THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/14/09	SM	Unfavorable

December 14, 2009

The Honorable Jeff Atwater
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 68 (2010)** – Senator Mike Fasano
Relief of Eric Brody

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM FOR $30,760,670.30 BASED ON A JURY AWARD AGAINST THE BROWARD COUNTY SHERIFF'S OFFICE TO COMPENSATE CLAIMANT ERIC BRODY FOR THE PERMANENT INJURIES HE SUFFERED WHEN THE CAR HE WAS DRIVING WAS STRUCK BY A DEPUTY SHERIFF'S CRUISER.

FINDINGS OF FACT:

On the evening of March 3, 1998, in Sunrise, Florida, 18-year-old Eric Brody was on his way home from his part-time job. He was making a left turn from Oakland Park Boulevard into his neighborhood when his AMC Concord was struck near the passenger door by a Sheriff's Office cruiser driven by Deputy Sheriff Christopher Thieman.

Deputy Thieman was on his way to a mandatory roll call at the Sheriff's district station in Weston. One estimate of his speed was 70 mph. Even the lowest credible estimate of his speed was in excess of the 45 mph speed limit. It is estimated that the cruiser, after braking, struck Eric's vehicle at about 53 mph. The impact caused Eric to be violently thrown toward the passenger door, where he struck his

head. He suffered broken ribs and a skull fracture. Eric was airlifted to Broward General Hospital where he underwent an emergency craniotomy to reduce brain swelling. However, he suffered a brain injury that left him with permanent disabilities.

Eric was in the hospital intensive care unit for four weeks and then was transferred to a rehabilitation center. He was later transferred to a nursing home. He remained in a coma for about six months. Eric had to learn to walk and talk again. Eric is now 29 years old, but still lives with his parents. He has difficulty walking and usually uses a wheelchair or a walker. His balance is diminished and he will often fall. Eric has some paralysis on the left side of his body and has no control of his left hand. He must be helped to do some simple personal tasks. He tires easily. The extent of his cognitive disabilities is not clear. His processing speed and short-term memory might be impaired and his mother believes his judgment has been affected.

At the time of the collision, Eric had been accepted at two universities and was interested in pursuing a career in radio broadcasting. However, his speech was substantially affected by the injuries that he suffered and currently it is difficult for anyone other than his mother to understand him.

One of the main issues in the trial was whether Eric was comparatively negligent. The Broward County Sheriff's Office (BCSO) contends that Eric was not wearing his seatbelt and that, if he had been wearing his seatbelt, his injuries would have been substantially reduced. Eric has no memory of the accident because of his head injury, but testified at trial that he always wore his seatbelt. Immediately after the collision. The paramedics who arrived at the scene testified that Eric's seatbelt was not fastened. However, the seatbelt was spooled out and there was evidence presented that the seatbelt could have become disconnected during the collision.

The jury saw a crash re-enactment that was conducted with similar vehicles, using a belted test dummy. The results of the reenactment supported the proposition that the collision would have caused a belted driver to strike his or her head on the passenger door. The seatbelt shoulder harness has little or no effect in stopping the movement of the upper body

in a side impact like the one involved in this case. The head injury that Eric sustained is consistent with injuries sustained by belted drivers in side impact collisions. Therefore, Eric's injury was not inconsistent with the claim that he was wearing his seatbelt at the time of the collision. It is concluded from the evidence presented that Eric was more likely than not wearing his seat belt.

Deputy Thieman's account of the incident was conspicuously lacking in detail. Deputy Thieman did not recall how fast he was going before the collision. He could not recall how close he was to Eric's vehicle when he first saw it. He could not recall whether Eric's turn signal was on. Another curious aspect of the incident was that Deputy Thieman had been traveling in the left lane of Oakland Park Boulevard, which has three westbound lanes, but collided with Eric's vehicle in the far right lane. If Deputy Thieman had stayed in the left lane, the collision would not have occurred. Why Deputy Thieman swerved to the right was not adequately explained. It would seem that the natural response in seeing a vehicle moving to the right would be to try to escape to the left. At trial, Deputy Thieman testified that he did not turn to the left because that was in the direction of oncoming traffic. However, there was no oncoming traffic at the time. It is concluded that the manner in which Deputy Thieman maneuvered his vehicle was unreasonable under the circumstances and that it was a contributing cause of the collision.

Deputy Thieman's was fired by the Broward County Sheriff's Office in 2006 for misconduct not related to the collision with Eric Brody.

Eric received $10,000 from Personal Injury Protection coverage on his automobile insurance. He receives Social Security disabilities payments of approximately $560 each month. He also received some vocational rehabilitation assistance which paid for a wheelchair ramp and some other modifications at his home.

