



STORAGE NAME: h6509.CJC

DATE: 3/6/2017

March 6, 2017

SPECIAL MASTER'S FINAL REPORT

The Honorable Richard Corcoran
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 6509 - Representative Cortes
Relief/Robert Allan Smith/Orange County

THIS IS A CONTESTED CLAIM IN THE AMOUNT OF \$2,813,536.09 AGAINST ORANGE COUNTY FOR INJURIES AND DAMAGES SUFFERED BY ROBERT ALLAN SMITH WHEN HIS MOTORCYCLE WAS STRUCK BY AN ORANGE COUNTY WORK VAN ON SEPTEMBER 7, 2006.

FINDING OF FACT:

This matter arises out of a motor vehicle crash that occurred on September 7, 2006, in Orlando, Florida at the intersection of DePauw Avenue and Orlando Street. DePauw Avenue runs north and south while Orlando Street runs east and west. The intersection is a four way intersection with Orlando Street having stop signs and DePauw Avenue having the right of way and no stop sign. The intersection is located in a residential neighborhood with a speed limit of 25 mph. On September 7, 2006, DePauw Avenue had a couple of vehicles parked on the street. It was a dry, clear day.

The Accident

Robert Allan Smith lived on DePauw Avenue in 2006 and was working on repairing his Honda VF 750 C Magna motorcycle. The night before, Mr. Smith had finished work at Seminole Harley Davidson and drove his motorcycle home when his motorcycle idled out. Having the day off, Mr. Smith had spent

most of the morning working on his motorcycle. He had assembled and disassembled several parts and had driven the motorcycle around the block two separate times. According to Mr. Smith, the motorcycle would falter when changing gears and not accelerate. It was on his third test drive on around the block when the accident occurred.

Around 1:45 PM, Lynn Godden was driving an Orange County work van westbound down Orlando Street. Mr. Godden was an Orange County employee who repaired air conditioners in County buildings. Mr. Godden approached the intersection of Orlando Street and DePauw Avenue and stopped at the stop sign controlling Orlando Street. He looked to his left down DePauw Avenue and witnessed Mr. Smith. According to Mr. Godden, he saw Mr. Smith on a motorcycle but believed Mr. Smith was heading in the opposite direction, or south down DePauw Avenue. According to Mr. Smith, he made eye contact with Mr. Godden and reports that Mr. Godden had a phone in his left hand. Either way, Mr. Godden looked both ways down DePauw Avenue and crept forward a few feet into the intersection as vehicles parked on DePauw Avenue and trees blocked his view. Believing the intersection was clear, Mr. Godden continued driving west on Orlando Street.

At the same time, Mr. Smith entered the intersection on his motorcycle. Seeing the Orange County van, Mr. Smith attempted to steer his motorcycle to the left to avoid the van. Despite his maneuvering, the front of the Orange County van struck Mr. Smith. After impact, the motorcycle continued 22 feet to the corner of DePauw Avenue and hit the curb, sending Mr. Smith flying in the air another 23 feet.

Mr. Godden stopped after clearing the intersection and ran to Mr. Smith's aid. Nelson Dean, a carpenter working at a nearby house, ran to the scene and called 911. Mr. Smith, who never lost consciousness, asked Mr. Godden for his cell phone and called his wife. The ambulance arrived and took Mr. Smith to the hospital. In the ambulance logs, it is reported that Mr. Smith was traveling at 50 mph. Mr. Smith denies ever stating he was traveling at that speed and Eric Miller, the paramedic attending Mr. Smith, could not remember who stated the speed. Mr. Smith believes he was traveling at 20-25 mph and due to his motorcycle's deficiencies, he does not believe there was any way he could have been traveling faster. Mr. Dean, who witnessed both Mr. Smith on his motorcycle and Mr. Godden stopped at the stop sign, stated Mr. Smith was traveling at 35-40 mph.

Mr. Godden was issued a citation for failing to yield to a stop sign¹ but later had the citation dismissed. He was not

¹ s. 316.123(2)(a), F.S. ("After having stopped, the driver shall yield the right-of-way to any vehicle which has entered the intersection from another highway. . . .").

reprimanded by Orange County. In the records submitted to this Special Master, Mr. Godden had received six traffic citations in the past twenty years, including four citations for failing to obey a stop sign. He retired from Orange County in 2008.

The Injuries

The front of the Orange County van hit Mr. Smith on his right side and his right leg was amputated above the knee at the scene of the collision. He also fractured his left fibula and foot along with fracturing his pelvis. He incurred over \$551,527.37 in medical bills, along with the cost of purchasing and maintaining his prosthetic leg. Having no health insurance, Mr. Smith's medical bills have been paid by Medicaid or the Department of Veteran Affairs. There are outstanding liens against any award Mr. Smith receives.

Mr. Smith continues to suffer the effects of his injuries with recurring infections in his leg. He has gone on to complete his college degree but has not been able to find employment. In the years following the accident, he has moved to Lakeland and receives social security disability along with Department of Veteran Affairs' benefits from his past service in the Army.

