



THE FLORIDA SENATE
SPECIAL MASTER ON CLAIM BILLS

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November 24, 1998

<u>SPECIAL MASTER'S FINAL REPORT</u>	<u>DATE</u>	<u>COMM</u>	<u>ACTION</u>
The Honorable Toni Jennings	11/25/98	SM	Favorable
President, The Florida Senate	12/03/98	RC	Favorable
Suite 409, The Capitol	1/7/99	FR	Favorable
Tallahassee, Florida 32399-1100			

Re: SB 24 - Senator Walter Campbell
Relief of Estate of Charlie Brown, Jr.

THIS IS A SETTLED CLAIM FOR \$80,000, BASED ON A JURY VERDICT AND EXCESS FINAL JUDGMENT AGAINST THE CITY OF DELRAY BEACH TO COMPENSATE THE ESTATE OF CHARLIE BROWN, JR., FOR DAMAGES BROWN SUSTAINED AS A RESULT OF THE CITY'S NEGLIGENCE IN MISPLACING EVIDENCE OF AN ACCIDENT THAT CRITICALLY INJURED BROWN. THIS BILL AUTHORIZES THE CITY TO PAY THE CLAIM FROM ITS OWN REVENUES.

FINDINGS OF FACT:

Charlie Brown, Jr., was riding his bicycle down Lake Ida Road in the City of Delray Beach when he was struck from behind by a car that immediately left the scene. This hit and run accident occurred on November 25, 1987 at about 10:30 p.m.

Lake Ida Road is a narrow, 2 lane highway. The night was misty and cloudy. Near the accident, street lighting was minimal. Brown was not wearing reflective clothing. He was riding on the roadway and not on a nearby bike path.

Sadly, Brown was critically injured and brain damaged. At the time of the accident he was 35 years old and the father of a 6 year old daughter. Brown was hospitalized

for a significant amount of time and then cared for by his father. Sometime after his father died, Brown was institutionalized until his death on May 4, 1997.

City police investigate; suspect charged. The city police investigated the accident, taking photographs at the scene and confiscating Brown's orange ten-speed bicycle for investigation. Several eyewitnesses reported seeing a small blue foreign car, possibly a Nissan, strike Brown from behind and then race away from the scene. One eyewitness told police that she attempted to pursue the blue four-door Nissan but it was traveling too fast for her to keep up with and it deliberately turned its lights off to avoid detection.

Six days after the accident, the police impounded Maria Heredia's blue/silver 4-door Nissan Sentra after it was observed parked in a nearby neighborhood in Delray Beach. The car had right front end impact damage to the bumper and splash guard, along with fresh scratches on the right side of the car from the front wheel to the rear door. Heredia admitted she had been driving the car on Lake Ida Road at the time of the accident, but she denied that she hit anyone. She admitted she was not wearing the prescription eye glasses she was supposed to wear when driving.

The Nissan and Brown's orange ten-speed bicycle were inspected and tested by the police. The investigating officer's affidavit stated that "small amounts of orange paint transfer were found on the vehicle along with fresh rubber transfer." Heredia was arrested and charged with leaving the scene of an accident involving personal injury.

Negligent evidence handling. Brown retained attorney Charles Nugent to represent him in a civil claim against Heredia. According to an affidavit filed by Nugent, he repeatedly spoke to Delray Beach Police Department officials, requesting permission to have his experts inspect and analyze the physical evidence held by the department. The department refused to allow inspection of the evidence while the criminal investigation was pending. Attorney Nugent was repeatedly assured that

the evidence would be maintained and safeguarded by the city police and would eventually be made available to his experts. Because of these assurances, Brown's attorneys simply waited for the city to make the evidence available to them, rather than going to court to get an order allowing Brown's experts to test and inspect the evidence.

The department lost, misplaced, or accidentally discarded some of the evidence and the state attorney subsequently dismissed the criminal charge brought against Heredia. No one advised Brown's attorneys. Later, Heredia filed a motion with the criminal court to obtain her impounded car. Again, no one advised Brown's attorneys and with no objections filed, the court ordered the police to return Heredia's car to her.