Eric has a normal life expectancy. One life care plan developed for Eric estimated the cost of his care will be $10,151,619. There was other evidence that the life plan could be $5 to $7 million. The BCSO recently offered to fund an "Independent Living Plan" for Eric. The plan would use

an annuity and provide an upfront payment to Eric of $388,000 and regular monthly payments of $8,000. Additional lump sum payments would be made every 12 years. The BSCO states that the plan would pay Eric $12.3 million over his estimated lifetime.

LITIGATION HISTORY:

In 2002, a negligence lawsuit was filed in the circuit court for Broward County by Charles and Sharon Brody, as Eric's parents and guardians, against the Broward County Sheriff's Office. The jury found that Deputy Thieman was negligent and that his negligence was the sole cause of Eric's damages. The jury awarded damages of $30,609,298. The court entered a cost judgment of $270,372.30. The sum of these two figures is $30,879,670.30. The BCSO paid the $200,000 sovereign immunity limit under s. 768.28, F.S. However, this payment was placed in a trust account to pay excess lien claims and Eric Brody has received nothing to date.

Senate Bill 68 incorrectly states that the jury awarded damages of $30,690,298. Adding this erroneous number to the stipulated costs of $270,372.30, results in a total claim of $30,760,670.30, which is requested in SB 68. The correct total excess judgment is $30,679,670.30.

CLAIMANTS' POSITION:

The BCSO is liable for the negligent operation of a motor vehicle by its employee. Eric Brody had no contributory negligence. The jury award is just and reasonable under the circumstances.

SHERIFF'S OFFICE POSITION:

The jury award is unjustified because it failed to assign comparative negligence to Eric Brody.

The provision of the claim bill regarding the assignment of claims against BCSO's insurer is unconstitutional and a violation of the sovereign immunity statutes.

CONCLUSIONS OF LAW:

The claim bill hearing was a *de novo* proceeding for the purpose of determining, based on the evidence presented to the Special Master, whether the BCSO is liable in negligence for the injuries suffered by Eric Brody and, if so, whether the

amount of the claim is reasonable.

Deputy Thieman had a duty to operate his vehicle in conformance with the posted speed limit and with reasonable care for the safety of other drivers. His speeding and failure to operate his vehicle with reasonable care caused the collision and the injuries that Eric Brody sustained. The BCSO is liable as Deputy Thieman's employer.

Although Eric Brody was required to yield before turning left, the evidence does not show that a failure to yield was a contributing cause of the collision. Eric reasonably judged that he could safely make the left turn. He was well past the lane in which Deputy Thieman was traveling. The collision appears to have been caused solely by Deputy Thieman's unreasonable actions in speeding and swerving to the right. I believe the jury was correct in assigning no fault to Eric.

At the claim bill hearing held in 2008, Claimant's counsel urged the Special Master to determine that the liability insurer for the BCSO acted in bad faith by failing to timely tender its $3 million coverage in this matter and, therefore, the insurer is liable for the entire judgment against the Sheriff's Office. However, because the insurer was not a party to the Senate claim bill proceeding, and because the bad faith claim is not a proper subject for determination in a claim bill hearing under the rules of the Senate, the Special Master did not take evidence nor make a determination regarding the bad faith claim.

In my Special Master's report for Eric Brody's first claim bill, filed in the 2009 Session, I recommended that the claim not be paid in an amount greater than the BCSO's $3 million insurance coverage unless the Senate was presented with a method to make the fiscal impact of this claim manageable for Broward County. Senate Bill 68 (2010) attempts to address this issue by providing, as an alternative to the direct payment of $30,760,670.30, that the BCSO may execute an assignment of its claim against its insurer to the legal guardians of Eric Brody. The BCSO objects to the assignment provisions the claim bill, contending that SB 68 is unconstitutional because it amounts to a type of special law that is prohibited by the Florida Constitution and violates the doctrine of separation of powers by encroaching on

judicial functions of weighing evidence and making factual findings. The BCSO also argues that the provision violates the sovereign immunity statute because the bill "legislatively coerces the assignment of claims and relinquishment of rights."

The parties' arguments on these legal points cannot be resolved by reference to legal precedent because there are no cases that have addressed these issues. The claim bill hearing process is not an adequate forum for fully addressing and resolving novel legal issues like those presented here. Nevertheless, to assist the Senate in its consideration of SB 68, I offer my view of whether the BCSO's arguments have merit.

The BCSO's argument that SB 68 is an unconstitutional special law has merit because Article III, Section 11(a)(7) of the Florida Constitution prohibits special laws or general laws of local application pertaining to "conditions precedent to bringing any civil or criminal proceedings." There are only a few cases interpreting this provision of the Constitution and most of the cases involved special laws that established a statute of limitations or a time period for challenging some act of a local government. In requiring an assignment of BCSO's legal claims against the BCSO's insurer to the guardians of Eric Brody and specifying the conditions of the assignment, SB 68 appears to establish conditions precedent to bringing a civil proceeding against the insurer.

