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DATE: March 7, 2001

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SPECIAL MASTER'S FINAL REPORT

The Honorable Tom Feeney
Speaker, The Florida House of Representatives
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: HB 711 - Representative Meadows
Relief of Pamela McMahan San Juan

THIS IS A CONTESTED, VERDICT-BASED EXCESS JUDGMENT CLAIM FOR \$280,971.57 ON FUNDS OF ORANGE COUNTY TO COMPENSATE PAMELA MCMAHAN SAN JUAN FOR PERSONAL INJURIES SUFFERED AS A RESULT OF THE OPERATIONAL LEVEL NEGLIGENCE OF ORANGE COUNTY IN MAINTAINING THE SHOULDER OF A COUNTY ROADWAY. THE COUNTY HAS ALREADY PAID \$100,000, PURSUANT TO THE SOVEREIGN IMMUNITY CAP SPECIFIED BY LAW.

FINDINGS OF FACT:

THE ACCIDENT: Between 3 p.m. and 4 p.m. on Sunday, April 13, 1997, the Claimant, Pamela McMahan San Juan, was driving her 1990 Dodge van on the Ocoee-Apopka road in a northbound direction in Orange County, Florida. It was sunny and dry at the time of the accident, with no visibility problems.

At the same time, a second vehicle operated by a third person, 18-year-old Brandy Owens, was traveling on the Ocoee-Apopka roadway in the opposite southbound direction, approaching the vehicle operated by Pamela McMahan San Juan. Ms. Owens was driving a pick-up truck belonging to her sister, which she had only driven a couple of times and which was bigger than the vehicle she was accustomed to driving. As the oncoming Owens' vehicle approached a curve in the roadway, the right-side wheels of the Owens' vehicle left the paved portion of the roadway and dropped approximately six inches or more onto the adjacent dirt shoulder. The speed of Ms. Owens' vehicle was

estimated at 48 M.P.H. as she left the roadway and 44 M.P.H. as she came back onto the roadway. The posted speed limit was 45 M.P.H., but the design speed for the curve was 55 M.P.H. The design speed represents the speed at which a truck in the rain could safely navigate banks in the roadway.

Ms. Owens apparently attempted to steer the vehicle back onto the roadway. During the maneuver, the Owens' vehicle reemerged onto the roadway surface at an abrupt angle, crossing the center line of the roadway and striking the oncoming vehicle operated by Pamela McMahan San Juan in an essentially head-on impact.

Pamela McMahan San Juan was using her available and operational safety restraints. There were no pre-existing mechanical defects in Pamela McMahan San Juan's vehicle, and no evidence of intoxication or physical impairment on her part. The Florida Highway Patrol investigating officer cited Brandy Owens for careless driving and concluded that the pavement drop-off contributed to the occurrence of the collision.

ROADWAY AND SHOULDER: The Ocoee-Apopka road was/is a two-lane, rural, asphalt-covered roadway, often described as a "farm to market road" because it was originally used to haul crops to market. The road is narrow, only about 22 feet wide, whereas most roads built today that would anticipate heavy truck and tractor traffic would be at least 28 feet wide. As large trucks pass each other on the road they tend to swerve toward and off the edges of the road causing deterioration of the road edge, ruts, and washout areas. Some of the shoulder areas, including the area where this collision occurred, are sandy and grass will not readily grow there.

In January, 1997 Orange County contracted with Cutler Repaving Company to pave over a 7½ mile strip of Ocoee-Apopka Road, including the area of the accident. The repaving project was completed on January 22, 1997. The repaving company was contracted "line-to-line," with the understanding that shoulder work and permanent striping of the roadway would be handled by the County as separate projects.

Following completion of the paving, the county pavement coordinator inspected the road, as he had done on an ongoing basis during the re-paving effort. However, the County did not begin to repair and re-shape shoulders and slopes on the roadway until April 7, 1997, *almost three*

months later. In addition to improving the appearance of the roadway, one of the purposes of the shoulder work was to get a better recovery area.

Along the roadway at the scene of the crash there existed a drop-off between the paved surface of the roadway and the shoulder area of approximately 6 or more inches in elevation. Orange County owns, maintains and controls the roadway and the shoulder.