LITIGATION HISTORY:

On February 14, 2007, Mr. Smith filed suit against Orange County in the Circuit Court of the Ninth Judicial Circuit alleging negligence on behalf of Mr. Godden and Orange County. Prior to going to trial, Mr. Smith and his wife, Jeanette Smith, divorced and she settled her claim against Orange County for \$85,000. A jury trial was held in November 2011 but resulted in a mistrial. The full case was presented to the jury and after six hours of deliberation on a Friday, the judge decided to send the jury home for the weekend and resume deliberations on Monday. One of the six jurors reported that she would not return Monday. After initially agreeing to go forward with a five person jury, Mr. Smith moved for a mistrial.

A year later, in November 2012, the case was tried again and resulted in a jury verdict of \$4,814,785.37. The jury found Orange County to be 67% at fault and Mr. Smith to be 33% at fault. The jury's calculations of damages were as follows:

Past Lost Earnings	\$137,280 ²
Past Medical Expenses	\$ 551,527.37
Future Medical Expenses	\$2,376,000
Past Pain & Suffering	\$228,258
Future Pain & Suffering	\$1,521,720
Total Damages	\$4,814,785.37

² Jeanette Smith, Mr. Smith's ex-wife, has a claim to 50% of Mr. Smith's award of past lost earnings. After reducing the jury verdict by Mr. Smith's apportionment of fault and dividing in half, her claim to past lost earnings comes to \$40,821.

The trial court reduced the damages for Mr. Smith's apportionment of fault and for Mr. Smith's collateral sources benefits of medical expenses paid by both the Department of Veteran Affairs and Medicaid. A final judgment was entered in the amount of \$2,913,536.09. Orange County did not appeal and rendered the statutory cap payment of \$100,000.

CLAIMANTS ARGUMENTS:

Mr. Smith argues that Orange County is liable for the negligence of its employee, Mr. Godden, when he failed to stop at the stop sign and ensure the intersection was clear. Mr. Smith argues the jury verdict should be given full effect through passage of this claim bill.

RESPONDENT'S ARGUMENTS:

Orange County opposes the claim bill. Orange County argues the comparative negligence of Mr. Smith, who it asserts was driving recklessly in excess of the speed limits, should reduce if not void any jury verdict. Additionally, Orange County objects to the calculation of future medical damages.

CONCLUSION OF LAW:

Whether or not there is a settlement agreement or a jury verdict, as there is here, every claim bill must be based on facts sufficient to meet the preponderance of the evidence standard. In order to prove a claim of negligence, Mr. Smith must show a duty of care was owed by Orange County to Mr. Smith and that duty was breached resulting in damages.³

Duty

Section 316.123(2)(a), F.S., provides a driver approaching an intersection with a stop sign must stop and "yield the right of way to any vehicle" which is approaching on the road. It is clear Mr. Godden owed a duty to Mr. Smith, who had the right of way as DePauw Avenue possessed no stop sign. Mr. Godden owed a duty to Mr. Smith to stop and yield the intersection to Mr. Smith.

Breach

Mr. Godden breached his duty of care to Mr. Smith when he proceeded through the intersection. Additionally, Orange County does not deny that Mr. Godden was acting within the scope of his employment and thus Orange County is liable for Mr. Godden's actions under the legal theory of respondeat superior.⁴ Mr. Godden's breach, driving through the intersection, was the proximate cause of Mr. Smith's injuries.

Comparative Negligence

In Florida, the doctrine of comparative fault provides for the apportionment of the loss among those whose fault contributed to the occurrence.⁵ A plaintiff's negligence diminishes the proportionality of the amount awarded but does not bar

³ *Mosby v. Harrell*, 909 So. 2d 323, 327 (Fla. 1st DCA 2005).

⁴ *Stinson v. Prevatt*, 94 So. 656, 657 (1922).

⁵ *Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973).

recovery.⁶ Here, a jury considered Mr. Smith's actions and apportioned comparative fault at 33%. Orange County believes his fault was much greater.

It is understandable for both the jury and for Orange County to find Mr. Smith somewhat liable for the accident. As Orange County presented to the jury and to the Special Masters, the medical records from Orlando Regional Medical Center reveal Mr. Smith reported drinking a beer on the day of the accident. Additionally, Orange County cites to Mr. Smith's two prior DUIs⁷ as evidence Mr. Smith may have been drinking and driving. Mr. Smith has repeatedly denied drinking on the day of the accident and does not know how the notation appeared in the hospital records. The two paramedics who stabilized and transported Mr. Smith did not report any smell of alcohol. There was no blood alcohol analysis performed at the hospital.

