

STORAGE NAME: h0527.hcl

DATE: March 15, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
HEALTH CARE LICENSING & REGULATION
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

SPECIAL MASTER'S FINAL REPORT

The Honorable John Thrasher
Speaker, Florida House of Representatives
420 The Capitol
Tallahassee, Florida 32399-1300

Re: HB 527 - Representative Gay
SB 16 - Senator Geller
Relief of Jeremy Stewart

THIS IS A VIGOROUSLY CONTESTED EXCESS JUDGMENT CLAIM FOR \$1,544,407 BASED ON A JURY VERDICT AGAINST THE CITY OF SANIBEL TO COMPENSATE JEREMY STEWART FOR PHYSICAL INJURIES, ECONOMIC LOSS, AND PAIN AND SUFFERING HE SUSTAINED WHEN THE MOTORCYCLE HE WAS DRIVING WAS STRUCK BY AN UNMARKED CITY OF SANIBEL POLICE CAR BEING DRIVEN AT AN EXCESSIVE RATE OF SPEED BY A CITY OF SANIBEL POLICE OFFICER WHO LOST CONTROL OF HIS VEHICLE WHILE RESPONDING TO A ROUTINE BACK-UP CALL.

FINDINGS OF FACT:

THE CRASH: At 1:41 a.m. on July 18, 1995, Jeremy Stewart was seriously injured while riding his motorcycle in a lawful manner in Sanibel. An on-duty Sanibel police officer, responding to a routine back-up call, was driving an unmarked police car at an excessive rate of speed on a wet road. He lost control of his vehicle. The police vehicle, showing no emergency equipment, crossed the center line and struck Jeremy's motorcycle head-on in Jeremy's lane of traffic. Jeremy went flying through the air and landed on the side of the road.

INJURIES: Jeremy was unconscious at the scene and airlifted to Lee Memorial Hospital. For a day or so he was believed by his parents to be teetering between life and death. Jeremy suffered intra-abdominal bleeding necessitating emergency surgery and the removal of his spleen which had been "ripped up" in the impact. Jeremy also had a compound fracture of his left, upper arm bone breaking through his skin. He was hospitalized for 6 days. He developed radial nerve palsy of the left arm, causing wrist-drop that rendered his left hand virtually useless. He was then confined to his home in a hospital-type bed for approximately one month. He spent the next 2 to 3 months in an arm cast. In addition, he had suffered multiple cuts and scarring throughout his body related to the crash and to the emergency surgery. Nine months later, Jeremy still had little use of his left arm and hand due to the radial nerve damage.

Jeremy's trauma physicians led him to a surgeon who specialized in repairing trauma-damaged limbs. Using Jeremy's 6th (extra) tendon, the surgeon recircuited nerves, tendons, and ligaments in a way that gave Jeremy basic "gross motor" usage of his left (dominant) hand. Although

he still has restricted side-to-side wrist motion, a claw effect when he draws his hand back, numbness on the tops of his second and third fingers, and greatly reduced strength in that hand, Jeremy considers the surgery a "good job." He basically had to relearn to use his left arm and hand.

More than 3 years after the crash, Jeremy still suffers from headaches, low back pain, neck pain, knee pain, occasional bleeding at the scar tissue, fatigue, difficulty sleeping, general aching, stiffness, limited range of motion, inability to write legibly, difficulty in buttoning his buttons, difficulty in tying his son's shoelaces, et cetera. Considering the severity of the trauma, a lot of these symptoms are likely to be permanent.

CLAIMANT'S BACKGROUND: At the time of the crash, Jeremy Stewart was just over 18 years of age. He had been working full-time in his father's business, hanging wall-paper and painting, and earning approximately \$23,000 per year. In addition, he also worked at a friend's business, installing car stereos.

