THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
3/29/17	SM	Unfavorable
	JU	
	CA	
	RC	

March 29, 2017

The Honorable Joe Negron
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 314** – Senator Gary M. Farmer, Jr.
HB 6545 – Representative Jake Raburn
Relief of Jerry Cunningham by Broward County

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNOPPOSED CLAIM FOR $550,000, IN LOCAL FUNDS, AGAINST BROWARD COUNTY FOR AN INCIDENT INVOLVING ONE OF ITS BUSES AND THE CLAIMANT, JERRY CUNNINGHAM. THE UNDERLYING SETTLEMENT IS FOR $850,000, OF WHICH THE COUNTY HAS PAID $300,000, AS PERMITTED BY LAW.

FINDINGS OF FACT:

On the morning of May 10, 2013, the Claimant and his mother walked to a Broward County Transit bus stop. The Claimant, who was 14 years old at the time, was on his way to school. On that morning, he grasped a moving Broward County Transit bus and attempted to run alongside it. Upon losing his grip and his footing, the Claimant fell to the pavement, incurring severe injuries.

Transit Bus Surveillance Video

The Claimant's counsel presented video from the bus. This video begins several minutes before the accident and continues for several minutes after the accident. The video featured an indication of the bus's speed at each moment of the footage. And it was shot from eight different camera angles simultaneously. For example, one camera was above the head of the driver, Reinaldo Soto, pointed toward the door.

Another camera was on the outside of the side of the bus opposite the driver's side, perhaps on the rear half of the bus, pointed toward the front. This video sufficiently supports the following findings of fact.

On the morning of the incident, the bus approached a stop where two women were waiting for the bus, but the Claimant was not waiting at the bus stop with them. As the bus came to a stop, one or more passengers alerted Mr. Soto that there were "runners coming." The two women safely and uneventfully entered the bus upon its arrival at the bus stop. Upon entering, the women remained at the front of the bus, as least far forward as Mr. Soto. While the women remained there, and just after the doors had begun to close, the Claimant came to the exterior of the front doors of the bus.

At the same time, the bus was just starting to ease away from the stop at 2 miles per hour. Within 3 seconds of the Claimant arriving at the front doors, and within 4 seconds of the bus beginning to ease away from the stop, the doors appear to have fully closed, and the bus had reached 6-10 miles per hour. And as for the operation or mechanics of the doors, they came together from opposite sides, meeting in the middle of the doorway, as they appear designed to do.

As the bus left the stop, the Claimant walked, then jogged, and then ran alongside the bus, with his right arm reaching across his body and his right hand making constant contact with the bus. With his left hand, the Claimant tapped on the door.

Then, with the doors closed, the bus increased its speed. It traveled at 16-19 miles per hour for several seconds, with the Claimant still running alongside of it, perhaps aided by the power of the bus.[1] At one point, and before the fall that caused his injuries, the Claimant momentarily lost his footing, yet was able to keep from falling by hanging onto the bus.

After the bus traveled several more seconds at speeds between 16 and 19 miles per hour, the Claimant fell to the pavement, thus sustaining his injuries. The video does not

[1] At the hearing, Claimant's counsel stated that it was unreasonable to think that the Claimant could run 18 or 19 miles per hour. The Special Master does not necessarily disagree that the Claimant could not reach those speeds on his own. But the evidence showed that the Claimant's speed may have been aided by the bus as he held onto it.

include any images showing that the Claimant's arm, wrist, or hand were trapped between the doors of the bus.[2, 3]

Within 5 seconds after the Claimant fell, and as passengers screamed, Mr. Soto stopped the bus.

Injuries

As a result of the accident, the Claimant incurred multiple injuries. He suffered a traumatic brain injury, skull fractures, facial fractures, rib fractures, a right clavicle fracture, a right scapular fracture, a right pulmonary contusion, and a left medial malleolus fracture.

The Claimant's Hand, Arm, or Wrist Was Not Trapped

An essential factual component of the Claimant's claim is that his hand, arm, or wrist was trapped in the bus's door. However, the preponderance of the evidence shows that the Claimant's hand, arm, or wrist was not caught in the door of the bus. Rather, the Claimant placed his hand on or in between the doors of the moving bus, and then attempted to run alongside it until he lost both his grip and his footing. At that point, he hit the ground and sustained his injuries. The following evidence was weighed in making these findings of fact.

Detective Michael Kelliher

Detective Michael Kelliher of the Traffic Homicide Unit of the Broward County Sheriff's Office investigated the accident. Det. Kelliher determined that the door of the bus could not have trapped the Claimant's arm, wrist, or hand. Instead, Det. Kelliher believed that the Claimant grabbed the door and held on as he attempted to run alongside the bus.

Det. Kelliher conducted several controlled exercises with the bus involved in the accident. One exercise involved a Detective DeJesus, who was approximately the size that the Claimant was at the time. Det. DeJesus placed his forearm

[2] The Claimant's attorney presented an audio recording of an interview by his investigator of the passenger sitting closest to the door, Brian Clark. During this recording, the *interviewer* states: "But at that point Jerry had [inaudible] reached for the bus and was already caught with his hand, hand [sic] in the door." Mr. Clark then said, "Yes." The interviewer quickly moved on. The witness's statement has little probative value for several reasons. First, the statement was not given under oath or subject to cross-examination. Secondly, the witness's "yes" answer was in response to a compound, leading question. Finally, the witness never explained what he saw that led him to conclude that the Claimant's hand was caught.

