THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
12/1/04	SM	Favorable

December 1, 2004

The Honorable Tom Lee
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 24 (2005)** – Senator Tony Hill, Sr.
Relief of Betty Obenza

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM FOR $156,555.76 BASED ON A CONSENT FINAL JUDGMENT OF $305,675.61 AGAINST THE JACKSONVILLE ELECTRIC AUTHORITY (JEA) TO COMPENSATE MS. OBENZA FOR INJURIES AND DAMAGES SHE SUSTAINED AS A RESULT OF THE NEGLIGENCE OF A JEA EMPLOYEE IN REAR-ENDING A VEHICLE BEING DRIVEN BY MS. OBENZA. THE JEA HAS PAID THE STATUTORY LIMIT OF $100,000.

FINDINGS OF FACT:

At 5:00 p.m. on June 5, 2000, Mrs. Obenza was stopped at a traffic signal at the intersection of Belfort Road and J. Turner Butler Blvd. She was driving a 1996 Nissan Sentra. A 1998 Jeep Cherokee, driven by an employee within the course and scope of his employment with the JEA, was stopped 5 to 6 feet behind Mrs. Obenza. The driver of the Jeep Cherokee allowed his foot to slip off the brake pedal, causing his bumper to make contact with the rear bumper of Mrs. Obenza's vehicle. The cost associated with the repair of Mrs. Obenza's vehicle was less than $300. The JEA incurred no repair costs for its motor vehicle, as the JEA vehicle sustained no damage.

The driver of the JEA vehicle advised that he was stopped at the red light when his foot slipped off the brake as he reached for something in the backseat. The claimant's accident reconstruction expert testified that the JEA vehicle was traveling between 2½ to 5 mph upon impact with the claimant's bumper.

At the JEA employee's request, law enforcement was called and an accident report was prepared. The law enforcement report makes no reference to any injuries associated with the accident, and issued no citation. Mrs. Obenza left the scene of the accident in her own vehicle and did not seek medical attention until later that evening, when she sought treatment at the emergency room for pain in her neck.

The emergency room physician that treated Mrs. Obenza on the evening of the accident diagnosed her with whip lash, and prescribed pain medication. She was subsequently seen by Dr. Hickey at Orthopedic Sports Rehab Clinic, who placed her on physical therapy. Unable to tolerate the pain medication nor the physical therapy, Mrs. Obenza sought the opinion of Dr. Booras, her husband's physician, who also prescribed physical therapy. An MRI taken a month after the accident showed a herniated disk and a disk bulge. Dr. Booras referred Mrs. Obenza to Dr. Hawkins, a neurosurgeon, who determined that Mrs. Obenza was not a surgical candidate, and recommended further diagnostic tests. Mrs. Obenza was also evaluated by Dr. Muenz, a physical medicine and rehabilitation specialist, who concurred with Dr. Booras' plan to treat her pain with physical therapy. Still not obtaining any pain relief, Mrs. Obenza was ultimately referred to Dr. Kilgore, a neurologist. An MRI taken 4 months after the accident showed disc bulges, mild foraminal encroachment and moderate degenerative disc disease. A CAT scan revealed two disc ruptures. Dr. Kilgore recommended pain management, and a neurosurgical consult if the pain management wasn't successful. Mrs. Obenza was then referred to Dr. Florete at the Institute of Pain Management, who performed a series of epidural steroid injections without success. Nine months after the accident, Mrs. Obenza was referred to Dr. Spatola, a neurosurgeon, who recommended surgery.

The surgery was performed 5 days after the initial consultation, and consisted of an anterior cervical discectomy, fusion, bone bank graft, and plate fixation at C4 -5 and C5-6. The surgery was deemed successful by Dr. Spatola.

Mrs. Obenza did not seek any medical treatment for 2 years following the surgery, as she believed that there was no further medical intervention possible. However, in February 2003, shortly before trial was to begin, she went back to her primary physician, who referred her for cortisone injections. Mrs. Obenza has testified that the cortisone injections have not offered her the desired pain relief, and that she is still in constant pain. Mrs. Obenza also testified at the Special Master's hearing that she did not take the prescribed medications, as she couldn't tolerate them.

The charges for Mrs. Obenza's medical treatment totaled $65,951.76. Of that amount, $12,000 was paid by her PIP auto insurance, $17,519.76 was paid by her health insurance, and $31,600.09 was written off by Blue Cross/Blue Shield.

A life care planner testified at trial, and offered two options for Mrs. Obenza's future care. The first option conservatively recommended pain management for the remainder of the 35.7 years of Mrs. Obenza's life expectancy. This option amounted to $225,559.14 in present value dollars. The second option recommended surgery, and amounted to $525,281.14 in present value dollars. Both options include the cost of medications and physical therapy, some of which Mrs. Obenza testified that she could not tolerate, though she testified that she was taking 4 different medications at the time of the Special Master hearing.

