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DATE: 3/27/2009

March 27, 2009

SPECIAL MASTER'S FINAL REPORT

The Honorable Larry Cretul
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 789 - Representative Burgin
Relief of Eric Brody v. Broward County Sheriff's Office

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM FOR \$30,760,372.30, BASED ON A JURY VERDICT THAT AWARDED THE PARENTS AND GUARDIANSHIP OF ERIC BRODY DAMAGES FOR INJURIES THAT HE SUFFERED DUE TO THE NEGLIGENCE OF AN EMPLOYEE OF THE BROWARD COUNTY SHERIFF'S OFFICE (HEREINAFTER REFERRED TO AS "BCSO"). THE BCSO HAS ALREADY PAID THE \$200,000 CAP AS PROVIDED IN SECTION 768.28, F.S.

FINDING OF FACT:

PROCEDURAL HISTORY: In February of 2003, the parents of Eric Brody, as his natural parents and guardians, filed a negligence proceeding against the BCSO in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida. A trial was held in the Fall of 2005 and on December 1, 2005, the jury found that Deputy Thieman and the BCSO were 100 percent negligent and Eric Brody was not comparatively negligent, and rendered a \$30,690,000 verdict in favor of the parents and guardianship. The trial lasted almost 2 months, including a 2-week break due to Hurricane Wilma.

Judgment was entered shortly after the jury verdict for the full amount of \$30,690,000, and the court entered a cost judgment for \$270,372.30, for a total judgment of \$30,960,372.30. The trial court denied the BCSO's posttrial motions for judgment notwithstanding the verdict, new trial, or remittitur. The BCSO

appealed the final judgment but not the cost judgment. The Fourth District Court of Appeal upheld the verdict and the amount of the verdict in the fall of 2007. The BCSO subsequently petitioned the Florida Supreme Court, which denied the petition in April of 2008.

The BCSO has paid the \$200,000 allowed under s. 768.28, Florida Statutes, and the remainder in the amount of \$30,760,372.30 is sought through the submission of this claim bill.

THE ACCIDENT: This case arises out of a tragic motor vehicle accident that occurred on March 13, 1998, at the intersection of Oakland Park Boulevard and 117th Lane in Broward County, Florida. At approximately 10:36 p.m., Eric Brody was making a left-hand turn into a subdivision on 117th Lane when Deputy Sheriff Christopher Thieman, operating a BCSO cruiser, proceeding westbound on Oakland Park Boulevard, collided with the vehicle operated by Eric, causing Eric to sustain catastrophic injuries. At trial, experts for the claimant and the defendant testified that Deputy Thieman was driving at a braking speed of between 53 mph and 70 mph when he struck the passenger side of Eric Brody's car. The lawful speed limit was 45 mph. Although he was out of his seat belt, it was photographed at the scene, fully spooled out with the retractor jammed. The greater weight of the evidence supports the conclusion that Eric Brody was buckled in his seatbelt at the time of the accident.

Eric was transported from the scene by helicopter to Broward General Hospital, where he was diagnosed with broken ribs, a skull fracture, blood clots in his brain, and a large accumulation of blood on the right side of his head. He underwent an emergency craniotomy to reduce the brain swelling. The surgery was successful; however, Eric remained in a coma.

Eric remained in the intensive care unit at Broward General Hospital for four weeks, and then was transferred to Health South Rehabilitation Facility, where there is a coma stimulation program. Thereafter, Eric was transferred to a nursing home where he remained in a coma for approximately six months. After re-gaining consciousness, Eric remains mostly confined to a wheelchair, with limited ability to speak, and with severe brain damage.

MEDICAL ISSUES: At the hospital, Eric Brody was placed on a ventilator and underwent an emergency craniotomy. He was in a coma for 6 months and underwent extensive rehabilitation.

