



STORAGE NAME: h6517.CJS

DATE: 3/22/2019

March 22, 2019

SPECIAL MASTER'S FINAL REPORT

The Honorable Jose R. Oliva
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 6517 - Representative McClure
Relief/Robert Allan Smith/Orange County

THIS IS A SETTLED CLAIM FOR \$750,000¹ AGAINST ORANGE COUNTY FOR INJURIES AND DAMAGES SUFFERED BY ROBERT ALAN SMITH WHEN HIS MOTORCYCLE WAS STRUCK BY AN ORANGE COUNTY WORK VAN ON SEPTEMBER 7, 2006.

FINDINGS OF FACT:

This matter arises out of a motor vehicle crash on September 7, 2006, in Orlando, Florida, at the four-way intersection of DePauw Avenue and Orlando Street. DePauw Avenue runs north/south and Orlando Street runs east/west. The intersection is in a residential neighborhood where the speed limit is 25 miles per hour. Orlando Street has stop signs at the intersection; DePauw Avenue has the right-of-way with no stop signs.

On the day of the accident, Robert Alan Smith ("Claimant"), who lived on DePauw Avenue, was repairing his motorcycle, which had recently idled out. He assembled and disassembled several parts and test-drove the motorcycle around the block twice. According to Claimant, the motorcycle would falter when changing gears and not accelerate. The accident occurred on

¹ The bill also seeks to extinguish certain lien interests for Claimant's treatment and care.

Claimant's third test drive around the block, during daylight hours on a dry day.

Around 1:45 p.m., Lynn Godden, an Orange County employee on duty at the time, was driving a county work van westbound on Orlando Street. Mr. Godden approached the intersection of Orlando Street and DePauw Avenue and stopped at the stop sign controlling Orlando Street. He looked to his left down DePauw Avenue and witnessed Claimant. According to Mr. Godden, he saw Claimant on a motorcycle but believed Claimant was heading in the opposite direction, away from the intersection. According to Claimant, he made eye contact with Mr. Godden and believed that Mr. Godden was aware of Claimant's presence. Mr. Godden, with parked vehicles partially blocking his view, crept forward a few feet into the intersection. Apparently believing the intersection was clear, Mr. Godden continued driving west on Orlando Street.

At the same time, Claimant entered the intersection on his motorcycle traveling northbound. Seeing the van, Claimant attempted to steer his motorcycle to the left to avoid a collision, but to no avail. The front of the van struck Claimant, sending him airborne about 23 feet.

Mr. Godden stopped after clearing the intersection and ran to Claimant's aid. Nelson Dean, a carpenter working at a nearby house, ran to the scene and called 911. Claimant, who apparently never lost consciousness, asked Mr. Godden for his cell phone and called his wife. An ambulance arrived and took Claimant to the hospital. The ambulance logs indicate Claimant stated he was traveling 50 miles per hour. Claimant denies ever stating he was traveling at that speed and Eric Miller, the paramedic on scene, was unsure who stated the speed.

Claimant later testified he was traveling 20 to 25 miles per hour and due to his motorcycle's deficiencies, did not believe he could have been traveling faster. Mr. Dean, who witnessed Claimant on his motorcycle and Mr. Godden stopped at the stop sign, stated Claimant was going 35 or 40 miles per hour.

The front of the county van hit Claimant on his right side, requiring his right leg to be amputated above the knee. Claimant also fractured his left fibula, foot, and pelvis. He incurred over \$551,527.37 in medical bills, many (if not all) of which were apparently paid by third parties, including Medicaid and the U.S. Department of Veteran Affairs. There are outstanding liens, including liens by Veteran Affairs, Medicaid, the State of Florida, and Claimant's ex-wife, against any award Claimant may receive. Claimant has continued to experience the effects of his injuries, including a leg infection.

Claimant went on to complete his college degree but struggled to find employment until 2017. He is currently employed at

Image Depot Express in Lakeland, Florida, earning twelve dollars an hour doing graphic design work. Claimant receives social security disability benefits of about \$800 per month, along with Veteran Affairs benefits from past military service.

