



**STORAGE NAME:** h6517.CJC h6517.CJC

**DATE:** 11/29/2017

November 29, 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 6517 - Representative Cortes  
Relief/Robert Allan Smith/Orange County

**THIS IS A CONTESTED CLAIM IN THE AMOUNT OF \$750,000<sup>1</sup> 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.**

FINDINGS 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/south, while Orlando Street runs east/west. This intersection is located in a residential neighborhood where the speed limit is 25 miles per hour. It is a four-way intersection with Orlando having stop signs and DePauw having the right-of-way and no stop signs. The accident occurred during daylight hours on a dry day.

On the day of the accident, Claimant, who lived on DePauw Avenue, was repairing his motorcycle, which had recently idled out. He assembled and disassembled several parts and test-drove the motorcycle around the block twice. According to Claimant, the motorcycle would falter when changing gears and not accelerate. On Claimant's third test drive around the block,

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<sup>1</sup> The bill also seeks to extinguish certain liens for Claimant's treatment and care.

the accident occurred.

Around 1:45 p.m., Lynn Godden, an Orange County employee on duty at the time, was driving an Orange County work van westbound on Orlando Street. 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 Claimant. According to Mr. Godden, he saw Claimant on a motorcycle but believed Claimant was heading in the opposite direction, away from the intersection of Orlando and DePauw. According to Claimant, he made eye contact with Mr. Godden and believed that Mr. Godden was aware of Claimant's presence. Mr. Godden, with parked vehicles partially blocking his view, crept forward a few feet into the intersection. Apparently believing the intersection to be clear, Mr. Godden continued driving west on Orlando Street.

At the same time, Claimant entered the intersection on his motorcycle traveling northbound. Seeing the van, Claimant attempted to steer his motorcycle to the left to avoid a collision, but to no avail. The front of the van struck Claimant, sending Claimant flying into the air a distance of about 23 feet.

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

The front of the Orange County van hit Claimant on his right side, requiring his right leg to be amputated above the knee. Claimant also fractured his left fibula, foot, and pelvis. He incurred over \$551,527.37 in medical bills, although it appears many (if not all) of the bills were paid by third parties such as Medicaid or the Department of Veteran Affairs. There are outstanding liens against any award Claimant may receive.

Claimant continues to suffer the effects of his injuries, suffering from what is apparently a recurring leg infection. He went on to complete his college degree but struggled to find employment until recently. He is now employed at Image Depot Express in Lakeland, Florida, where he earns twelve dollars an hour doing

graphic design work. Claimant receives social security disability for about \$800 per month, along with Veteran Affairs benefits from past military service.

The record indicates that Mr. Godden, the driver of the Orange County van, has received multiple traffic citations over the course of his life, including failure to obey a stop sign. Mr. Godden is now retired from Orange County.

LITIGATION HISTORY:

On February 14, 2007, Claimant filed suit against Orange County in circuit court, alleging negligence by Mr. Godden and Orange County. Before trial, Claimant and his wife divorced, and she settled her claim against Orange County for \$85,000. A jury trial was held in November 2011. After the full case had been presented to the jury and after hours of jury deliberation, the judge sent the jury home for the weekend, with deliberations to resume the next Monday. One of the jurors indicated she would not return Monday. Ultimately, a mistrial was declared.

A year later, in November 2012, the case was tried again and resulted in a jury verdict of \$4,814,785.37, with the jury finding Respondent 67% at fault and Claimant 33% at fault. The jury's calculations of damages were as follows:

Past Lost Earnings	\$137,280.00
Past Medical Expenses	551,527.37
Future Medical Expenses	2,376,000.00
Past Pain & Suffering	228,258.00
Future Pain & Suffering	1,521,720.00
<b>Total Damages</b>	<b><u>\$4,814,785.37</u></b>

The trial court reduced the damages in part for collateral sources of medical expenses and Claimant's portion of fault and entered a final judgment for \$2,913,536.09. Respondent did not appeal and paid the statutory cap of \$100,000. Claimant's ex-wife has a lien against Claimant for about \$40,000 (that is, half of Claimant's reduced award for past lost wages).

CLAIMANT'S POSITION:

Claimant argues Respondent is liable for the negligence of its employee, Mr. Godden, for failing to yield the right-of-way to Claimant; and that the jury verdict, while too low an amount, should be honored. Claimant asserts he was traveling 25 miles per hour or slower at the time of the accident and that he was in no way negligent. Claimant states that he has not yet received any payout from the \$100,000, because that money is held in trust until the matter is resolved.

RESPONDENT'S POSITION:

Respondent opposes the claim bill, arguing that Claimant was comparatively negligent in the accident. Respondent asserts that Claimant was traveling at a speed of up to 50 miles per hour at the time of the accident and implies Claimant may have

had alcohol in his blood. At the Special Master hearing, Respondent argued that Claimant was up to 75% responsible for the accident, not 33% as the jury found. Respondent objects to the calculation of medical damages.

CONCLUSIONS OF LAW:

Regardless of whether there is a jury verdict or a settlement agreement, every claim bill must be reviewed *de novo* in light of the standard elements of negligence.