County personnel were generally aware, or should have been aware, of this un-repaired drop-off area. As previously stated, the County pavement coordinator had inspected the road numerous times during and immediately following the repaving efforts in January of 1997, including the shoulders. The same pavement coordinator had occasion to drive the stretch of road where the accident occurred on the Friday immediately preceding the accident. Shortly after the repaving was completed, the County repaired a shoulder drop-off a little over a mile from the accident site at the intersection of Ocoee-Apopka Road and Bradshaw Road by installing barricades until the grass shoulder could be built up. Perhaps most telling was the fact that by April 9, 1997 County workers had completed work on the shoulders and slopes of Ocoee-Apopka Road to a point approximately *two-tenths of a mile (about 350 yards) north of the area where the collision occurred.* At that point, instead of continuing to work south along Ocoee-Apopka Road, the work crews moved to another area of the road and did not return to the area where the collision occurred until April 16, 1997, approximately three days after the collision occurred.

At the time of the crash, the County had posted no signs in the area to warn motorists of the dangerous drop-off on the edge of the paved surface of the roadway. While there was a "Soft Shoulder" warning sign on the southbound side of Ocoee-Apopka Road immediately preceding the curve where the accident occurred, the sign failed to adequately warn of the impending drop-off danger.

A lawsuit on behalf of Pamela McMahan San Juan was filed against Orange County together with Cutler Repaving, Inc., the paving contractor involved in the resurfacing work on the roadway. (Ms. San Juan had previously settled the Brandy Owens portion of the case for the sum of \$125,000.) A jury trial commenced on March 22, 1999 and concluded on March 24, 1999 with a jury verdict in favor of Pamela McMahan San Juan and against Brandy Owens and Orange County.

At time of trial, the claimant's expert, Dr. William Fogarty, rendered the opinion that Orange County had not properly maintained the shoulder and was in violation of the Florida Department of Transportation Manual of Uniform Minimum Standards for Design, Construction, and Maintenance for Streets and Highways (commonly referred to as the "Green Book"), in that Orange County had allowed a 6 inch or more elevation difference to exist between the surface of the paved roadway and the adjacent shoulder.

According to Dr. Fogarty, this was a typical drop-off-induced collision in which the right tires of a vehicle go off the roadway followed by an over correction as the driver tries to get the two wheels back onto the pavement. The super elevation between the shoulder and the pavement of the roadway causes friction upon the inner surface of the right-hand tire, further accentuating the movement of the tire upon its return to the roadway, and accounts for the radical angle of return onto the roadway and into the oncoming motorists.

In Dr. Fogarty's opinion, the failure to provide an appropriate "fillet" at the shoulder drop-off area was a primary contributing factor in the collision. A "fillet" is a triangular wedge of asphalt material placed alongside a shoulder drop-off area. Its purpose is to support the edge of the roadway and to allow vehicles that leave the paved roadway to have a path back onto the roadway surface while allowing the driver to maintain control of the errant vehicle. The addition of compacted fillet supporting the edge of the roadway would have allowed Ms. Owens to come back onto the road without the sharp angle that caused her to veer into the opposite lane.

Orange County provided no expert testimony dealing with minimum roadway maintenance standards, or the relationship between the pavement drop-off and the occurrence of the collision.

INJURIES: Pamela McMahan San Juan suffered the following medical injuries in the impact: an open right femoral shaft fracture which required intramedullary nailing; a retrograde intramedullary nailing of the left femoral shaft fracture; an external fixation of a right distal radial fracture; a fracture dislocation of the left arm requiring open reduction and internal fixation and the fracture of the left clavicle. In brief, she suffered the fracture of both arms and both legs in this accident, requiring surgical procedures on all extremities with nails and screws applied for internal fixation.

Following the impact, Pamela McMahan San Juan was

transported to Orlando Regional Medical Center ("ORMC") and came under the care of orthopedic surgeon Dr. Csencsitz. After surgery and a six-day stay at ORMC, Ms. San Juan was transferred to an affiliated rehabilitation facility where she resided for seven weeks and underwent extensive, extremely painful daily physical rehabilitation. After being discharged from the rehabilitation facility, Ms. San Juan continued to see a physical therapist and Dr. Csencsitz periodically. She has been discharged by Dr. Csencsitz and diagnosed with permanent residual physical impairment, and is presently unemployed. Pamela McMahan San Juan resides at home with her husband, and cares for several minor children.