Jeremy had dropped out of school in the eighth grade and tried home schooling which apparently was not a great success either. So, he made a friendly wager with his parents that if he could take and pass the GED exam, they would allow him to be an independent, outdoor-type, free-spirited individual, working full-time for his father in the wallpaper/painting business. He did just that. After the crash, Jeremy registered a community college remedial course, but he fell behind and was unable to finish, in large part, due to his inability to write legibly.

PROCEDURAL BACKGROUND OF CASE: This case was tried by jury in Lee County on April 22-24, 1997. Because Sanibel admitted liability at the trial, the sole issue was damages which the jury found as follows:

| | |
|---------------------------|----------------|
| Past Medical Expenses | \$ 62,407.81 |
| Future Medical Expenses | \$ 150,000.00 |
| Past Lost Wages | \$ 40,000.00 |
| Future Lost Wages | \$ 347,000.00 |
| Past Pain and Suffering | \$ 170,000.00 |
| Future Pain and Suffering | \$ 875,000.00 |
| | |
| Total Damages | \$1,644,407.81 |

A few days later, Sanibel filed a Motion for New Trial or Remittitur which the court denied. Then the city filed an appeal with the Second District Court of Appeal. On February 18, 1998, the appellate court upheld the jury's verdict, without an opinion.

The city (or its insurance carrier) has paid the initial \$100,000 authorized by law. The claimant's past medical expenses and past lost wages totaled \$102,407.81. The city concedes an obligation to pay another \$2,407.81 in satisfaction of these two elements of his damages, but calls the remaining award "excessive."

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UNDERCOVER
SURVEILLANCE:

In preparation for their legislative defense of this claim bill, and to support and illustrate their defense that Jeremy had exaggerated the extent of his physical injuries, the City of Sanibel and/or its insurance carrier, the Florida League of Cities, spent \$80,000 for a team of private investigators to follow, befriend, otherwise engage, and video record Jeremy's activities on his 2-week surfing vacation to Costa Rica in June 1998.

Once Jeremy's vacation plans were known, the investigators went under cover to intercept him and his traveling companion at the Miami International Airport, to purchase tickets on the same flight, to engage him in "friendly conversation," and to find out his travel plans, itinerary, and activities in Costa Rica. Once the friendship was established, the team of investigators apparently won Jeremy's confidence, in part, by unreeling several plausible cover stories--one of the young men was supposed to meet his girl friend in San Jose but she didn't show up--so he was just going to surf around for a couple of weeks. The other story was that the investigators were filming a rafting video for National Geographic and they were going to rent a fishing boat from "Juan" and go out into the open Pacific (where in fact Jeremy fought and caught an amberjack). The boat just happened to have some extra seats that Jeremy and his friend could have for free; and that Jeremy and his friend could also accompany them on a white-water rafting trip, for free, for the same reason. So, Jeremy and from two to four under cover investigators traipsed around Costa Rica, from one surfing spot to another. This was no deluxe holiday at a modern, air-conditioned, beach-front tourist hotel. They went from San Jose to Jaco to remote, mosquito-infested, primitive areas in the Pacific coastal area--Domenical, Hermosa Beach, Zancudo, etc. The routes were over primitive, rocky and rough roads well matched for the rented Suzuki Sidekicks used by both the claimant and the undercover teams. There were bars, drinking, and even a "15 gin" hangover for Jeremy, mixed in with the rafting, surfing, and fishing. This "holiday" lasted for about 2 weeks until, the investigators, having obtained as much information as they thought they were going to be able to extract from Jeremy, called off their part of the mission as Jeremy and his traveling partner began to suspect that the investigators were actually drug enforcement types.