[3] The Claimant stated he has no memory of the incident.

through the open front doorway, and the doors were closed. Upon closing the doors, the 4-inch rubber safety guards (or "flaps") on the doors formed around Det. DeJesus's arm, which was in "no way constrained" by the doors. And he could remove his arm "with minimal effort."

A similar exercise was conducted with a Detective Michael Wiley, who was bigger than the Claimant was at the time of the accident. Detective Wiley was able to remove his arm "without resistance from the doors."

Assistant State Attorney Alexander Fischer

The Broward County Sherriff's Office referred the case to the State Attorney's Office in Broward County for possible prosecution. Assistant State Attorney Alex Fischer conducted a legal and factual investigation under the supervision of Assistant State Attorney Peter Holden. Mr. Fischer and Assistant State Attorney David Weigel examined a bus of the same year, make, and model as the bus involved in the Claimant's accident.

Both Mr. Fischer and Mr. Weigel "freely slid" their "entire arms through the closed door of the bus." Moreover, they discovered that the rubber flaps on the two front doors closed in such a way that the more forward door's flap was on the outside of the other flap. This created a "path" through which one may pull something, such as an arm, toward the back of the bus from the outside.

Mr. Fischer concluded that the Claimant's arm or hand was not trapped or stuck. Instead, the Claimant, perhaps with his hand in the rubber flap area of the door, was voluntarily trying to keep up with the bus.

With regard to the testing by the Sherriff's Office and the State Attorney, the Claimant's attorney attempted to discredit those tests for not being performed on a moving bus. The reports describing the testing do not state whether the tests involved a moving or a stationary bus. However, even if the tests were performed only on stationary buses, it would not undermine the conclusions of these reports. Given the construction and the operation of the doors as described above, the bus's moving away from the Claimant would have made it easier, not harder, for him to remove his hand from the doors.

Transit Bus Surveillance Video

The surveillance video appears to show the Claimant voluntarily running alongside the bus. If his arm was caught in the bus's doors, one would have expected the video of the incident to show the Claimant make a jerking motion or a tugging motion in an attempt to part with the bus. But the Claimant made no such motion.

Nonetheless, argument was presented to support the contrary conclusion—namely, that the Claimant's arm was trapped in the door of the bus, and thus the Claimant was forced to attempt to run alongside the bus until he could no longer. At one point in the video, just moments before his ultimate fall, the Claimant loses his footing yet appears to keep his hand(s) on the bus and does not fall to the ground. According to the Claimant's counsel, this proves that the Claimant's arm was caught in the doors. However, this conclusion is not required.

The fact that the Claimant momentarily lost his footing and yet did not fall to the ground could be explained by him continuing to hold onto the bus's door. Moreover, if it was the Claimant's trapped arm that prevented him from falling when he momentarily lost his footing, then it is unclear how his arm suddenly became un-trapped moments later, allowing him to fall to the ground. The Claimant's attorney did not explain how the Claimant's arm could suddenly become free. A better explanation of the moment when the Claimant lost his footing is that his arm was not trapped and that he chose to hang onto the door. As such, the Claimant kept his grip during his first loss of footing but was unable to hold on when he took his ultimate fall. Alternatively, perhaps he purposefully let go of the bus, hoping he could safely part with the bus before it reached even greater speeds.

The time elapsed from when the bus left the bus stop until the Claimant fell was approximately 9 seconds.

Parties' Stipulation

The parties stipulated in this matter that the Claimant's arm was "apparently caught in the door." However, the stipulation was not supported by the evidence presented to the Special Master. And under the Senate Rules, the Special Master is not bound by the stipulation. In contrast to the stipulation, the evidence shows that the Claimant grabbed onto the bus and

could have removed his arm or hand from it with minimal force.

CONCLUSIONS OF LAW:

The claim bill hearing was a *de novo* proceeding to determine, based on the evidence presented to the Special Master, whether Broward County is liable for the Claimant's injuries, and if so, whether the amount of the claim is reasonable.

The Claimant asserted that the bus driver, Mr. Soto, as an agent for Broward County, negligently operated the bus, causing the Claimant to incur economic and non-economic damages.

A negligence claim has four essential elements. The Claimant must prove that the Respondent owed him or her a certain *duty* of care, that the Respondent *breached* this duty, and that the breach *caused* the Claimant to incur *damages*. Thus, the four elements of negligence are often referred to in short as (1) duty, (2) breach, (3) causation, and (4) damages.

Here, the Claimant did not prove causation. That is, the Claimant did not prove that the Respondent's alleged breach of its alleged duty caused the Claimant's injuries. Instead, the preponderance of the evidence showed that the Claimant caused his own injuries. Therefore, the Claimant failed to prove his claim.