The biggest contention of Orange County concerning Mr. Smith's comparative negligence is the belief that he was driving too fast. The speed limit on DePauw Avenue is 25 mph and Mr. Smith states he was driving at 20-25 mph. Mr. Smith lived on DePauw Avenue and was familiar with both the normal speed of traffic and the many cars typically parked on the street. However, eyewitness Nelson Dean reported that Mr. Smith was traveling at 35 to 40 mph. Additionally, paramedic Eric Miller's medical reports state that Mr. Smith told the first responders he was going around 50 mph.

Both parties presented expert witnesses as to Mr. Smith's speed. Mr. Orion Keifer, a mechanical engineer, testified for Mr. Smith and stated Mr. Smith was traveling at 25 mph or less based off of where Mr. Smith landed. The distance from impact to the sidewalk where Mr. Smith landed was 49.5 feet. For a man of Mr. Smith's size (6' 4" and 285 lbs), Mr. Keifer testified Mr. Smith had to have been traveling at 25 mph or slower to only be thrown 49 feet. Dr. Keifer testified that if Mr. Smith was traveling 50 mph, he would have been thrown 160-180 feet from impact instead of the 49.5 feet. Furthermore, Mr. Keifer testified he believes Mr. Smith was traveling slower than 25 mph because Mr. Smith remained on the bike at impact and skidded to the curb, making two large chips in the curb, before being thrown off the bike and landing in his final resting place. Thus, a shorter distance being airborne suggests Mr. Smith was traveling at a slower speed.

Orange County's expert, Dr. James Ipser, an astrophysicist, testified that Mr. Smith was airborne upon impact with the van. Dr. Ipser claimed the reason Mr. Smith did not travel as far as

⁶ s. 768.81(2), F.S.

⁷ Mr. Smith was arrested and convicted of driving under the influence in June 2000 and August 2001. Additionally, Mr. Smith had received his re-instated license a week before the accident. While he did not have a motorcycle endorsement, he stated he took the written test and was allowed to ride without passengers until he passed the driving test.

someone going 50 mph was because he hit guide wires on an adjacent telephone pole. Dr. Ipser also testified that if Mr. Smith had been traveling at 25 mph, he would have had ample opportunity to stop and avoid the van. Ultimately, Orange County believes Mr. Smith was driving reckless and should be found to be 75% at fault for the accident, not the jury's apportionment of 33%.

It is clear that the jury considered and weighed all of the testimony and actions of Mr. Smith when finding him to be 33% at fault. No testimony, reports, or arguments presented to the instant Special Master has shown any reason to further disturb the jury's apportionment. I find Mr. Smith was comparatively negligent and that apportionment of fault is 33% is appropriate.

Damages

Mr. Smith's damages are severe and life altering. He had his right leg amputated above the knee. His left leg was fractured and his pelvis was broken. It is clear the loss of his right leg continues to plague Mr. Smith to this day. At trial, different estimates were presented by both parties as to the cost of purchasing and maintaining a prosthetic leg. Mr. Smith's expert estimated an average annual cost to be near \$55,164 while Orange County's expert estimated it to be around \$44,400 annually.

In the years following the trial, Mr. Smith has had his prosthetic replaced and continues to suffer from complications from the amputation. In December 2016, he was hospitalized for an infection in his right leg. He has gained considerable weight and is now diabetic.

Orange County argues any medical costs have been shouldered by the Department of Veteran Affairs and Medicaid.⁸ Additionally, Orange County argues Mr. Smith only needs a new prosthetic every ten years instead of every five, cutting the annual costs of purchasing and maintaining a prosthetic from \$44,400 a year to around \$22,200.

Considering all of Orange County's arguments as to why damages are excessive, this instant Special Master concludes the jury's award and resulting final judgment is an appropriate amount to compensate Mr. Smith for what he has lost.

ATTORNEY'S/ LOBBYING FEES:

Claimant's attorney has an agreement with Claimant to take a fee of 25% of Claimant's total recovery. Claimant's attorney has hired a lobbyist and has agreed to pay 5% of any amount of the claim bill in lobbying fees; such payment is included in the

⁸ The Department of Veteran Affairs has a lien in the amount of \$181,560.04 and Medicaid has a lien in the amount of \$42,147.35. Both liens would be satisfied from any award passed by the Legislature.

SPECIAL MASTER'S FINAL REPORT--

Page 7

attorney's 25% fee. Outstanding costs total \$ \$76,312.81.

RESPONDENT'S
ABILITY TO PAY:

Orange County has a self-insured retention fund in the amount of \$1,000,000 with an excess insurance policy for \$10 million. If the claim bill were to pass, \$670,510.74 would be paid from the self-insured retention fund and the remaining amount from the excess policy.

LEGISLATIVE HISTORY:

This is the first time this instant claim has been filed in either chamber.

RECOMMENDATIONS:

I respectfully recommend that HB 6509 be reported **FAVORABLY**.

Respectfully submitted,

PARKER AZIZ

House Special Master

cc: Representative Cortes, B., House Sponsor
Senator Torres, Senate Sponsor
Ashley Istler, Senate Special Master