With regard to ongoing physical injuries, Ms. San Juan has had persistent problems with her right knee and has continuing difficulty climbing stairs. Getting up off the floor or out of a chair remains painful. While Ms. San Juan has achieved an acceptable range of motion in most of the joints affected by the accident and her strength is relatively good, she suffers from persistent problems associated with endurance and repetitive motion. She can perform most activities, but fatigues fairly quickly. For example, homemaking and other activities that require extensive kneeling or squatting are problematic. While not a component of the damage claim, it is noteworthy that this limitation would preclude Ms. San Juan from pursuing full-time employment in the home-care or professional housekeeping industries. Similarly, repetitive motion of the arms and wrists, such as typing, are problematic and may prevent her from pursuing a desired career as a medical secretary. Finally, as with any serious injury affecting joints, the risk of arthritis is increased and may not manifest itself until years from now.

Ms. San Juan has also suffered and continues to suffer emotional pain and suffering as a result of the accident. Several witnesses at trial and Ms. San Juan herself testified to a dramatic change in temperament for the worse following the accident. This may be in part due to the fact that she is unable to participate in some activities that she enjoyed before the accident --- such as bowling, dancing, walking, and riding bikes and playing with her children.

LEGAL PROCEEDINGS:

This case went to trial in March, 1999, and the jury found that Brandy Owens was 50% at fault for causing injuries to Pamela McMahan San Juan and that Orange County was 50% at fault. Cutler Repaving was not found at fault.

Orange County appealed to the Fifth District Court of Appeals who affirmed the case, without opinion.

Damages as found by the jury were as follows:

Past medical expenses	\$145,000.00
Past pain and suffering	\$125,000.00
Future pain and suffering	<u>\$375,000.00</u>
Total damages	\$645,000.00

On May 19, 1999, upon post verdict hearing, the trial judge entered a final judgment in favor of Pamela McMahan San Juan against Orange County. After deducting lawful setoffs and the 50 percent finding of fault against Brandy Owens in accordance with applicable Florida Law, the judge entered a judgment against Orange County for the net sum of \$380,971.57. Of this amount, Orange County has tendered its \$100,000 cap, reducing the amount of the final judgment effectively to the sum of \$280,971.57. Additionally, the parties agree that the final judgment fails to credit the respondent with the sum of \$5,600 due to an arithmetic error (offset to medical injuries from collateral source payment), and that the claim should be reduced by that amount.

CLAIMANT'S MAIN
ARGUMENTS:

1. Pamela McMahan San Juan, a Florida citizen and resident, lawfully using the Ocoee-Apopka roadway in a non-negligent manner, suffered severe injuries following a head-on collision with an oncoming vehicle which was caused by a defective road condition, consisting of an excessive pavement/ shoulder drop-off of 6 inches or more, in violation of Florida Department of Transportation Minimum Standards, and existing without appropriate warning signs or other devices.
2. Orange County knew, or should have known, of the shoulder conditions and admitted having its agents traverse and inspect the roadway prior to the occurrence of the accident.
3. A Florida jury returned a \$645,000 verdict in favor of Ms. San Juan against Brandy Owens and Orange County. Orange County's appeal was rejected *per curiam* (without opinion). The jury verdict is sound and should not be overturned.

ORANGE COUNTY'S

MAIN ARGUMENTS:

1. The County makes the same argument it did at trial, that Brandy Owens was completely at fault for having caused this accident. Regardless of what caused Ms. Owens to drive off the roadway on a dry, clear day, she negligently brought her vehicle back onto the roadway without first stopping or substantially slowing down. In doing so, she drove over a four to six inch drop off at a excess rate of speed and recklessly over-compensated, veering into the opposite lane of traffic and causing the accident. *(Note: The County chose not to call Brandy Owens as a witness at the claims hearing.)*

2. The County also takes the position that it uses reasonable care to actively maintain and repair the Ocoee-Apopka Road. The County had the road repaved in January, 1997. Furthermore, the county had begun work on repairing and reshaping the shoulders and slopes of the roadway in April, 1997. In fact, the County had gotten within .2 miles of the area where the accident occurred.