As a result of the closed head trauma Eric Brody received during the accident, he suffers from static encephalopathy, spastic quadriplegia, neuromuscular scoliosis, multiple contractions of the left upper and lower extremities, and

abnormalities of gait and standing.

DAMAGES: Eric Brody, who is now 28-years-old, has been left profoundly brain-injured and lives with his parents. His speech is barely intelligible, he has significant memory loss and cognitive dysfunction, and he has visual problems. Eric also has impaired fine and gross motor skills and has very poor balance. Although Eric is able to use a walker for short distances, he must mostly use a wheelchair to get around. The entire left side of his body is partially paralyzed and spastic, and he needs help with many of his daily functions. Eric is permanently and totally disabled. However, Eric has a normal life expectancy.

LEGAL ISSUES: Eric Brody alleged in his lawsuit that Deputy Thieman was negligent in the operation of his vehicle by driving too fast and by steering his vehicle two lanes to the right where the impact occurred.

At trial, the BCSO took the position that Deputy Thieman's driving was not negligent and was not the proximate cause of the accident; that Eric Brody acted negligently by making a left-hand turn into the path of the oncoming police vehicle and by not wearing a seat belt. The BCSO took the position that Eric Brody's negligence was the proximate cause of the accident and his resulting injuries.

At the claim hearing, the BCSO took the position that Deputy Thieman's negligence was only simple negligence, not gross negligence; that the jury ignored compelling evidence of comparative negligence; that the jury was motivated by emotion; that all jury determinations must be questioned; and that payment of a claim bill in the requested amount would exceed by far the award in any prior claims awarded by the Legislature.

The BCSO further argued that this claim bill would impose a draconian economic impact on the BCSO during a difficult economic period

CONCLUSION OF LAW:

Some see the Legislature's role in claim bills against the State of Florida as merely rubber stamping and "passing through" for payment those jury verdicts that have been reduced to judgment and survived appeal, if any. Others see the Legislature's role as a de novo responsibility to review, evaluate, and weigh the total circumstances and type of the state's liability in the case, and to consider those factors that might not have been perceived by or introduced to the jury or court.

Whichever of these two views each lawmaker holds, at the Special Master's level every claim bill, whether based on a jury

verdict or not, must be measured anew against the four standard elements of negligence.

While the BCSO took several positions at the claim bill hearing, I did not find these positions persuasive in leading to a conclusion different from that of the jury's. The BCSO argued that the BCSO itself did not commit any negligent act, that it did not negligently hire Deputy Theiman, and that the Legislature should require more than the underlying facts in this case to justify what it sees as an unprecedented and unwarranted award. While reasonable minds could differ on whether Deputy Theiman's conduct was merely simple negligence or whether it exceeded that standard, simple negligence is all that is required to support the jury's decision.

The BCSO did not offer any evidence in support of its position that the jury ignored compelling evidence of comparative negligence. While the argument of comparative negligence was made at trial by the BCSO, there was no evidence presented that the jury ignored this argument. As mentioned above, while there was some conflicting expert testimony in the record, I find that the greater weight of the evidence supports the conclusion that Eric Brody was wearing his seatbelt when the accident occurred.

I do not find a comparison to past claim bills legally relevant in determining the outcome of the claim at hand. While members of the Legislature voting on this claim may want to consider such an argument, I believe my role is to look at this claim independently, make findings based on this record, and to attribute liability and determine damages accordingly.

Finally, it is readily apparent that we are currently in very difficult economic times and that the amount of the award in this claim is substantial. However, I find that while this argument may be relevant to the members of the Legislature voting on the claim bill, it is outside the scope of my review.

DUTY - Deputy Theiman had a duty to exercise reasonable care in operating his vehicle. See s. 316.183(1), F.S. BCSO is responsible for any negligence of Deputy Theiman in operating the BCSO vehicle. The verdict against the BCSO was based upon a stipulation by the parties that the BCSO was legally responsible for any negligence of Deputy Theiman.

