



THE FLORIDA SENATE
SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
10/12/17	SM	Favorable
10/24/17	JU	Favorable
	GO	
	RC	

October 12, 2017

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

Re: **SB 38** – Senator David Simmons
Relief of Erin Joynt by Volusia County

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM IN THE AMOUNT OF \$1,895,000 BASED ON A JURY TRIAL AWARD TO COMPENSATE ERIN JOYNT FOR INJURIES SUSTAINED WHEN SHE WAS RUN OVER WHILE SUNBATHING BY A VOLUSIA COUNTY BEACH PATROL VEHICLE.

FINDINGS OF FACT:

The Accident

On July 31, 2011, the Claimant, Erin Joynt, her husband, and two children were vacationing beachgoers at Atlantic Ocean Beach in Daytona Beach Shores. They traveled from their home of Wichita, Kansas and stopped at Daytona Beach Shores. They were planning to go to Walt Disney World afterwards.

At the time of the accident, the Claimant was lying face down on a towel sunbathing on the beach while her husband and two children were frolicking in the surf. At the same time, in the regular course of his employment duties, Thomas Moderie, an employee of the Volusia County Beach Patrol, was driving a 2005 Ford F-150 pickup truck owned by Volusia County northbound in the designated travel lanes along the beach in the vicinity of the Claimant.

Moderie was flagged down by a pedestrian who informed Moderie that there was broken glass on the beach sand in an area south of their location. Moderie then decided to turn his vehicle around but did not exit his vehicle to check the turnaround area for tourists as he was taught.

As Moderie made the right hand U-turn, he ran over the Claimant as she lay sunbathing on the beach. The truck's tire rolled over the Claimant's head, neck, and torso.

The right hand U-turn was against Volusia County's policies and procedures. These procedures required beach patrol employees to make U-turns to the left while remaining within the designated travel lanes.

Injuries

The Claimant was severely injured as a result of the accident. Her injuries included including multiple cranial and facial fractures, rib fractures, permanent facial injuries, memory loss, back pain, and damage to her left ear and additional hearing loss in this ear.

Medical Care

The Claimant was hospitalized from July 31, 2011, through August 5, 2011, at the Halifax Medical Center in Daytona Beach. Thereafter, the Claimant returned home to Wichita, Kansas. However, she continued to receive medical treatment for her injuries.

In September 2011, the Claimant had a gold weight surgically inserted into her left eyelid to help her blink/close her eyes. She has undergone multiple left ear pressure equalization tube placements and removals to assist with fluid drainage. In 2012, the Claimant had a left ear tympanoplasty with ossicular chain reconstruction surgery. Her left eardrum has a permanent perforation, along with hearing loss.

Education and Employment

In 2013, the Claimant completed her college degree in education at Southwestern College in Wichita, Kansas. The Claimant is currently employed as a paraprofessional at an elementary school in Wichita where she assists children who are struggling to read.

Impact of Accident on Daily Living

The injuries the Claimant sustained during the accident have been life-changing.

Prior to the accident, the Claimant led an active lifestyle with her family, including riding and racing motorcycles, boating, swimming, and playing softball. She was also proud of her diction and eloquence. Since the accident, it is too painful for her to enjoy the aforementioned activities. Additionally, the Claimant is unable to make certain sounds and sometimes has difficulty in finding the right word to express herself.

At the time of the claim bill hearing (January 5, 2017), the Claimant continued to suffer as a result of the impact of the truck operated by Moderie. The Claimant is unable to blink her right eye without the assistance of the gold weight that was sewn into her eyelid. The Claimant has a perforated eardrum and resulting hearing loss in her left ear. When listening to someone talk, she must turn in the direction of the speaker and rely on her right ear.

The Claimant has permanent facial paralysis on the left side of her face, has speech and neurological deficits, and chronic pain. The Claimant has an inability to enunciate certain sounds; she cannot eat with a spoon or rinse out her mouth without holding it closed. The Claimant cannot drink out of a bottle of water; she must have a cup or straw. The Claimant can only feel half of her husband's kiss, and she continues to have daily pain associated with her injury. Sitting or standing too long hurts.

The Claimant takes the following medications as a result of the accident: Trazadone (anti-depressant), Duloxetine (anti-depressant and nerve pain reliever), Tramadol (pain medication), Meloxicam (anti-inflammatory and pain medication), and Lidocaine (pain medication).

In addition to the physical changes and changes to her lifestyle resulting from the accident, the accident has affected the Claimant's personality. She is not as outgoing as she used to be and has become moody and irritable. When the Claimant is upset, she is not able to produce tears. The Claimant is very self-conscious about smiling or laughing; she is unable to smile as half her face is partially paralyzed.

