THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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November 24, 1998

SPECIAL MASTER'S FINAL REPORT	DATE	COMM	ACTION
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	Fav/2 amend
Tallahassee, Florida 32399-1100			

Re: SB 48 - Senator Donald Sullivan
Relief of Paul W. Gilfoyle

THIS IS AN EQUITABLE CLAIM FOR $225,000 BASED UPON A SETTLEMENT AGREEMENT BETWEEN THE CLAIMANT'S GUARDIAN AND THE CITY OF CLEARWATER TO COMPENSATE THE CLAIMANT FOR INJURIES SUFFERED IN A MOTOR VEHICLE ACCIDENT INVOLVING THE CLAIMANT'S VEHICLE AND A CITY OF CLEARWATER POLICE CAR.

FINDINGS OF FACT:

1. The Accident

On September 5, 1993, at approximately 10:30 p.m., claimant Paul W. Gilfoyle was driving northbound on U.S. 19. Mr. Gilfoyle and his passenger, Walter Bryan, had just left the restaurant at which they ate dinner. With their dinner, each had consumed approximately 1½ glasses of wine. Mr. Gilfoyle proceeded North on U.S. 19 at a speed of approximately 65 miles per hour. The posted speed limit was 50 miles per hour.

At approximately 10:30 p.m., City of Clearwater Police Officer Alan Whitacre had just finished handling a call at the Ramada Inn at Countryside and U.S. 19 when he heard a call to provide backup to a police officer involved in a foot chase of a suspect who was armed with a gun. Officer Whitacre was one of a number of officers who responded to the call. Officer Whitacre was driving a City of Clearwater

police car southbound on U.S. 19 at a speed of approximately 65 miles per hour with emergency lights and sirens on.

The two vehicles approached the intersection of U.S. 19 and Drew Street from opposite directions. At this intersection, U.S. 19 was a divided roadway, with three through lanes and a left turn lane on each side of the divider. Mr. Gilfoyle was northbound in the left-hand through lane, the through lane nearest the northbound left turn lane. He was driving slightly under 50 miles per hour. Officer Whitacre was southbound in the right-hand through lane, the through lane furthest from the southbound left turn lane. Officer Whitacre was braking from 65 miles per hour to 35 miles per hour, intending to turn left onto Drew Street from the right-hand through lane. The light was green for North/South traffic.

Officer Whitacre did not see Mr. Gilfoyle until a split second prior to impact. His view was partially blocked by a line of cars stopped in the northbound left turn lane. He did see a car stopped in the right-hand through lane and a car stopping in the center through lane. He did see northbound cars go through the intersection in front of him before he reached the point of impact.

It is unclear when Mr. Gilfoyle first saw Officer Whitacre. The investigating officer wrote that the northbound left turn lane was blocked with vehicles, which may have prevented both drivers from seeing the other. Although others at the scene could see Officer Whitacre, none of them was in a position for the line of cars to affect the view of Officer Whitacre. One of these witnesses, who was driving behind Mr. Gilfoyle, stated that she did not think that either driver could see the other's vehicle. Mr. Gilfoyle's passenger did not see the patrol car until a split second prior to impact.

Additionally, some of the witnesses stated that they could hear a siren while some did not. Some specifically stated that they did not hear a siren. Mr.

Gilfoyle's passenger stated that he did not hear a siren.

Mr. Gilfoyle entered the intersection just as Officer Whitacre made his left turn across Mr. Gilfoyle's path. Approximately two-tenths of a second and 15 feet before impact, Mr. Gilfoyle hit his brakes and attempted to swerve right to avoid the collision. He was too late, and, at approximately 10:39 p.m, the two vehicles collided. Mr. Gilfoyle's speed at impact was approximately 45 miles per hour; Officer Whitacre's speed was approximately 35 miles per hour. Mr. Gilfoyle was not wearing a seat belt at the time of the accident.

At approximately 2:30 a.m., blood was drawn from both Mr. Gilfoyle and Officer Whitacre. Mr. Gilfoyle's blood alcohol level was .03.