Analysis

After briefly mentioning the Claimant's allegations as to duty and breach, the analysis will move into a discussion of causation. The Special Master's ultimate conclusion rests on the determination that the Claimant did not prove that the Respondent was the legal cause of the Claimant's accident and injuries; so, the causation element is discussed in relative depth. The issue of monetary damages is not discussed because the lack of causation makes the issue of damages moot.

Duty: The Claimant's counsel asserted three theories of duty. One of these theories was that the Respondent owed the Claimant whatever duty is owed under ordinary negligence. The Claimant's counsel also argued that the Respondent owed a heightened duty of care as a "common carrier." Third, the Claimant asserted that several rules in the Florida Administrative Code constituted duties of care. So, the

argument went, where these rules required the County to do something, the County was required to do so or face possible liability. This last theory is often referred to as "negligence *per se*." Upon questioning by the Special Master, counsel for the Claimant finally disclosed that the trial court had found, as a matter of law, that the Claimant's negligence *per se* claim was invalid.

Breach: The Claimant asserted that Mr. Soto breached his duties to the Claimant by (1) easing away from the bus stop before fully closing the doors on the bus, (2) failing to check the rearview mirrors (in which he allegedly would have seen the Claimant), (3) leaving the bus stop with passengers at the front of the bus (ahead of the "standee line"), and (4) not stopping the bus when passenger's alerted him that someone was outside the bus. As such, to prove the causation element of negligence, the Claimant needed to prove that one or more of these actions/inactions caused his injuries.

Causation: The type of causation required to sustain a negligence claim is referred to as "proximate" causation, which has two necessary elements. In short, these elements are referred to as cause-in-fact and foreseeability. Specifically, the Claimant must show (1) that the Respondent's breach in fact caused his injuries, and (2) that the accident that resulted from the Respondent's breach was a reasonably foreseeable result of the Respondent's conduct. *Coker v. Wal-Mart Stores, Inc.*, 642 So. 2d 774 (Fla. 1st DCA 1994).

The second element—foreseeability—is itself comprised of three standards set forth in case law, each of which must be met for a claimant to prove his or her case. Accordingly, causation is outlined in terms of its elements as follows:

1. Cause-in-fact.
2. Foreseeability.
    a. Natural and Probable Consequences Standard.
    b. Scope of Danger Standard.
    c. Remote Consequences Standard.

In sum, if a claimant fails to prove any of the above elements or standards, his or her claim fails. As explained below, the Claimant failed to prove (at least) the foreseeability element of causation, because he failed to prove that his claim met (at least) the first two standards of foreseeability.

The "natural and probable consequences standard" has been explained by the Florida Supreme Court as follows:

> "Natural and probable" consequences are those which a person by prudent human foresight can be expected to anticipate as *likely* to result from an act, *because they happen so frequently from commission of such act that in the field of human experience they may be expected to happen again*. "Possible" consequences [on the other hand] are those which happen to so infrequently from the commission of a particular act, that in the field of human experience, they are not expected as likely to happen again from the commission of the same act.

Cone v. Inter County Tel. and Tel. Co., 40 So. 2d 148, 149 (Fla. 1949) (Emphasis added). However, "it is immaterial that the [Respondent] could not foresee the *precise* manner in which the injury occurred or its *exact* extent." *McCain v. Florida Power Corp*., 593 So .2d 500 (1992) (emphasis in the original).

Here, the Claimant's accident was not a natural and probable consequence of Mr. Soto's alleged negligence. A person, "by prudent human foresight," would not think it *likely* that Mr. Soto's alleged breaches of his alleged duty would result in a young man, grabbing the door of the moving bus and holding onto it while the bus picked up considerable speed.

The second foreseeability standard is the scope of danger standard. Under this standard, it is not necessary that a respondent foresee the exact course of events that led to an accident, but "it must be shown that the … general-type accident was a reasonably foreseeable consequence of the [respondent's] negligence." *Tieder v. Little*, 502 So. 2d 923, 926 (Fla. 3d DCA 1987).

Here, the general-type accident that occurred was clearly not a reasonably foreseeable consequence of any of the Respondent's allegedly wrongful conduct. Rather, it was a totally unforeseeable type of accident.

The third standard that comprises the foreseeability component of proximate causation is the remote consequences standard. However, because the Claimant's

case failed to meet the first two standards, whether the Claimant met this standard is irrelevant.
In sum, the Claimant failed to meet the foreseeability element of causation. Therefore, the Claimant failed to prove the causation element of negligence, an essential element of his negligence claim.

ATTORNEY'S FEES: Section 768.28(8), F.S., limits the Claimant's attorney's fees to 25 percent of the Claimant's total recovery by way of any judgment or settlement. The Claimant's attorney and lobbyist submitted separate affidavits stating that, in the aggregate, the Claimant's attorney and lobbyist would receive no more than 25 percent of the amount awarded by this bill. Further, the affidavits stated that the Claimant, Jerry Cunningham, would receive 75 percent of any amount awarded under this bill.

RECOMMENDATIONS: Based on the foregoing, I recommend that Senate Bill 314 (2017) be reported UNFAVORABLY.

Respectfully submitted,

Adam Stallard
Senate Special Master

cc: Secretary of the Senate