PROCEDURAL HISTORY:

On April 5, 2012, the Claimant filed suit for negligence against Volusia County in the Circuit Court, Seventh Judicial Circuit, In and For Volusia County, Florida.

In June 2014, a 4-day trial was held. Volusia County admitted negligence, and the jury determined damages. On June 27, 2014, the jury found Volusia County liable for the Claimant's injuries and awarded her \$2.6 million in compensatory damages. The compensatory damages consisted of:

- \$100,000 for Future Medical Costs;
- \$500,000 for Future Lost Earnings;
- \$500,000 for Past Pain and Suffering; and
- \$1.5 million for Future Pain and Suffering.

On July 14, 2014, the Claimant filed a Motion for Attorneys' Fees and Costs. To date, the trial court has not ruled on this motion.

On August 18, 2014, judgment was entered pursuant to the jury's verdict. Thereafter, an Amended Final Judgment was entered on August 19, 2014.

On September 17, 2014, Volusia County appealed the Amended Final Judgment challenging the portions of the judgment awarding damages for lost earning capacity (\$500,000) and future medical expenses (\$100,000) to the District Court of Appeals of Florida, Fifth District. Volusia County did not challenge the portion of the judgment awarding damages for past pain and suffering (\$500,000) and future pain and suffering (\$1.5 million).

On November 13, 2015, the Fifth District Court of Appeal concluded there was no reasonable evidence submitted on which the jury could predicate a verdict in favor of the Claimant on the claims of lost earning capacity and future medical expenses. The Fifth District Court of Appeal reversed the jury's award for these claims and remanded the case to the trial court to strike same from the final judgment. See *Volusia Cty. v. Joynt*, 179 So. 3d 448 (Fla. 5th DCA 2015).

On January 12, 2016, The Second Amended Final Judgment for Plaintiff (Joynt) in the amount of \$2 million was entered against Volusia County by the trial court in accordance with the mandate from the Fifth District Court of Appeal. The Second Amended Final Judgment noted that the trial court

retained jurisdiction to determine and award taxable costs, and to determine entitlement, and if necessary, the amount of attorney's fees.

In accordance with s. 768.28, F.S., Volusia County paid the sovereign immunity limit amount of \$200,000 for this accident. Of the \$200,000 sovereign immunity limit, \$100,000 was paid to the Claimant's husband for loss of consortium, and \$15,000 was paid to Joynt's two children (\$7,500 per child) for loss of consortium prior to trial pursuant to a settlement agreement. The remaining \$85,000 was paid to the Claimant following entry of final judgment.

After the accident, Moderie's personal automobile insurance carrier, Allstate Insurance, paid the Claimant \$20,000. Star Insurance Company, Volusia County's excess insurer, paid \$34,000 to the Claimant's husband pursuant to a settlement agreement prior to trial.

To the extent Claimant's damages caused by Volusia County total \$2 million as reflected in the Second Amended Final Judgment, the Claimant has received a total amount of \$105,000, including \$85,000 from Volusia County and \$20,000 from Moderie. Volusia County is entitled to a setoff of the settlement amount paid by Moderie. See s. 768.041(2), F.S.; *Honeywell Int'l, Inc. v. Guilder*, 23 So. 3d 867, 871 (Fla. 3d DCA 2009). The remaining balance for the claim bill is \$1,895,000.

On April 20, 2016, the Claimant filed a Complaint for Declaratory Judgment against Volusia County and Star Insurance Company in the Circuit Court, Seventh Judicial Circuit, In and For Volusia County, Florida. The issue is whether Star Insurance Company is obligated to pay the judgment for the Claimant without the passage of a claim bill under s. 768.28(5), F.S. On May 27, 2016, the case was removed to the U.S. District Court, Middle District of Florida, Orlando Division. The Claimant filed a Motion for Stay of Proceedings Until Legislative Session Is Complete on January 18, 2017. The Declaratory Judgment case remains pending.

CLAIMANT'S POSITION:

The Claimant maintains the claim bill should be approved to uphold the reduced jury verdict of \$2 million, less \$105,000 already received by the Claimant.

Volusia County did not challenge the jury award of past pain and suffering (\$500,000) and future pain and suffering (\$1.5 million) in its appeal to Florida Fifth District Court of Appeal.

No funds from Volusia County will be used to pay the claim bill. Volusia County previously purchased insurance coverage from Star Insurance Company. Payment of the claims bill will come from this insurance coverage.

THE COUNTY'S POSITION:

Volusia County maintains that the claim bill is not ripe for consideration by the Legislature since the Claimant has not exhausted all available administrative and judicial remedies pursuant to Senate Rule 4.81(6). Plaintiff's Motion for Attorney's Fees and Costs is still pending in the underlying civil action and the Complaint for Declaratory Judgment filed against Volusia County and Star Insurance Company is pending in U.S. District Court, Middle District of Florida.