2. Claimant's Injuries

As a result of the accident, Mr. Gilfoyle received a catastrophic closed head injury and went into a coma. He had bleeding between the membranes of his brain. He was completely non-responsive; when medical professionals provided a stimulus, he did not open his eyes and there was no verbal or motor response. He had to have breathing and feeding tubes inserted. He also had a collapsed lung and a fractured pelvis.

Mr. Gilfoyle came out of the coma early in 1994. Although he could recognize people he knew, he could not speak and had no controlled coordination, so he could not communicate in any way. He had a shortening of connective tissues of the hands and feet that resulted in an inability to use his hands or to walk. He remained dependent upon the feeding tube. He was incontinent as to bowel and bladder control.

As time passed, they began switching him back and forth from the feeding tube to spoon feeding. He had physical therapy and had surgery on his hands and feet. He gained a very limited mobility. With help, he could move from the bed to a wheel chair. He could

propel himself a few feet in the wheel chair. However, his hands remained of limited use due to the continuing limitations on range of motion. He remained incontinent as to bowel and bladder control. He still could not speak and communication was very limited. His cognitive abilities were limited. He was found to be depressed, frustrated, and hopeless, with suicidal thoughts. He developed behavioral problems.

The prognosis is for little improvement. He is bedfast for the most part and sleeps off and on throughout the day. He cannot express his wants and needs. He remains frustrated and at times lashes out at medical personnel. He requires 24 hour care.

3. Damages

Both parties hired medical professionals to do a "life care plan" on Mr. Gilfoyle. A life care plan is a statement of the individual's needs related to his health care from that point until the end of his life expectancy. Each party then had an economics professional calculate the present value of the expenses indicated in the life care plan and of past and future losses in earnings.

The Guardian's expert did a life care plan in July of 1994, with an update done in October of 1996. A professional appraiser then determined the present value of past and future medical expenses and past and future earnings. As of September 22, 1993, the actual past medical expenses were $243,503.98. The expert determined that the present value of the future medical expenses in the life care plan was $4,309,466.80. As to lost earnings, the expert determined that past lost earnings were $94,864.25 and that the present value of future lost earnings was $1,298,015.05. Finally, the expert determined that there would be a loss in Social Security retirement benefits of $4,784.52. The total amount of these expenses and losses is $5,950,079.

The City of Clearwater's medical expert did a life care plan in October of 1996. In 1997, the city's

economist determined that the present value of future medical expenses would fall within a range of $659,756 - 836,250. The expert determined that the present value for past and future lost earnings was $908,324. The total of these amounts, using the highest medicals, is $1,744,574. The city did not provide any evidence as to any determinations its expert may have made relating to past medical expenses or any Social Security losses.

If, for purposes of comparison, the Guardian's expert's past medical expenses and lost Social Security payments are added, the total is $1,992,862.24. There is a difference of approximately $395,720 between the two total damage amounts, resulting primarily from the difference between the two determinations of present value of future medical expenses.

The latest information on Mr. Gilfoyle's past medical expenses is a statement from his Guardian's attorney that as of October 6, 1998, these expenses exceed $1,120,000.

The present value of both Mr. Gilfoyle's future medical expenses and his future lost earnings is speculative. According to the Guardian's economic valuation expert, Mr. Gilfoyle's expected life span in 1996 was 27.6 years; however, the city's expert stated that Mr. Gilfoyle's expected life span at that time was 20.5 years. Both of these figures appear to have come from standard mortality tables, not from any expert medical opinion. Mr. Gilfoyle's life expectancy may well be shorter than standard. For example, he has had recurrent pneumonia and had one episode that was bad enough that his physicians contacted his Guardian and told her that he may need to be placed on life support within 24 hours. The situation was bad enough that the Guardian made funeral and burial arrangements at that time.

As to Mr. Gilfoyle's lost future earnings, between 1987 and 1993, he had four different employers. He worked for small companies in an increasingly

competitive job market of computer software development. Additionally, they did not provide any evidence to support the statements, the city's attorneys have stated that Mr. Gilfoyle has had problems with the Internal Revenue Service and declared bankruptcy in 1989, which they believe could have affected his employability as an executive officer of a company.