The BCSO's contention that SB 68 is an unconstitutional violation of the doctrine of separation of powers is based on two "whereas" clauses of the claim bill which declare that the BCSO's insurer is liable for bad faith in failing to timely offer to pay the policy limit in the Brody case. I do not believe such legislative findings have any effect on the judicial determination of factual and legal issues presented to a court. Therefore, SB 68 does not violate the doctrine of separation of powers. Nevertheless, the whereas provisions amount to an unnecessary and inappropriate legislative prejudgment of the bad faith claim. Whatever other action the Senate wishes to take on the claim bill, the two whereas clauses should be deleted from the bill.

The BCSO's argument that the assignment of the BCSO's legal claims exceeds the Legislature's authority under the

sovereign immunity statute has some merit. The Legislature can do more in a claim bill than simply direct that a certain amount of money be paid to a claimant. On the other hand, the Legislature probably cannot order, as Eric Brody's only compensation, that the BCSO assign its legal claim against the insurer to the Brodys. The fact that SB 68 offers the BCSO a choice -- pay the $30 million *or* assign the BSCO's legal claim against the insurer to the Brodys -- does not make me confident that the legal problem in the first example has been erased.

Finally, the unusual size of this claim bill must be addressed. Sovereign immunity from liability in tort effectively prevents the State and local governments from being bankrupted by damage awards. Claim bills in excess of $10 million are unusual. Claims bills in excess of $20 million are rare. This claim bill for over $30 million is the largest ever claim bill to my knowledge. In the past, the largest claim bills have usually called for installment payments or other mechanisms to make the fiscal impact manageable. The BCSO contends that it cannot pay this claim without drastic reductions in governmental services. It asserts that the claim is equivalent to 300 law enforcement officers or five fire/rescue stations. Eric deserves to be compensated for his injuries caused by the negligence of Deputy Thieman, but it would be unreasonable to waive sovereign immunity if the result is to cause severe reductions in government services to the citizens of Broward County.

The fiscal burden that would be associated with the Legislature's regular passage of $10, $20, and $30 million claim bills, especially for claims that will be paid by local governments, strongly suggests that a balance must be struck between the principle of sovereign immunity and the principle of fair compensation.

A trial court cannot set aside a jury verdict unless "it is so inordinately large as obviously to exceed the maximum reasonable range within which the jury may reasonably operate." See Kaine v. Government Employees Insurance Company, 735 So. 2d 599 (Fla. 3d DCA 1999). However, that legal principle is not applicable to a claim bill. The payment of a claim bill is a matter of legislative grace and the Senate is free to deviate from a jury award. When very large claim bills are filed, it is reasonable for the Senate to

consider, among other factors, whether the amount of a claim deviates substantially above or below the median jury verdict for similar injuries. This was my reasoning when I recommended that the Senate pay a smaller amount to the claimant in SB 30 (2008), because the $5.5 million jury award was at the extreme high end of awards for similar injuries (severe fracture to one leg without paralysis). The Senate passed the claim bill after reducing the award to $4 million.

In one sense, a price cannot be put on the loss of a normal life and the hardships associated with permanent physical injuries. However, that is exactly the task that juries are given in personal injury cases. At the request of the Special Master, the parties submitted jury verdict data for cases involving permanent brain injuries. The information was inadequate to allow a median award to be stated with confidence, but it is likely to be under $20 million.

Because 1) reasonable questions have been raised about the validity of SB 68's provision for the assignment of the BCSO's legal claims, 2) payment of the claim bill by Broward County will cause severe fiscal impacts to the citizens of Broward County, and 3) alternative awards and compensation mechanisms have not been adequately explored, I believe the Senate should decline to pass this bill until these issues are satisfactorily addressed.

LEGISLATIVE HISTORY:

This is the second claim bill presented to the Senate in this matter. The first claim bill was amended and passed by the Senate, but died in the House.

ATTORNEY'S FEES AND LOBBYIST'S FEES:

Claimant's attorney has agreed to limit attorney's fees and lobbyist's fees to 25 percent of the claim paid.

OTHER ISSUES:

Section 4 of SB 68 requires that attorney's fees and other costs "shall be paid only to the claimant's currently retained attorneys and lobbyists." The law firm of Searcy Denny Scarola & Shipley objects to this provision because the firm claims to have incurred over $1 million in fees and costs in representing the Claimant while the Claimant's current attorney was an employee of the law firm. I recommend

that the Senate not allow the claim bill to be used to advance the interests of one party in this private dispute.

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 68 (2010) be reported UNFAVORABLY.

Respectfully submitted,

Bram D. E. Canter
Senate Special Master

cc: Senator Mike Fasano
Philip Twogood, Secretary of the Senate
Counsel of Record