Volusia County further maintains that the amount of the claim bill is excessive under the facts and circumstances of the underlying claim.

Although Volusia County recognizes that the Claimant suffered real and substantial injuries, including partial facial paralysis, the county contends that the \$2 million jury verdict for non-economic damages (\$500,000 for past pain and suffering and \$1.5 million for future pain and suffering) is excessive.

CONCLUSIONS OF LAW:

The claim bill hearing was a *de novo* proceeding to determine whether Volusia County is liable in negligence for damages suffered by the Claimant and, if so, whether the amount of the claim is reasonable. This report is based on the evidence presented to the Special Master prior to, during, and after the hearing.

The duty to use care in driving a motor vehicle has been established by statute and case law. Section 316.1925(1), F.S., provides:

Any person operating a vehicle upon the streets or highways within the state shall drive the same in a careful and prudent manner, having regard for the width, curves, corners, traffic, and all other attendant circumstances, so as not to endanger the life, limb, or property of any person. Failure to drive in such manner shall constitute careless driving and a violation of this section.

Although this statute is limited on its face to streets and highways, the same duty of care should apply to persons who drive on a beach where sunbathers are present.

According to case law, motor vehicle drivers have a duty to avoid pedestrians on and off roadways. See, e.g., *City of Tallahassee v. Kaufman*, 87 Fla. 119 (1924) (imposing liability on the City of Tallahassee for damages caused by a trailer pulled behind a fire truck that swept across a street corner and injured a pedestrian).

Moderie had a duty to operate the Volusia County beach patrol vehicle in consideration of the safety of sunbathers and other patrons of the beach and in compliance with Volusia County Beach Patrol policies and procedures. It was entirely foreseeable that severe injuries to sunbathers, such as the Claimant, could occur when Moderie violated these duties.

By failing to look for and avoid sunbathers as he drove on the soft sand area of the beach and by failing to turn the vehicle around in the direction away from sunbathers in violation of county policies and procedures, Moderie breached his duty of care, and the breach was the proximate cause of the severe injuries to the Claimant.

Moderie was acting within the course and scope of his employment with Volusia County at the time he ran over the Claimant. Volusia County, as Moderie's employer, is liable for the damages caused by its employee's negligent act. *Mercury Motors Express v. Smith*, 393 So. 2d 545, 549 (Fla. 1981) (holding that an employer is vicariously liable for compensatory damages resulting from the negligent acts of employees committed within the scope of their employment); *Stinson v. Prevatt*, 84 Fla. 416 (1922).

In its Post-Hearing Memorandum, Volusia County cites to Senate Rule 4.81(6) and maintains that the instant claim bill should proceed no further. Senate Rule 4.81(6) provides, in part, that a claim bill is not ripe for hearing until all “available administrative and judicial remedies have been exhausted.” The Complaint for Declaratory Judgment that is pending in U.S. District Court, Middle District of Florida, should be considered a collateral appeal. However, the declaratory judgment action is not appealing the validity nor the amount of the reduced jury verdict that has been finalized on appeal to the Florida Fifth District Court of Appeal, but rather the issue is whether Volusia County’s insurer, Star Insurance Company, is obligated to pay the judgment for the Claimant without the passage of a claim bill by the Legislature. Further, the outstanding Motion for Attorney’s Fees and Costs will be moot, if this claim bill is passed by the Legislature. Therefore, I conclude that Senate Rule 4.81(6) does not prevent the claim bill from proceeding forward.

After considering all of the factors in this case, I conclude that the \$1,895,000 amount of this claim bill is appropriate.

FISCAL IMPACT:

Volusia County has insurance coverage through Star Insurance Company for the period of October 1, 2010 to October 1, 2011. The policy provided excess automobile coverage for vehicles insured under the policy owned by Volusia County, including the vehicle driven by Moderie and involved in the July 31, 2011 accident. This policy provides coverage of \$5 million per accident or occurrence (with a \$15 million policy aggregate limit) and includes a self-insured retention of \$100,000 per person for liability for claims pursuant to s. 768.28, F.S. Volusia County previously paid an advanced premium of \$520,000 for this policy. No county funds will be required to pay the claim bill.

RELATED ISSUES:

An amendment to the instant claim bill is needed to clarify that Volusia County has already paid \$200,000 for the accident and that those funds were apportioned among Ms. Joynt, her husband, and her children.

ATTORNEYS FEES:

The Claimant’s attorneys have agreed to limit their fees to 25 percent of any amount awarded by the Legislature in compliance with s. 768.28(8), Florida Statutes. No lobbyist fees will be paid.

RECOMMENDATIONS:

For the reasons set forth above, I recommend that Senate Bill 38 be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

John Ashley Peacock
Senate Special Master

cc: Debbie Brown, Secretary of the Senate