3. Orange County was not actively negligent in causing injuries to Pamela McMahan San Juan. Orange County did not build Ocoee-Apopka Road, the portion of the roadway in question having been dedicated to Orange County by the State of Florida over 20 years ago. Orange County did not create a trap for motorists that caused the claimant's injuries. To the contrary, Orange County used reasonable care to maintain and repair the roadway at great expense to its taxpayers.

4. The Waiver of Sovereign Immunity statute, section 768.28, F.S., was passed with the intent to make the state, the counties, and the municipalities liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. But, the Legislature clearly and constitutionally restricted the amount of damages, recognizing the extreme burden that could be placed on taxpayers and on County and municipal governments whose obligation it is to provide necessary services to its taxpayers, as well as maintaining County infrastructure. Orange County has 2,200 miles of roadway to constantly maintain and repair in an era of rapid population growth.

5. Narrow rural roads, like Ocoee-Apopka Road, are now heavily traveled in comparison to 20-30 years ago.

It would place an undue burden on taxpayers if they were made to pay compensation over and above the statutory limit when, as in this case, taxpayer dollars were already being spent on maintenance and repair of the road. Orange County spent \$85,000.00 per mile to repave 7.5 miles and approximately .25 cents per square foot on shoulder rehabilitation.

6. Moreover, Orange County should be liable to no greater extent than Brandy Owens, who was found 50% at fault for causing the accident and whose insurers paid out their policy limits (\$125,000).

CONCLUSIONS OF LAW:

Under Florida case law, Orange County is legally responsible for injuries proximately resulting from dangerous drop-offs at the shoulders of its roads. Manning v. State Department of Transportation, 288 So.2d 289 (Fla. 2nd DCA 1974), *cert. denied*, 295 So.2d 307 (Fla. 1974). Although a county cannot and should not be held liable for highly unusual, extraordinary, or bizarre consequences resulting from a breach of its duty to protect motorists from dangerous conditions, there was nothing highly unusual, extraordinary, or bizarre about the motorists actions in this collision.

LIABILITY: From my review of the evidence, I find Orange County had a duty to maintain the roadway/shoulder area near the scene of the crash; Orange County breached that duty and that breach was a proximate cause of the crash that resulted in the injuries suffered by Pamela McMahan San Juan herein. I also find that Brandy Owens had a duty to operate her vehicle in a reasonably safe manner; that Ms. Owens breached that duty and that her breach was a proximate cause of the crash that resulted in the injuries suffered by Ms. San Juan. I attribute comparative liability for this accident at 50 percent for Orange County and 50 percent for Brandy Owens.

DAMAGES: The \$144,272.44 medical and hospital expense portion of the award is clearly supported. The balance of the Final Judgment consists of past and future pain and suffering, mental anguish and loss of capacity for the enjoyment of life suffered by the claimant in the past and in the future.

For purposes of claim bills, a respondent who assails a jury verdict as being excessive should have the burden of showing the Legislature that the verdict was unsupported by any credible evidence; or that it was influenced by

corruption, passion, prejudice or other improper motives; or that it had no reasonable relationship to the damages shown; or that it imposes a hardship on the Defendants out of proportion to the injuries suffered, or that it obviously and grossly exceeds the maximum limit within which a jury may properly operate. Orange County has raised none of these factors, either at time of a jury trial in this case or at any other time. To Orange County's credit, it "does not attempt to diminish the injuries suffered by Pamela McMahan San Juan and does not assail the jury verdict as being excessive. Orange County takes the position that it was not at fault for causing the injuries to the Claimant." Respondent's Proposed Special Master's Final Report, p. 9 (October 20, 2000).

There is no debate over the amount of damages sought against Orange County. The amount is reasonable. The Final Judgment entered by the trial court has already been adjusted for Brandy Owens' degree of negligence as assessed by the jury.