BREACH OF DUTY – Deputy Thieman breached his duty to use reasonable care by negligently operating his BCSO issued cruiser.

PROXIMATE CAUSE - The greater weight of the evidence clearly points to the conclusion that the accident was caused by Deputy Theiman and that this was the proximate cause of the injuries to Eric Brody. There is competent and substantial

evidence to support a finding of liability on the part of the BCSO. I find Deputy Theiman exceeded the posted speed limit in violation of section 316.183, F.S., and carelessly operated his vehicle in violation of s. 316.1925, F.S., causing the collision which resulted in the injuries to Eric Brody.

DAMAGES – The jury found BCSO to be 100% at fault for the accident and Eric Brody's injuries. The jury found damage amounts as follows:

Past medical expenses and lost earnings	\$ 1,439,675
Future medical expenses and lost earnings	\$ 9,656,541
Past Pain & Suffering	\$ 2,703,627
Future Pain & Suffering	\$ 16,609,455
Past expenses by his Parents	\$ 200,000
TOTAL DAMAGES	\$ 30,609,298

The judgment also awarded costs in the amount of \$270,372.30. The total award was \$30,960,372.30.

After conducting the hearing in this matter, and upon review of the records made available by the parties and their submissions, I find the determination of economic damages and costs in the amount of \$11,647,290.30 to be reasonable and supported by competent and substantial evidence.

The determination of damages for pain and suffering is more difficult. The record clearly demonstrates that Eric Brody and his family have had life as they knew it completely changed. No amount of money can quantify what they have lost and the pain they must endure. The record does not reveal how the jury came to its determination. Their award for pain and suffering is almost twice that of the economic damages.

Generally speaking, there is no set rule for measuring damages for past, present, and future pain and suffering. The law declares that there is no standard for measuring pain and suffering damages other than "the enlightened conscience of impartial jurors"¹

While the Legislature may determine that the amount awarded for pain and suffering in this matter should be adjusted, I cannot find any legal reason based on the record to depart from the jury's award.

¹ *Braddock v. Seaboard A. L. R. Co.*, 80 So.2d 662, 667 (Fla. 1955) (citing *Toll v. Waters*, 138 So. 393 (Fla. 1939)).

Any award made in this claim would come from the general operating funds of the BCSO. The BCSO states that it has not set aside any funds to pay any award. At the time of the accident, the BCSO carried insurance coverage for vehicular negligence in the amount of \$3 million that would be available to offset the award.

ATTORNEY'S/
LOBBYING FEES:

The attorney for the claimant has provided an affidavit to the effect that his fees will be limited to 25 percent of all gross amounts paid to the Claimants as the result of a claim bill. The affidavit does not address the payment of costs. Outstanding costs are \$1,115,771.69.

The affidavit states that costs for professional lobbying services, will be borne by the client in addition to the 25% for attorney's fees. The agreed upon lobbying fees for this claim are eight percent of any claim bill amount.

Regardless of the agreement between the guardianship of Eric Brody and his attorney and the lobbyists, the bill provides that the total amount paid for attorney's fees, lobbying fees, costs, and other similar expenses relating to this claim may not exceed 25 percent of the total amount awarded under the bill.

LEGISLATIVE HISTORY:

This is the first year this claim has been filed in the Legislature.

RECOMMENDATIONS:

Based on the record before me, I find that the Claimants have met their burden to demonstrate by a greater weight of the evidence that the injuries and damages sustained by Eric Brody were caused by the negligent act of the BCSO, through its employee, Deputy Theiman. I further find that the amount requested for this claim, the amount awarded by the jury, is justifiable. Therefore, I recommend that this claim bill be reported FAVORABLY.

Respectfully submitted,

TOM THOMAS
House Special Master

cc: Representative Burgin, House Sponsor
Senator Pruitt, Senate Sponsor
Judge Bram D.E. Canter, Senate Special Master
Counsel of Record