Several months later, the city allowed Attorney Nugent to take possession of Brown's bicycle. Nugent was provided a rear wheel that was detached from the bicycle and was undamaged. However, the rear wheel photographed at the accident scene was severely damaged. City police advised Nugent that they had discarded other evidence taken from Heredia's car. Because of the missing pieces of evidence, Brown's experts were not able to connect Heredia's car to the hit and run accident.

Brown sues city for negligent evidence handling. Brown then filed a civil action against the city for negligent destruction or spoliation of evidence. Brown's complaint alleged that the city negligently failed to preserve and safeguard the physical evidence and failed to alert him in a timely fashion so that he could conduct his own investigation. As a result of this negligence, the complaint further alleged that Brown lost the ability to recover in a civil action against the Heredias. Brown also sued Maria Heredia and her husband, Edurado Heredia, in a second count of the complaint. However, the Heredias obtained a summary judgment on the grounds that there was no substantial evidence tending to show that their car was involved in the hit and run accident.

Before trial, the city moved for summary judgment on the following grounds:

- the city owed Brown no duty to retain evidence for his future civil action;
- even if it had such a duty, the city is immune since evidence retention is a discretionary function; and,
- Brown cannot prove causation, i.e., any breach of duty by the city cannot be proven to have caused Brown's inability to recover against the Heredias.

In support of its motion, the city filed an affidavit from Sergeant Kenneth Herndon swearing that the police never found any traces of evidence on the Heredias' car and that the only material taken from the car was splattered bugs. This affidavit substantially conflicted with the probable cause affidavit charging Maria Heredia with leaving the scene of an accident in which another officer swore that "small amounts of orange paint transfer were found on the vehicle along with fresh rubber transfer." Despite this factual conflict, the trial court granted the city's motion stating that the city did not owe Brown a duty to retain evidence except for his own bicycle tire. The trial court also reasoned that Nugent's affidavit was conclusory in claiming that Brown's inability to collect damages from the Heredias was entirely due to the police having misplaced his bicycle's rear wheel.

Brown appealed the trial court's ruling and prevailed. *Brown v. City of Delray Beach*, 652 So. 2d 1150 (Fla. 4th DCA 1995). The appellate court concluded that the record, when read in the light most favorable to Brown, is sufficient to withstand summary judgment for the city. *Brown*, at 1154.

Jury verdict and final judgments. The case against the city was tried on August 19, 1996. The jury returned a verdict in favor of Brown for a total of \$400,000. The jury concluded that Brown's comparative negligence in the operation of his bicycle was 25 percent and reduced the verdict to \$300,000.

Brown was awarded attorney's fees and costs due to the city's rejection of Brown's Demand for Judgment. Final Judgment was entered against the city on December 17, 1996 in the amount of \$304,298.25 (interest from the date of the verdict included). An agreed final judgment of attorneys fees and costs for \$83,684.14 was entered on January 22, 1997.

The city paid \$100,000, the sovereign immunity cap on April 16, 1997. On July 13, 1998, the parties agreed to settle the excess judgment claim, including attorneys fees and costs, for \$80,000.

Brown's damages. Immediately after the accident, Brown was hospitalized for a significant period of time. He suffered multiple trauma, including severe facial and brain injuries. The accident split open the side of his head, crushed his face and jaw, and broke his left leg. Brown had several surgeries and had a feeding tube inserted.

Beginning in September 1988, Brown saw a neurologist, Dr. James Creveling. Brown could not walk well, fell often, and his gait and equilibrium were very poor. Brown's father took him to Dr. Creveling who concluded that Brown had suffered movement, mood and gait disorder caused by the accident. Nonetheless, Brown's father, who had become his sole caretaker, reported that Brown was able to accompany him to work and to go to the store by himself.

Brown saw Dr. Creveling periodically until October 1990. From that date he did not see Dr. Creveling again until September 1993. When he saw Brown in 1993, Dr. Creveling noted that Brown's health had significantly deteriorated. Although, Dr. Creveling testified that this deterioration was the natural progression of his injuries, Brown had been severely neglected after his father died in 1990 when Brown's extended family took over his care. Social workers discovered that Brown had been kept bedridden in a shed behind the house. He was likely malnourished. Dr. Creveling admitted that such an intervening event could have worsened his condition.