Mr. Godden, the driver of the county van, has received multiple traffic citations, including failure to obey a stop sign. He is now retired from the county.

LITIGATION HISTORY:

On February 14, 2007, Claimant filed a negligence suit against the county (Respondent). Before trial, Claimant and his wife divorced, and she settled her claim against the county for \$85,000. A jury trial was held in November 2011. After the full case had been presented to the jury and after hours of jury deliberation, the judge sent the jury home for the weekend, with deliberations to resume the next Monday. One of the jurors indicated she would not return Monday. Ultimately, a mistrial was declared.

The case was tried again in 2012 and the jury returned a verdict of \$4,814,785.37, finding Respondent 67% at fault and Claimant 33% at fault. The jury's calculations of damages were:

Past Lost Earnings	\$137,280.00
Past Medical Expenses	551,527.37
Future Medical Expenses	2,376,000.00
Past Pain & Suffering	228,258.00
Future Pain & Suffering	1,521,720.00
Total Damages	<u>\$4,814,785.37</u>

The court reduced the damages, in part due to collateral source payments and Claimant's portion of fault, and entered a final judgment for \$2,913,536.09. Respondent did not appeal and paid the statutory cap of \$100,000. Claimant's ex-wife has a lien against Claimant for about \$40,000 for half of Claimant's reduced award for past lost wages.

CLAIMANT'S POSITION:

Claimant argues Respondent is liable for the negligence of its employee, Mr. Godden, for failing to yield the right-of-way to Claimant. Claimant asserts he was traveling 25 miles per hour or slower at the time of the accident and that he was in no way negligent. Claimant states that he has not yet received any payout from the \$100,000 because that money is held in trust until the matter is resolved. At the Special Master hearing, Claimant argued that the entire amount of the jury verdict should be honored. After the hearing, Claimant and Respondent settled for \$750,000.

RESPONDENT'S POSITION:

Respondent initially opposed the claim bill, arguing that Claimant was comparatively negligent for the accident.² After the Special Master hearing, Respondent and Claimant settled for \$750,000, and the claim bill is no longer contested.

CONCLUSIONS OF LAW:

Regardless of whether there is a jury verdict or a settlement agreement, each claim bill is reviewed *de novo* in light of the standard elements of negligence.

Duty & Breach

Respondent owed a duty to Claimant to stop and yield the intersection to Claimant. Under Florida law, a driver approaching an intersection with a stop sign must stop, and after stopping, must "yield the right of way to any vehicle" in the intersection or which is approaching so closely as to constitute a hazard.³ Respondent's employee, Mr. Godden, as he approached the intersection, owed a duty to Claimant, who had no stop sign and enjoyed the right-of-way. Mr. Godden was acting within the scope of employment with the county, and thus Respondent is liable for Mr. Godden's actions under the doctrine of respondeat superior. Respondent breached its duty to Claimant when its employee proceeded through the intersection without the right-of-way.

Causation

The primary dispute at the Special Master hearing was whether, and to what extent, Claimant's own negligence contributed to the accident. Claimant argued that he bears zero fault, while Respondent argued that Claimant bears up to 75% of the fault.⁴

To support its argument at the hearing, Respondent made two main assertions: first, that Claimant was traveling at a speed of up to 50 miles per hour in a residential area when the crash occurred; and second, that Claimant may have been impaired by alcohol.

Claimant's speed at the time of the crash was closely contested at trial and at the Special Master hearing, with Claimant stating he was traveling 25 miles per hour or less, and Respondent arguing Claimant was traveling 35 to 50 miles per hour. Eyewitness Nelson Dean stated that Claimant was traveling 35 to 40 miles per hour. Additionally, paramedic Eric Miller's medical notes state that Claimant had said he was traveling about 50 miles per hour. Claimant denied at the Special Master hearing that he ever said this to Mr. Miller.

² At the Special Master hearing, Respondent argued Claimant was traveling at a speed of up to 50 miles per hour at the time of the accident and that Claimant may have had alcohol in his blood. Respondent suggested Claimant was up to 75% responsible for the accident, not 33% as the jury found. Respondent also disputed the amount of medical damages.