The investigators recorded 10 reels of video tape that show Jeremy engaged in all levels of strenuous physical activity. He was surfing in 12 to 15 foot surf; he was helping carry a raft on top of his head; he was pulling himself up on the side of a boat; he was "fighting" a large game fish for somewhere between 15 and 45 minutes, etc.¹

CLAIMANT'S MAIN ARGUMENTS:

- The police officer was 100 percent responsible for the crash, which the city admitted.
- Jeremy Stewart was totally innocent; he did nothing to contribute to the crash. He was in his lane of traffic, lawfully driving, not speeding, and not under the influence of any alcohol, drug, or other illegal substance.
- The city stipulated at trial that Jeremy's actual past medical bills were \$62,407 and that that amount was reasonable for his injury level.
- The city stipulated, in closing arguments at trial, that Jeremy had lost \$40,000 in past income due to the injuries suffered in this crash.
- The city stipulated at trial that \$150,000 for Jeremy's future medical needs was a reasonable figure.
- Jeremy has not yet begun to experience fully all the significant future medical consequences of his trauma.
- The city did not challenge the reasonableness of future lost wages, either in the Motion for Remittitur or on appeal.
- Jeremy's loss of earned income is proven by a drop from \$23,000 in the year before the crash, to \$5,770 in 1997.
- Jeremy suffers the on-going effects of the severe injury to his left arm and hand, the removal of his spleen, back pain, and scarring.
- The jury's award of \$170,000 for past pain and suffering is reasonable because two separate, mock juries, empaneled by Jeremy's lawyer for separate dry run trials before the real trial, rendered "verdicts" of \$300,000 and \$100,000, and the real jury's award of \$170,000 is right in the middle of that range.
- Jeremy suffers continuing loss of strength, motor coordination, and dexterity in his dominant hand.

¹About a month before the Costa Rican trip, the city and/or its carrier, the Florida League of Cities, had Jeremy surveilled and video recorded over a 3 or 4-day period in Lee County. The videotape yields mixed inferences. For example, while leaving Publix, Jeremy carried his keyring in his left hand, but unloaded 4 bags of groceries, from the cart to his car, with only his right hand. While inspecting the engine of an unidentified car apparently parked in the rear service area of his friend's auto stereo shop, Jeremy held the hood up for several seconds with his left hand, but only long enough to insert the holding rod with his right hand. At that same location, Jeremy engaged in a brief game of Frisbee with four of his young co-workers, during which he caught and tossed the frisbee one time with his left hand; however, the precise moment of release is hidden behind an obstruction (dumpster or edge of nearby building), so it is not known if he "flicked" it or turned his whole torso to give the disc its forward speed. Several other Frisbee "catches" and "tosses" were right-handed.

- Jeremy will never be able to be a skilled craftsman in the wall paper hanging business--a trade practiced by three prior generations of Stewarts.
- Prior to the crash, there were 703 job classifications that Jeremy was fit for; now there are 436, mainly in the pizza delivery/cabana boy categories.
- Jeremy has no spleen and faces increased risk of death from infection and virus.
- Since the crash, Jeremy is easily fatigued. He has been able to do only several hours of work at a time.
- The fact that Jeremy does not let his pain make him an invalid should not be held against him. Although he can and does surf and snowboard, that does not mean that he is not doing these activities knowing full well that he will pay the price in pain.
- Jeremy's body is scarred.
- The big money issue is future pain and suffering. Using the "three times specials" rule of thumb, a long-standing popular adage, a jury could be expected to award up to \$1.8 million in future pain and suffering; and the actual jury award was less than half of the 3 times specials adage.
- The mock jury panels "awarded" Jeremy \$766,000 and \$1 million for future pain and suffering, and the real jury award was right in the middle.
- The trial judge specifically ruled that the future pain and suffering award was a reasonable award under the evidence before the jury.
- Jeremy has been through the court system, including winning the appeal brought by the City of Sanibel, which appeal was rejected by the appellate court.
- The City of Sanibel and its insurance carrier have brought this claim bill situation upon themselves. Prior to trial, the claimant offered to accept \$1,000,000 (the amount of insurance coverage) in full settlement of the claim. The City Council formally requested the carrier to pay the \$1 million limits of the policy. The carrier declined, apparently deciding to take the risk of a trial, and in fact had never made a pre-trial settlement offer. At trial, the attorney for the city suggested to the jury that \$600,000 would be an appropriate verdict. To the extent that Sanibel eventually is ordered by the Legislature to pay any excess over coverage, that will be a matter that Sanibel can resolve with its carrier.
- The city attempts to portray Jeremy as a bad and/or wild kid because he:

- has two children, each by a different mother, neither of whom he married;
 - has a large tattoo on his back;
 - at times has sported a pony tail;
 - drove a ninja-type motorcycle;
 - drives "flashy" low-rider cars with custom paint jobs and a lot of chrome;
 - occasionally drinks (and abuses) alcohol;
 - tried psychedelic-type mushrooms on an earlier vacation in Costa Rica; and
 - went into a convenience store at night wearing a ski-mask; but the fact is that . . .
- Jeremy Stewart voluntarily supports his two children and has a clean FCIC arrest record. Before this crash, had only one speeding ticket; and since the crash has had 3 minor infractions: expired tag (1996), improper equipment (1997), and a seat belt violation (1998).
 - The city doesn't contest liability.
 - Future medical expenses, future pain and suffering, and future wage loss awards are excessive and not realistically related to the claimant's actual present and likely future circumstances.

THE CITY'S MAIN ARGUMENTS:

- 1) **Future Medical Expenses** - The jury awarded Jeremy \$150,000 for future medical expenses premised on his projected need for significant medical care throughout his life due to the loss of his spleen and his high risk to life-threatening bacteria that require him to have immediate access to sophisticated medical facilities.

However, Jeremy vacationed in the rural areas of Costa Rica in 1997 and 1998, far from medical facilities, for weeks at a time.

According to Jeremy's own expert, Dr. Timothy Hughes, Jeremy should avoid excessive drinking because it will render him more susceptible to bacterial diseases which can lead to overwhelming sepsis, which without a spleen, can be fatal.

According to the private investigator's testimony at the Special Masters' hearing (which was not refuted by the claimant), Jeremy drank excessive amounts of alcohol during his recent trip to Costa Rica.

- 2) **Future Pain and Suffering** - The jury awarded Jeremy \$875,000 for future pain and suffering, premised on the expectation that his health had been significantly impaired resulting in his inability to work at his chosen trade.

However, the evidence is that Jeremy has been and is able to work, at least part-time, hanging wall-paper and painting. According to testimony by the private investigator, Jeremy claims to have earned

\$25,000 last year either wallpapering, painting, or in commission sales of stereo systems at a friend's shop.

While Jeremy claims to be unable to work more than 2 - 2½ hours a day due to his lack of stamina, the undercover videotapes show him continuously surfing for hours; white water rafting for extended periods of time; and spending the day actively deep sea fishing. According to the private investigator, and not refuted by the claimant, the claimant's recreational activities also included snowboarding in Colorado and hiking in the jungle of Costa Rica.

3) Future Wage Loss - The jury awarded the claimant \$347,000 for loss of wage earning ability. The award was premised upon Jeremy's contention that he has incurred a substantial diminution in job opportunities as a result of the crash. The award was based on the following assumptions:

- Jeremy would seek future employment.

However, according to Jeremy and the private investigator, Jeremy has not actively looked for work. In fact, he "bragged" that he will never have to work again when his money comes through because \$1 million invested at 10 percent, will provide him with \$100,000 a year which is more than enough to provide support for his children, and to fund his recreational lifestyle.

- Jeremy would be unable to return to any employment with his father in the wallpaper-hanging/painting business.

However, according to the claimant, his father, and the private investigator, Jeremy does still work for his father. According to the private investigator, Jeremy stated that he earns approximately \$25,000 a year (some of the income "off the books"), which is approximately \$2,000 more annually than what he was earning at the time of the crash.

- Jeremy was not expected to regain any significant dexterity in his left hand.