4. Legal Proceedings

As a result of Mr. Gilfoyle being in a coma, on September 29, 1993, an order was entered determining that Mr. Gilfoyle was totally incapacitated and that a plenary guardian should be appointed. On that same date, letters of plenary guardianship of the person and property of Mr. Gilfoyle were issued naming his daughter, Anne-Marie Cheroke Lindsey, as his guardian.

On February 24, 1995, Mrs. Lindsey filed a lawsuit against the City of Clearwater in her capacity as Mr. Gilfoyle's guardian. In June of 1998, a Stipulation and Joint Motion for Approval of Settlement was executed and filed. A hearing was held on the Motion on June 23, 1998, and an Order Approving Settlement was entered on that date.

The Settlement Agreement provides: for payment of $325,000, with $100,000 to be paid by the City of Clearwater and the remainder to be sought in a claim bill; that the city will not oppose a claim bill in this amount; and that, if the Legislature passes a claim bill in an amount in excess of $225,000, the claimant expressly waives any effort to collect, any entitlement to, or any payment of the amount in excess of $225,000.

The Stipulation and Joint Motion for Approval of Settlement states that Plaintiff agrees to pay her attorneys a sum equal to 25 percent of the gross recovery.

On July 7, 1998, a joint Stipulation of Dismissal with Prejudice was filed and an Order of Dismissal with Prejudice was entered.

CONCLUSIONS OF LAW: In determining causation and liability, there are five factors to consider: Mr. Gilfoyle's consumption of alcohol prior to the accident; Mr. Gilfoyle's speeding prior to the accident; Officer Whitacre's actions in making the turn; Mr. Gilfoyle's failure to yield to an emergency vehicle; and Mr. Gilfoyle's failure to wear a seat belt.

1. Consumption of Alcohol

   Approximately four hours after the accident, Mr. Gilfoyle's blood alcohol level was .03. Section 316.1934, F.S., provides that with a blood alcohol level of .05 or less, "it is presumed that the person was not under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired." There is no evidence of impairment to overcome this presumption. On the contrary, Mr. Gilfoyle's passenger, Walter Bryan, indicated that he had ridden Mr. Gilfoyle on prior occasions and that he was driving as he usually did, that there was nothing unusual. Mr. Bryan indicated that Mr. Gilfoyle did not seem impaired in any way.

2. Mr. Gilfoyle's Speed

   Both case law and the statutes provide that failure to obey traffic control statutes may be considered as evidence of comparative fault in civil actions. *Ridley v. Safety Kleen Corporation*, 693 So.2d 934, 936 (Fla. 1996) and §316.614(10), F.S. At least two eyewitnesses to the accident and the events preceding it stated that Mr. Gilfoyle had been speeding prior to the accident. However, both the police officer who initially investigated the accident and the two experts who reconstructed the accident determined that Mr. Gilfoyle had slowed prior to the accident. The police officer did not attempt to determine Mr. Gilfoyle's speed. The two experts in accident reconstruction determined that he was driving below the speed limit just prior to impact and that there was no significant slowing due to braking just prior to the impact. As such, his previous speeding did not contribute to causing the accident.

3. Officer Whitacre's turn

   Case law provides that a police officer who is in pursuit of a fleeing offender has a duty to operators of other motor vehicles to conduct the pursuit in a manner that is consistent with reason and public safety. *e.g.*, *City of Pinellas Park v. Brown*, 604 So.2d 1222, 1227 (Fla. 1992).

Similarly, section 316.072, F.S., provides specified privileges concerning traffic regulations for drivers of emergency vehicles. The section provides that the driver of an authorized emergency vehicle, when responding to an emergency call, may disregard regulations governing direction or movement or turning in specified directions, so long as the driver does not endanger life or property. The section provides that the privileges provided therein do not relieve the driver of an emergency vehicle from the duty to drive with due regard for the safety of all persons and do not protect the driver from the consequences of his or her reckless disregard for the safety of others.

