THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
11/1/11	SM	Fav/1 amendment
	RC	

November 1, 2011

The Honorable Mike Haridopolos
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 4 (2012)** – Senator Lizbeth Benacquisto
Relief of Eric Brody

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM FOR $15,575,021.30 OF LOCAL MONEY BASED ON A JURY AWARD AGAINST THE BROWARD COUNTY SHERIFF'S OFFICE TO COMPENSATE CLAIMANT ERIC BRODY FOR THE PERMANENT INJURIES HE SUFFERED IN A COLLISION WITH 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 severe 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 an induced coma for about six months. After the coma, Eric had to learn to walk and talk again. Eric is now 32 years old and 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 are impaired. Eric's mother believes his judgment has also 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 his injuries and it is now 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. The paramedics who arrived at the scene of the crash 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 in the crash.

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 is consistent with the claim that he was wearing his seatbelt at the time of the collision. I conclude 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.

A 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. 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 and, in any event, Thieman could have avoided the collision by continuing straight ahead. 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 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 his future care would cost $5 to $7 million.

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 BCSO. In December

2005, after a lengthy trial, 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. Post-trial motions for new trial and remittitur were denied. The verdict was upheld on appeal.

The BCSO paid the $200,000 sovereign immunity limit under s. 768.28, Florida Statutes. The payment was placed in a trust account and none of it has been disbursed. Attorney's fees and costs have not been deducted. Eric Brody has received nothing to date.

CONCLUSIONS OF LAW:

The claim bill hearing was a *de novo* proceeding to determine, based on the evidence presented to the Special Master, whether the BCSO is liable in negligence for the damages 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 acted reasonably in assigning no fault to Eric.

At the claim bill hearing, Claimant's counsel urged the Special Master to determine that the liability insurer for the BCSO, Ranger Insurance Company 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 BCSO. 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, I did not take evidence nor make a determination regarding the bad faith claim.

Modification of the Claim

SB 42 (2011), which passed the Senate, but not the House of Representatives, required the BCSO to pay the $31 million claim, but stated that, in lieu of payment, the BCSO could assign its bad faith claim against its insurer to the Brodys and, if it assigned its claim, the BCSO was not required to pay the $31 million. The BCSO and the Brodys entered into an agreement in which the BSCO agreed to assign its bad faith claim against its insurer to Brody in exchange for the Brodys' release of liability against the BCSO, but the Brodys have not yet executed the release of liability.

This year, SB 4 reduces the claim amount to about $15.6 million. The bill makes no mention of an option for the BCSO to avoid payment of the $15.6 million by assigning its bad faith claim to the Brodys, but that option appears to be presumed.

Ranger Insurance Company objects to SB 4, claiming that it is "an unconstitutional bad faith litigation authorization bill" masquerading as a claim bill. I do not agree that SB 4 authorizes the bad faith litigation. The authority for the bad faith claim and for the assignment of the claim exists independent of Senate action. There is no legal precedent which assists in analyzing this issue. However, I do not see a constitutional bar to the Senate's passage of a claim bill that orders a respondent to pay a claim that might be (or is even expected to be) resolved by a release of the respondent's liability by the claimant for valuable consideration. If Ranger Insurance Company is right, that the BCSO cannot avoid paying the claim via its agreement with the Brodys, then Eric Brody will be paid by the BCSO as provided by SB 4.

ATTORNEYS FEES:

In compliance with s. 768.28(8), Florida Statutes, the Claimant's attorneys will limit their fees to 25 percent of any amount awarded by the Legislature.

SPECIAL ISSUES:

In my report for SB 42 (2011), I urged the Senate to consider the unusual size of the claim bill (about $31 million) and the substantial 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. I suggested that a balance should be struck between the principle of sovereign immunity and the principle of fair compensation, and recommended that the award be reduced to $15 million. It is still my recommendation that the award should not exceed $15 million, to avoid a precedent for the escalation of claims.

On page 5 of SB 4 is a whereas clause setting forth allegations related to the bad faith claim. Because the bad faith claim was outside the scope of the claim bill hearing and no findings of fact or conclusions of law were made regarding that claim, SB 4 should be amended to delete the whereas clause.

Section 4 of SB 4 directs that half of the State's lien interests will not be waived and that the Claimant's guardianship shall reimburse the state for half of the expenses of Medicaid, Medicare, or the Agency for Health Care Administration. The settlement of lien interests can be a complex matter and is normally not addressed in a claim bill. The settlement of lien interests is negotiable, but is subject to the requirements of federal law. The outcome cannot be dictated by a state. SB 4 should be amended to delete Section 4.

RECOMMENDATION:

For the reasons set forth above, I recommend that Senate Bill 4 (2012) be reported FAVORABLY, as amended.

Respectfully submitted,

Bram D. E. Canter
Senate Special Master

cc: Senator Lizbeth Benacquisto
Debbie Brown, Secretary of the Senate
Counsel of Record

Attachment

591722

LEGISLATIVE ACTION

Senate . House

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The Special Master on Claim Bills recommended the following:

Senate Amendment (with title amendment)

Delete lines 178 - 180

and insert:

warrant payable to the Guardianship of Eric Brody in the sum of $15,000,000

Delete lines 191 - 199.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete lines 129 - 141.


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