However, the videotapes provided by the private investigator show that Jeremy has regained significant dexterity in his left hand. He was videotaped tying ropes and securing articles in his car; carrying his surfboard and using a radio-type device; adjusting the drag on a fishing reel and repeatedly casting while fishing; holding a tow rope while being pulled by a small fishing boat; and operating a small underwater camera. He was even seen doing chin-ups with both arms and pulling himself up into the boat, using both hands and arms.

In addition to the above, future wage loss damages also assumed that Jeremy would be prone to fatigue and would lack the stamina necessary to engage in his chosen occupation. And, according to

Jeremy, his mother, and his father, he is unable to work longer than 2 or 2½ hours a day before experiencing exhaustion.

However, the videotapes show that the claimant is able to engage in strenuous recreational physical activities, including surfing during rough water conditions, white water rafting, hiking through jungle terrain, and deep sea fishing for many hours.

LEGISLATURE'S ROLE:

Some see the Legislature's role in claim bills against a municipality as merely rubber stamping and "passing through" for payment those jury verdicts that have been reduced to judgment and survived appeal, as this one has. Others see the Legislature's role as a *de novo* responsibility to review, evaluate, and weigh the total circumstances and type of the city's liability in the case, and to consider those factors that might not have been perceived by or introduced to the jury or court.

Whichever of these two views each lawmaker holds, at the Special Master's level every claim bill, whether based on a jury verdict or not, must be measured anew against the four standard elements of negligence.

In this case, the issue of liability (duty, breach, and proximate cause) has been admitted by the City of Sanibel.

STANDARDS FOR FINDINGS:

Findings of fact must be supported by a preponderance of evidence. The Special Master may collect, consider, and include in the record, any reasonably believable information that the Special Master finds to be relevant or persuasive. At the Special Master's level, the claimant has the burden of proof on each required element. However, in the final analysis, this is a legislative measure that, once the Master's report and recommendation are filed, can be lobbied in the Legislature, just as any other measure can be. Objections to the Special Master's findings, conclusions, and recommendations can be lobbied and addressed directly to the members of the Senate, either in committee, or individually, as the parties choose.

ATTORNEY'S FEES:

Section 768.28(8), F.S., limits claimant's attorneys' fees to 25 percent of claimant's total recovery by way of any judgment or settlement obtained pursuant to §768.28, F.S. Claimant's attorney has acknowledged this limitation and verified in writing that nothing in excess of 25 percent of the gross recovery will be withheld or paid to him or his firm or to any other lawyer as attorneys' fees.

CONCLUSIONS OF LAW:

Rather than the subjective, time-worn "shock the conscience" standard used by courts, for purposes of a claim bill a respondent that assails a jury verdict as being excessive should have the burden of showing the Legislature that the verdict was unsupported by sufficient credible evidence; or that it was influenced by corruption, passion, prejudice, or other improper motives; or that it has no reasonable relation to the damages shown; or that it imposes an overwhelming hardship on the respondent out of proportion to the injuries suffered; or that it obviously and grossly exceeds the maximum limit of a reasonable range within

which a jury may properly operate; or that there are post-judgment considerations that were not known at the time of the jury verdict.

For decades, a company called Jury Verdict Research has collected, classified, and analyzed virtually all reported personal injury and wrongful death cases in the United States. Using a formula based on a regression coefficient derived from a correlation analysis of total medical expenses, wage loss, and verdicts which have demonstrated a reliable linear relationship, the editors have reported a probability range of expected verdicts for males having similar age, work history, and level and types of injuries as that of Jeremy Stewart, adjusted for many factors including admission of liability, geographical variances, type of defendant, et cetera. Based on my review of their data, and allowing for additional subjective variance for the obvious intangible factors that each case presents, the jury's verdict in this case, based on the information known and presented to it at the time, was well within the range of expected verdicts reported by the editors.

