could no longer perform the arduous labor of tree farming. In addition, Mr. Ebner performed a number of functions at his company that he can no longer perform: managing the books, negotiating sales, and maintaining his merchandise. Mr. Ebner testified that he cannot effectively work.

Prior Medical History

Mr. Ebner has a preexisting condition that was aggravated by the February 6, 1996 motor vehicle accident. He has treated for headaches as a result of a prior surgery in 1994. However, the character, intensity and frequency of the headaches have been aggravated by this accident.

In addition, Mr. Ebner's past medical history is significant for a prior narcotics problem when Mr. Ebner was in his teens. Mr. Ebner currently suffers from medication addiction as a result of the numerous medications that have been prescribed for him to manage his pain. He attended a detoxification program in an attempt to lower the frequency and potency of the medication he takes with some results. However, Mr. Ebner testified that his health insurance would not cover additional in-house detoxification programs.

Loss of Consortium

Mr. Ebner has not functioned in the role of husband or father for years. Mr. Ebner lives in constant fear of losing his family and all that he has worked for in his life. Ms. Ebner testified that Mr. Ebner and she are no longer able to do the activities they once enjoyed together. She testified that Mr. Ebner has become a different person. He rarely smiles and shows little emotion. She indicated that he had become lifeless.

CONCLUSIONS OF LAW:

To establish a cause of action for negligence, the claimant must establish by a preponderance of evidence four elements: the defendant had a legal duty, the defendant breached that duty, the breach proximately caused the plaintiff's injury, and the plaintiff incurred damages as a result. See *Gibbs v. Hernandez*, 810 So.2d 1034, 1036 (Fla. 4th DCA 2002).

Duty: Mr. Rennolds had a legal duty to properly maintain his vehicle in his lane. See s. 316.1925, F.S. St. Lucie County shared that legal duty as Mr. Rennold's employer because Mr. Rennolds was acting in the course and scope of his employment at the time of the accident.

Breach: Mr. Rennolds breached his duty to maintain his vehicle in the proper lane. As Mr. Rennolds was operating a county dump truck in the course and scope of his employment, St. Lucie County has breached its duty as well.

The respondents, while conceding some responsibility with respect to the accident, maintain that should the claim proceed to trial it is likely that the jury would apportion liability with respect to the two potential defendants and assign comparative negligence with respect to the claimants. However, for purposes of the claim bill, St. Lucie County concedes liability.

The finding of breach does not rest on the county's concession. Rather, after evaluating all of the evidence, I find that the county breached its duty by failing to maintain a proper lane. There was no credible testimony produced which established that any other party shared in comparative fault.

Proximate Cause: Causation requires a natural, direct and continuous sequence between the negligent act and the injury, so that it can reasonably be said that but for the act the injury would not have occurred. See *Gibbs v. Hernandez*, 810 So.2d at 1037. The harm is proximate if prudent human foresight would lead one to expect that similar harm is likely to be substantially caused by the specific act or omission. See *McCain v. Florida Power Corp.*, 593 So.2d 500, 503 (Fla. 1992). The sole precipitating, direct cause of the injuries sustained by the claimants was the force of impact brought on by Mr. Rennolds' breach of his duty. Although Mr. Anesko's vehicle ultimately struck the claimants, the claimants' injuries would not have occurred but for the negligence of the county's employee.

Damages: Mr. Ebner has sustained injuries secondary to the motor vehicle accident to include: right temporal headache pain, status post multiple skull fractures, diplopia secondary to head trauma, history of post-concussive syndrome, pain disorder associated with post psychological factors and a general medical condition, mood disorder secondary to chronic pain, and cognitive disorder, NOS, depression, chronic migraines, trigeminal neuralgia and temporomandibular joint dysfunction all secondary to the motor vehicle accident. It is anticipated that should this claim proceed to trial, there would be medical testimony that Mr. Ebner sustained permanent injuries as a result of the accident within a reasonable degree of medical probability. Accordingly, Mr. Ebner would be entitled to pain and

suffering. Mr. Ebner has incurred medical bills in the amount of \$136,381.18 as of October 9, 2002. It is anticipated that Mr. Ebner would suffer a loss of future earning capacity and incur additional medical expenses for treatment and care. Ms. Ebner has lost the joy and comfort of her husband and father to her children.

Release: Ms. Ebner executed a full, final and complete release of any and all claims that Ms. Ebner may have or may have had against St. Lucie County as a result of the motor vehicle accident of February 6, 1996. The parties have agreed that the release does not cover Ms. Ebner's derivative claim from Mr. Ebner for loss of consortium. St. Lucie County stipulated on the record that the release does not bar Ms. Ebner's loss of consortium claim.

COLLATERAL SOURCES:

The claimants received policy limits of \$15,000 from Mr. Anesko's bodily injury insurance carrier. The claimants also received \$300,000 from their underinsured motorist insurance carrier. His major medical carrier, Principal Life paid \$136,381.18 in medical bills of which Mr. Ebner paid \$13,000 in satisfaction of the subrogation lien.

Mr. Ebner receives \$705 per month in social security benefits. Finally, Medicare pays for some of Mr. Ebner's physician visits. Mr. Ebner's health insurance provider pays for some of his prescriptions. Mr. Ebner is responsible for a co-payment.

As the claim bill is a result of a settlement, I recommend that no offset be taken with respect to collateral sources per Legislative prerogative.

ATTORNEYS FEES:

Attorney's fees are limited to 25 percent of recovery pursuant to s. 768.28, F.S. The claimant's attorney has stipulated to 25 percent recovery of fees.

RECOMMENDATIONS:

I recommend that Senate Bill 40 be reported FAVORABLY.

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Respectfully submitted,

Lowell D. Matthews, Jr.
Senate Special Master

cc: Senator Howard E. Futch
Faye Blanton, Secretary of the Senate
House Subcommittee on Claims