Finally, section 316.126, F.S., provides that all drivers of motor vehicles are to yield to emergency vehicles when the emergency vehicle is giving audible signals by siren or visible signals by displayed blue or red lights. However, the section also provide that it does not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway. Additionally, the section is not to be interpreted to diminish or enlarge any rules of evidence or liability in any case involving the operation of an emergency vehicle.

Officer Whitacre himself stated that his duty in making a left turn under emergency conditions was "to enter and pass through the intersection after having made sure it was clear of any oncoming vehicles." However, according to the investigating officer who filled out the traffic accident report, she listed Officer Whitacre's speed at the time of the accident as 25 miles per hour because he told her that was the speed he was driving. This was a busy intersection, with three through lanes and a left turn lane on each side of the divider. Officer Whitacre stated that there was a blind spot, that his view was partially blocked by a line of stopped cars in the northbound left turn lane. He said he saw northbound cars go through the intersection in front of him before he reached the point of impact, indicating that the

drivers of these cars probably were unaware of him. Under such circumstances, slowing to 25 miles per hour is not a sufficient safeguard for the safety of other drivers and endangers the life or property of those other drivers. It is not consistent with reason and public safety and does not evidence a "due regard for the safety of all persons." Therefore, Officer Whitacre breached his duty of care to other drivers, including Mr. Gilfoyle.

Additionally, although it does not appear to have been a factor in causing the accident, Officer Whitacre's left turn from the right hand through lane was not safe, particularly when combined with his speed. The evidence indicates that Mr. Gilfoyle, and probably the other northbound drivers who came through the intersection in front of Officer Whitacre before he reached the point of impact, did not see Officer Whitacre before entering the intersection. However, if Mr. Gilfoyle had seen Officer Whitacre prior to this time, he would have seen a police car proceeding southbound in a right-hand through lane in the process of braking from a speed of 65 miles an hour. This would not give Mr. Gilfoyle any reasonable indication that the police car was soon to turn across his path. In fact, the driver of the vehicle approximately 100 yards behind Mr. Gilfoyle and in the same lane stated "[t]he guy who was driving the Cadilic (sic) probably thought he (Officer Whitacre) was going straight at that rate of speed."

Officer Whitacre stated that he made the left turn from the right-hand through lane because he was taught that it was safer to make the turn in this manner in emergency situations. However, this method of turning would always involve a risk when other vehicles were in the vicinity and is dangerous and negligent when done in a busy intersection.

4. Failure to yield

As is discussed above, section 316.126, Florida Statutes, requires drivers of motor vehicles to yield to emergency vehicles which are giving audible or visible signals. Specifically, the statute provides that

an operator of a motor vehicle must "yield the right-of-way to the emergency vehicle and shall immediately proceed to a position parallel to, and as close as reasonable to the closest edge of the curb of the roadway, clear of any intersection and shall stop and remain in position until the authorized emergency vehicle has passed, unless otherwise directed by any law enforcement officer."

However, as has been discussed previously, the evidence indicates that Mr. Gilfoyle was unaware of Officer Whitacre until approximately two-tenths of a second before impact. He neither heard audible signals nor saw visible signals in time to yield safely prior to entering the intersection.

5. Seat belt

Section 316.614 of the Florida Statutes is the "Florida Safety Belt Law." It provides that it is unlawful for any person to operate a motor vehicle in this state unless the person is restrained by a safety belt. Failure to wear a seat belt while operating a motor vehicle does not constitute negligence per se and cannot be used as prima facie evidence of negligence, but it may be considered as evidence of comparative negligence. The failure to wear a seat belt is an affirmative defense. The basis for this defense is that the failure to use an available, functioning seat belt either caused or measurably worsened the plaintiff's injuries that resulted from the defendant's actions, and as a result, the plaintiff's recoverable damages should be barred or reduced. *Ridley v. Safety Kleen Corporation*, 693 So.2d 934, 938 (Fla. 1996).