RESPONDENT'S
ABILITY TO PAY:

The City of Sanibel has about 6,000 full-time residents and carries a peak season load of over 5 times that. Sanibel had an available \$1 million in pooled insurance coverage to pay toward the \$1,644,407 balance of the Final Judgment, leaving an uninsured liability of \$644,407, none of which was specifically budgeted in the FY 1998-99 budget; except that Sanibel historically carries about \$240,000 in a budgeted reserve for unforeseen legal contingencies or other operational or emergency needs.

So, the payment in one budget year of an award substantially in excess of \$1,000,000 is likely to result in a reduction in services or staffing, or the delay or cancellation of capital improvement projects, or the removal of any emergency cushion from the city budget.

The most recent financial statements of the City of Sanibel, prepared by its independent auditors, Schultz Chaipel & Co., L.L.P., shows as of September 30, 1997, an unreserved, undesignated reserve of about \$2.2 million in the general fund.

This money is customarily carried forward and reappropriated as a source of funds in the following fiscal year, but the City Council can and will decide that adjustment, if the Legislature directs the Council to budget part of that reserve for payment of part or all of the uninsured part of the Stewart claim, either in one lump sum, or staggered over several years.

GENERAL CONCLUSIONS:

Future Medical Expenses: The testimony of the experts and the action of the jury and judges who considered this case should be upheld in full as to this contested element of damages, even though the claimant appears, at times, to have contributed to the risk of exacerbation of his present and future medical conditions.

Future Wage Loss: The video surveillance illustrates that Jeremy Stewart is still able to participate in physically active recreational-type activities. However, it does not directly address or significantly compromise his

claim insofar as his fine motor skills ability, including using a screwdriver in his left hand (as would be required in the auto and home stereo business); or using a wall paper knife to cut fine lines along a straight edged tool used by wall paper hangers, or to do the detailed work required in the art of faux painting.

However, for the reasons explained above, and improvements in his ability to earn a living, I would decrease the contested future wage loss component from \$347,000 to \$200,000.

In hindsight, it turns out that during his surveillance, Jeremy told a lot of truth to the undercover investigators. I believe that his unguarded admission about his \$25,000 current income level is worthy of belief and not just the boasting by a person trying to impress his new friends.

Future Pain and Suffering: The picture that the jury got of Jeremy Stewart was one of a debilitated young man who was at the point of exhaustion virtually all the time; however, that is not how Jeremy Stewart actually lives. In my view, post-trial reality needs to be reflected in appropriate legislative adjustments to this component of the verdict. My recent personal observations and those brought to the Special Masters by the videotaped evidence lead me to recommend an adjustment in this contested component from the \$875,000 awarded by the jury, downward to \$600,000. The jury award of \$170,000 for past pain and suffering is supported and should be confirmed.

Claim bills, in the context of sovereign immunity, allow a "balanced view" of the claim, weighing the harm done by the public officer or entity with other factors arising before and after the trial of the case in court.

Accordingly, I recommend that the total award to Jeremy Stewart be adjusted from \$1,644,407.81 downward to \$1,222,407.81, as explained above.

SCHEDULING OF PAYMENT: As an accommodation to the City of Sanibel, and without working a significant detriment on Jeremy Stewart, I recommend that \$900,000 of the recommended \$1,222,407.81 be paid (by the carrier) when the bill becomes law; and the balance of approximately \$322,407 be split into two equal payments of approximately \$161,200 each, to be paid July 1, 2000, and July 1, 2001, all without interest. This arrangement will allow the City of Sanibel to budget for these payments in an orderly and non-disruptive way.

RECOMMENDATIONS: ACCORDINGLY, I recommend that House Bill 527 be reported FAVORABLY AS AMENDED.

Respectfully submitted,

Tonya Sue Chavis
House Special Master

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cc: Representative Gay
Senator Steven A. Geller
D. Stephen Kahn, Senate Special Master