COLLATERAL SOURCES & OTHER DEDUCTIONS:

The \$280,971 recovery amount sought in the claim bill should be reduced by **\$59,292.41** to account for the following payments and deductions:

1. \$44,964.85 Deduction for Medical Bills "Written Off" by Orlando Regional Healthcare System ("ORHS"):
On July 18, 1997, ORHS released Ms. Pamela McMahan San Juan from any legal obligation to pay \$44,964.85 in medical bills incurred during her stay at the Orlando Regional Medical Center (April 13-18, 1997). ORHS had filed a Release of Claim of Lien in favor of Ms. San Juan for this amount (plus the \$8,000 PIP payment, detailed below) in apparent anticipation of a payment from Medicaid on her behalf. Medicaid, however, denied payment. The practical effect is that ORHS must "write off" the \$44,964.85, and has no legal recourse against Ms. San Juan for this amount. Awarding Ms. San Juan \$44,964.85 for medical bills that she doesn't have to pay would unjustly enrich the Claimant at the expense of Orange County. The Claimant has acquiesced in this deduction.
2. \$8,000 Collateral Payment by Personal Injury Protection ("PIP") Insurance for Medical Damages:
ORHS received a collateral payment on behalf of Pamela McMahan San Juan in the sum of \$8,000

from PIP for medical damages, which it applied to her outstanding bill.

3. \$5,600 Offset for Medical Damages Paid by Third Party Insurer: The parties have stipulated that the Final Judgment fails to credit Orange County with a \$5,600 offset for medical damages paid by a third-party insurance company as part of the settlement of the Brandy Owens portion of the case.
4. \$727.56 Reduction Relating to Medical Damages: This reduction reflects the difference between the jury award for medical damages (\$145,000) and the amount stipulated to by the parties at trial and the claims hearing (\$144,272.44).

MEDICAID ISSUES/ DEDUCTIONS:

ORHS has filed a separate lawsuit against Pamela McMahan San Juan seeking recovery of \$65,426.80, which lawsuit is presently pending. The amount represents bills for Ms. San Juan's medical treatment at ORHS' Birc rehabilitation facility in April/May of 1997.

Claimant's attorney, however, has filed an affidavit with the Special Master announcing his intent to defend against ORHS' lawsuit on the grounds that Medicaid law precludes ORHS from recovering the outstanding bills. Medicaid has paid \$560.74 to ORHS in connection with Ms. San Juan's Birc medical bills. ORHS' attorney, at the time of this writing, officially disagrees with the Claimant's legal position. Thus, there is potentially a pending legal issue yet to be determined.

It is unclear, however, what portion, if any, of the \$65,426.80 sought by ORHS in its suit against Ms. San Juan is for payment of goods or services *not covered by Medicaid*. It is also not clear whether ORHS' requested payment from Medicaid was for *only a portion* of the \$65,426.80 in outstanding bills, and, if so, whether it is precluded from seeking recovery from Ms. San Juan for the remainder. Thus, there *may* still be justiciable issues in ORHS' suit.

It would be imprudent for the Legislature to intervene to resolve the pending lawsuit through claims legislation. Conversely, Ms. San Juan has made out all the elements of her claim against Orange County (duty, breach, causation, damages) and a resolution of the claim bill should not be delayed by, or dependent upon, collateral

litigation by a third-party creditor. Thus, to insure that the Claimant is not unjustly enriched at the expense of Orange County should her legal argument prevail in court, and to provide equity to the Claimant by allowing a timely resolution of this matter, the claim bill should be amended as follows:

- **The award to Ms. San Juan should be reduced by \$64,866.06 (\$65,426.80 [total Birc medical bills] - \$560.74 [Medicaid payment to ORHS for Birc bills]).**
- **Orange Co. should be directed to pay ORHS the amount awarded in the lawsuit, not to exceed \$64,866.06.**

ATTORNEYS FEES:

Section 768.28(8), Florida Statutes, limits claimant's attorneys' fees to 25 percent of the claimant's total recovery by way of any judgment or settlement obtained pursuant to Section 768.28. Claimant's attorneys have acknowledged this limitation and verified in writing that nothing in excess of 25 percent of the gross recovery will be withheld or paid as attorneys' fees.

RECOMMENDATIONS:

This bill, as filed, fails to credit the respondent with a number of collateral source payments and other deductions discussed herein. An amendment is necessary to reduce the claims amount by those sums.

Accordingly, I recommend that House Bill 711 be reported **FAVORABLY, AS AMENDED.**

Respectfully submitted,

Stephanie Birtman
House Special Master

cc: Representative Meadows, House Sponsor
Senator Geller, Senate Sponsor
Jonathon Fox, Senate Special Master
House Claims Committee