Mr. Gilfoyle was not wearing his seat belt at the time of the accident. An expert witness analyzed Mr. Gilfoyle's accident and injuries. The expert is both a physician and an engineer, and does consulting in injury causation analysis where mechanical forces have contributed to the cause of injuries to humans. He concluded that had Mr. Gilfoyle been wearing his available seat belt, he would not have hit his head on the windshield and would not have received a

significant closed-head injury. Had he had his seat belt on, Mr. Gilfoyle's injuries would have been bruising along the routing of the seat belt and lacerations to the face, such as lacerations of the lip area or the chin or a bloody nose.

6. Causation and liability

Two factors contributed to causing Mr. Gilfoyle's injuries, Officer Whitacre's negligence in making his left turn and Mr. Gilfoyle's negligence in not wearing his seat belt. Officer Whitacre's negligence was significant in causing the accident. However, although Mr. Gilfoyle's failure to wear his seat belt was not a factor in causing the accident, it was the major factor in causing his injuries. If Mr. Gilfoyle had been wearing his seat belt, he still would have received injuries, but they would have been relatively minor. He would have suffered bruising along the seat belt, perhaps even the collapsed lung, and some facial lacerations. He would have lost his car. He would not have had any of the major, long-term expenses he has had with the catastrophic head injury.

If Mr. Gilfoyle had been wearing his seat belt, his economic damages would have been much less, perhaps in the range of $100,000-200,000. This is approximately 3 percent of the present value of the total damages as determined by the Guardian's expert and approximately 10 percent of the present value of the total damages as determined by the city's expert.

Officer Whitacre's negligence is therefore found to be 5 percent of the causation of Mr. Gilfoyle's injuries while Mr. Gilfoyle's own negligence is found to be 95 percent of the causation. Five percent of the highest figure for total damages, $5,950,079, is approximately $297,500. The settlement was for $325,000, and future litigation expenses are avoided. The settlement is therefore reasonable.

SPECIAL NEEDS TRUST AND MEDICAID:

Mr. Gilfoyle has received and is receiving Medicaid FUND benefits. To preserve Mr. Gilfoyle's Medicaid eligibility, to protect the funds to be received pursuant to this bill, to provide for Mr. Gilfoyle's supplemental needs, and to ensure proper expenditures, Mr. Gilfoyle's Guardian has created a Special Need Trust to receive all the funds, minus attorney's fees and costs. Mr. Gilfoyle's Guardian is the trustee.

The Legislature has the option of directing that the money from this claim bill be paid into the Trust, with Medicaid to be reimbursed from funds remaining at Mr. Gilfoyle's death, or of requiring that Medicaid be reimbursed before anything is paid into the Trust. Given Mr. Gilfoyle's past and projected medical expenses, the money should be paid into the Trust and Medicaid reimbursed with remaining money at his death. To do otherwise would defeat the purpose of this claim bill.

ATTORNEY'S FEES: Section 768.28(8), F.S., provides that no attorney may charge or receive legal fees in excess of 25 percent of any judgment or settlement. The Stipulation and Joint Motion for Approval of Settlement states that "Plaintiff has agreed to pay her attorneys . . . an attorney's fee for their representation in this action, in a sum equal to 25 percent of the gross recovery."

The bill provides two general uses for the $225,000 which it directs to be paid. The money is to be used to pay legal fees incurred on Mr. Gilfoyle's behalf as a result of the accident and to fund a special needs trust for the future care of Mr. Gilfoyle. A statement was provided as to the proposed distribution of the $225,000 sought in the claims bill. The statement provides, in part, that 25 percent will be used for attorney fees and that $6,000 will be used for legal fees for preparation of Special Needs Trust. Such payments of legal fees would appear to be contrary to the limitations of §768.28(8), F.S.

RECOMMENDATIONS: Accordingly, I recommend that SB 48 be reported FAVORABLY.

Respectfully submitted,

Kevin Wiehle
Senate Special Master

cc: Senator Donald Sullivan
Faye Blanton, Secretary of the Senate
John Topa, House Special Master