Suit was filed in the circuit court of Duval County against the JEA for Mrs. Obenza's injuries and damages, and for loss of consortium by her husband. While the JEA admitted negligence, they denied that the negligence of their driver was the proximate cause of Mrs. Obenza's damages.

The jury found in favor of Mrs. Obenza, and awarded the following:

Past Medical Expenses	$ 65,951.76
Future Medical Expenses	$ 225,000.00
Past Lost Earnings	$ 6,723.85
Past Pain & Suffering	$ 10,000.00
Future Pain & Suffering	$ 10,000.00
Loss of Consortium	$ 0
TOTAL	$ 317,675.61

A consent final judgment was entered for $305,675.61, which included a setoff of $12,000 for PIP and medical payment. The judgment was not appealed.

CLAIMANT'S ARGUMENTS: There is a valid jury verdict in their favor, which has not been appealed. Everything that the respondent argued at the Special Master's hearing was argued unsuccessfully at trial.

RESPONDENT'S ARGUMENTS:

- While the respondent's admit duty and breach of duty, they strenuously argued that the negligence of their driver was not the cause of the claimant's damages. Their expert testified that any impact caused by the contact between the two vehicles was absorbed by the claimant's bumper.
- Mrs. Obenza told different doctors varying and exaggerated stories about the cause of her injuries, yet claimed not to remember whether her head moved as a result of the collision.
- Mrs. Obenza did not seek further medical treatment for her pain until after seeking legal advice.
- Common sense dictates that being rear-ended by a vehicle going less than 5 mph, by a vehicle that is less than 5 feet from the claimant's vehicle could not have caused enough of an injury to require surgery.
- The damages are excessive in light of the minor nature of the accident. Mrs. Obenza is not following the course of action set out in the life care plan adopted by the jury, and did not need any treatment for a two-year period between the surgery and trial.

CONCLUSIONS OF LAW: **Duty:** Section 316.1925, F.S., provides that any person operating a vehicle upon the streets shall drive in a safe and prudent manner. The JEA had a duty to drive carefully, which duty was breached by the negligence of their driver. Florida courts presume negligence of the driver who runs

into the rear of another automobile which is lawfully stopped in traffic. Chiles v. Beaudoin, 384 So.2d 175 (Fla. 2nd DCA 1980).

Causation: While the extent of the claimant's damages is in question, I find that the claimant's injuries were a natural and probable result of the respondent's negligence.

Damages: The jury awarded a total of $317,675.61 in past and future damages, which was reduced to $305,675.61 by consent final judgment. The $156,555.76 requested in the bill reflects further reductions of $49,119.85 for medical expenses covered by Blue Cross Blue Shield to which they have not claimed any right of subrogation.

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. The respondent failed to meet this burden.

LEGISLATIVE HISTORY:

Senate Bill 28 (2004) by Senator Hill was recommended favorably by the Senate Special Master with amendments recommending the amount be reduced to $156,555.76 to reflect medical expenses that were covered by insurance for which the insurance company has not exercised their right to subrogate. The bill died in the Committee on Comprehensive Planning.

Similarly, HB 669 (2004) by Rep. Fields died in the Subcommittee on Claims.

In preparation for the 2005 legislative session, both parties were given the opportunity to supplement the record. The claimant submitted medical records from Riverside Spine indicating that the Botox injections in Ms. Obenza's shoulder are not making the pain better and in fact may be making her pain worse. Dr. Kramarich's notes indicate that Ms. Obenza complains of a 50 percent loss of daily function due to pain as of April 27, 2004.

By letter dated September 22, 1004, Attorneys for the Respondent stated that an award in the amount of $156,555.76 would cause significant damage to City of Jacksonville's Risk Management Fund. At the September 17, 2003, Prehearing Conference, Respondent's attorney stated that the balance in the Fund was approximately $20 million.

ATTORNEYS FEES: The claimant's attorney has submitted an affidavit certifying that attorney's fees are limited in accordance with §768.28(8), F.S. Except for lobbying fees, there are no outstanding costs, as costs were paid out of the initial $100,000. The lobbyist has indicated that his fee is included in the attorney's fees, as limited by statute.

RECOMMENDATIONS: In light of the foregoing, I recommend that Senate Bill 24 be reported FAVORABLY.

Respectfully submitted,

Diana Caldwell
Senate Special Master

cc: Senator Tony Hill, Sr.
Faye Blanton, Secretary of the Senate
House Claims Committee