³ S. 316.123(2)(a), F.S.

⁴ In Florida, the doctrine of comparative fault provides for apportionment of the loss among those whose fault contributed to the occurrence. *Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973). A plaintiff's negligence diminishes the proportionality of the amount awarded but does not bar recovery. S. 768.81(2), F.S.

Both parties presented extensive expert testimony as to Claimant's speed. Orion Keifer, a mechanical engineer and Claimant's expert witness, testified Claimant was traveling 25 miles per hour or less based on where Claimant's body and motorcycle landed after the crash. The distance from impact to the resting place of Claimant's body was between 45 and 50 feet. Mr. Keifer opined that if Claimant had been traveling 50 miles per hour, he would have been thrown 160-180 feet.

Respondent's expert, Dr. James Ipser, opined Claimant was traveling about 50 miles per hour when the accident occurred. Dr. Ipser opined that Claimant went airborne upon impact with the van and then hit guide wires on a nearby telephone pole, causing his body not to travel as far as it would have otherwise gone. Dr. Ipser also opined if Claimant had been going 25 miles per hour, he could have avoided the accident.

At the Special Master hearing, Respondent cited Claimant's two prior DUI convictions⁵ as evidence that he may have been drinking and driving the day of the accident. Claimant denied alcohol impairment on the day of the accident, and the two paramedics who stabilized and transported Claimant did not report any signs of alcohol impairment.

I find that the jury's determination that Claimant was 33% responsible and Respondent was 67% responsible is wholly reasonable. The jury evaluated the evidence presented at trial and decided that Claimant's percentage of fault lay at 33%—that is, between the 0% argued by Claimant and the 75% argued by Respondent. No testimony or arguments presented at the Special Master hearing demonstrate any reason to disturb the jury's apportionment of liability.

Damages

Claimant's damages are severe and life-altering. His right leg was amputated above the knee, and that loss continues to plague him. His left leg was fractured, and his pelvis was broken. The parties presented different estimates for the cost of purchasing and maintaining a prosthetic leg—Claimant's expert estimated the average annual cost at \$55,164, and Respondent's expert estimated the cost at \$44,400.

In the years following trial, Claimant has had his prosthetic replaced and continues to suffer from complications from the amputation. In December 2016, he was hospitalized for an infection in his right leg. Claimant is overweight and diabetic.⁶

⁵ Claimant was convicted of driving under the influence twice, apparently in 2000 and 2001. Additionally, Claimant had not had his license for about six years and received his reinstated license about a week before the accident. While he did not have a motorcycle endorsement, Claimant stated he took the written test and was allowed to ride without passengers until he passed the driving test.

⁶ At the Special Master hearing, before the parties had settled the claim, Respondent suggested that many, if not all, of the medical costs had been paid by third parties, including the U.S. Department of Veteran Affairs and Medicaid.

I conclude the jury's award and resulting final judgment of \$2.9 million is an appropriate amount to compensate Claimant for his losses. In the claim bill, Claimant seeks \$750,000, which is reasonable, plus the extinguishment of certain lien interests.

ATTORNEY'S/
LOBBYING FEES:

If the claim bill passes, the attorney fee will not exceed \$150,000, and the lobbying fee will not exceed \$37,500. Outstanding costs are \$71,511.15.

RESPONDENT'S ABILITY
TO PAY:

At the time of the accident, Orange County maintained a self-insured retention fund of \$1,000,000 with an excess insurance policy for \$10 million. According to Respondent, if the claim bill were to pass, \$670,510.74 would be paid from the self-insured retention fund, and the remaining amount would purportedly be paid from the excess policy.

LEGISLATIVE HISTORY:

This is the third session this claim has been presented to the Legislature. Last session, CS/HB 6517 passed the House by a vote of 111-4 but died in Senate Governmental Oversight and Accountability.

RECOMMENDATION:

I recommend House Bill 6517 be reported **FAVORABLY**.

Respectfully submitted,

JORDAN JONES

House Special Master

cc: Representative McClure, House Sponsor
Senator Torres, Senate Sponsor
Christie Letarte, Senate Special Master