Brown was institutionalized until his death on May 4, 1997.

CONCLUSIONS OF LAW:

Each claim bill must be based on facts sufficient to establish liability and damages by a preponderance of the evidence. This is true even for a claim bill in which the parties have entered a settlement agreement, as the parties have here.

Liability. The elements of negligent destruction of evidence are:

1. existence of a potential civil action,
2. a legal or contractual duty to preserve evidence which is relevant to the potential civil action,
3. destruction of that evidence,
4. significant impairment in the ability to prove the lawsuit,
5. a causal relationship between the evidence destruction and the inability to prove the lawsuit, and
6. damages.

Continental Insurance Co. v. Herman, 576 So. 2d 313, 315, (Fla. 3d DCA 1990), *rev. denied*, 598 So. 2d 76 (Fla. 1991). Further, as the court recognized in *Brown v. City of Delray Beach*, 652 So. 2d 1150 (Fla. 4th DCA 1995), a claim for negligent destruction of evidence does not require establishing that the plaintiff would have succeeded if the evidence had been properly maintained, only that the destruction of evidence "cost [him] an opportunity to prove [his] lawsuit." *Id.* at 1154, quoting, *Miller v. Allstate Insurance Co.*, 573 So. 2d 24, 31 (Fla. 3d DCA 1990), *rev. denied*, 581 So. 2d 1307 (Fla. 1991).

I find the claimants have presented sufficient evidence on each of the above elements, thereby establishing the city's negligent destruction of evidence.

However, Brown was also at fault for failing to exercise reasonable care in riding his bicycle. The jury determined that Brown was 25 percent at fault. I find sufficient evidence to support the jury's verdict on this point.

Damages. I find there was sufficient evidence to support the jury's finding that the accident caused Brown's extensive injuries. The table below itemizes the jury's verdict award and describes the judgment claim amounts.

DESCRIPTION	AMOUNT
Jury verdict: past medical expenses and lost earnings	\$50,000
Jury verdict: future medical expenses and lost earnings	\$250,000
Jury verdict: past pain and suffering	\$50,000
Jury verdict: future pain and suffering	\$50,000
JURY VERDICT: TOTAL	\$400,000
Jury verdict: Brown's comparative negligence (25%)	-\$100,000
Final Judgment: (includes pre-judgment interest)	\$307,298.25
Final Judgment: attorneys fees and costs	\$83,684.14
Final Judgments: total city has paid	-\$100,000
Excess Judgment: difference between what county owes and what it has paid	\$290,982.39
TOTAL CLAIM: (Settlement Amount)	\$80,000

Given the extent of Brown's injuries, these damage awards are low. In my view the low award was possibly the jury's attempt to factor for the defendant's claim that the negligent care of Brown was an intervening event

aggravating his condition. I find there is sufficient evidence to support the damage award.

ATTORNEYS FEES:

Section 768.28(8), F.S., limits claimants' attorney fees to 25 percent of judgment or settlement obtained pursuant to the statute. Claimant's attorney submitted an affidavit stating that his fee arrangement complies with the statutory limitation.

SPECIAL ISSUES:

Brown died without a will. Brown's daughter, Nicola Brown, now 17, is the sole beneficiary of his estate. Nicola's mother, Diane Brown, has been appointed guardian of her property. Nicola is currently in high school and will reach legal adulthood on September 27, 1999. According to claimant's counsel, it is the Browns' intention "to establish a trust with the settlement proceeds which would be earmarked for her further education, health and welfare."

RECOMMENDATIONS:

Therefore, I recommend that Senate Bill 24, in the amount of \$80,000, be reported FAVORABLY.

Respectfully submitted,

Abel Gomez
Senate Special Master

cc: Senator Walter Campbell
Faye Blanton, Secretary of the Senate
Phillip Miller, House Special Master