Duty & Breach

Mr. Godden owed a duty to Claimant to stop and yield the intersection to Claimant. Under Florida law, a driver approaching an intersection with a stop sign must stop, and after stopping, must "yield the right of way to any vehicle" in the intersection or which is approaching so closely as to constitute a hazard.<sup>2</sup> Mr. Godden, as he approached the intersection, owed a duty to Claimant, who had no stop sign and enjoyed the right-of-way. Mr. Godden was acting within the scope of employment with Orange County, and thus Respondent is liable for Mr. Godden's actions under the doctrine of respondeat superior. Mr. Godden breached his duty to Claimant when he proceeded through the intersection without the right-of-way.

Causation

The primary point of contention between the parties is whether, and to what extent, Claimant's own negligence contributed to the accident. Claimant argues that he bears zero fault, while Respondent argues that Claimant bears up to 75% of the responsibility for the accident.<sup>3</sup>

To support its argument that Claimant's negligence contributed to the accident, Respondent makes two main assertions: first, that Claimant was traveling at a speed of up to 50 miles per hour in a residential area when the crash occurred; and second, that Claimant may have been impaired by alcohol. It is undisputed that Claimant was not wearing a helmet.

Claimant's speed at the time of the crash was hotly contested at trial and at the Special Master hearing, with Claimant stating he was traveling at 25 miles per hour or less, and Respondent arguing Claimant was traveling at 35 to 50 miles per hour.

Eyewitness Nelson Dean stated that Claimant was traveling at 35 to 40 miles per hour. Additionally, paramedic Eric Miller's medical notes state that Claimant told the first responders that he was traveling about 50 mph. Claimant denied at the Special Master hearing that he ever said this to Mr. Miller.

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<sup>2</sup> See s. 316.123(2)(a), F.S.

<sup>3</sup> In Florida, the doctrine of comparative fault provides for apportionment of the loss among those whose fault contributed to the occurrence. See *Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973). A plaintiff's negligence diminishes the proportionality of the amount awarded but does not bar recovery. See s. 768.81(2), F.S.

Both parties presented extensive expert testimony as to Claimant's speed. Orion Keifer, a mechanical engineer, testified for Claimant that Claimant was traveling 25 miles per hour or less based on where Claimant's body and motorcycle landed after the crash. The distance from impact to the resting place of Claimant's body was between 45 and 50 feet. Mr. Keifer opined that if Claimant had been traveling 50 miles per hour, he would have been thrown 160-180 feet instead.

Respondent's expert, Dr. James Ipser, opined that Claimant was traveling about 50 miles per hour when the accident occurred. Dr. Ipser opined that Claimant went airborne upon impact with the van and then hit guide wires on a nearby telephone pole, causing Claimant's body to stop traveling as far as it would have otherwise gone. Dr. Ipser also opined that if Claimant had been traveling at 25 miles per hour, he would have had opportunity to avoid the accident.

With regard to the possible presence of alcohol impairment, there was some evidence that a hospital record reflected Claimant having had some alcohol on the day of the accident. Additionally, Respondent cites to Claimant's two prior DUI convictions<sup>4</sup> as evidence that he may have been drinking and driving the day of the accident. Claimant denies alcohol impairment on the day of the accident, and the two paramedics who stabilized and transported Claimant did not report any alcohol. It appears that no blood alcohol analysis was performed at the hospital.

I find that the jury's determination that Claimant was 33% responsible and Respondent was 67% responsible is wholly reasonable. The jury had the opportunity to evaluate these factors and ultimately decided that Claimant's percentage of fault lay at 33%—that is, between the 0% argued by Claimant and the 75% argued by Respondent. No testimony or arguments presented at the Special Master hearing have shown any reason to disturb the jury's apportionment of liability.

#### Damages

Claimant's damages are severe and life-altering. His right leg was amputated above the knee, and that loss continues to plague him to this day. His left leg was fractured, and his pelvis was broken. The parties presented different estimates for the cost of purchasing and maintaining a prosthetic leg, with Claimant's expert estimating the average annual cost at \$55,164, and Respondent's expert estimating it at \$44,400.

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<sup>4</sup> Claimant was convicted of driving under the influence twice, apparently in 2000 and 2001. Additionally, Claimant had received his reinstated license about 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.

In the years following the trial, Claimant 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. Claimant is now overweight and diabetic.

Respondent asserts that many, if not all, of the medical costs have been shouldered by third parties such as the Department of Veteran Affairs and Medicaid.<sup>5</sup> Respondent also suggests Claimant needs a new prosthetic only every ten years instead of every five.

Notwithstanding Respondent's arguments, I conclude the jury's award and resulting final judgment of \$2.9 million is an appropriate amount to compensate Claimant for his losses. In the instant claim bill, Claimant seeks only \$750,000 plus the possible extinguishment of certain medical liens, which is reasonable.

ATTORNEY'S/  
LOBBYING FEES:

Claimant's attorneys will limit their fees to 25 percent of any amount awarded by the Legislature. Out of this amount, 5 percent will go to lobbyist fees.

RESPONDENT'S ABILITY  
TO PAY:

At the time of the accident, Orange County maintained a self-insured retention fund for \$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 would purportedly be paid from the excess policy.

LEGISLATIVE HISTORY:

This is the second session this claim has been presented to the Legislature. Last session, CS/HB 6509 (2017)—which sought the full excess jury verdict amount of \$2,813,536.09—passed the House by a vote of 109-4, but it died in Senate Judiciary. Current House Bill 6517 seeks the lesser amount of \$750,000 plus the extinguishing of certain medical liens.<sup>6</sup>

RECOMMENDATION:

I recommend that House Bill 6517 be reported **FAVORABLY**.

Respectfully submitted,

**JORDAN JONES**

House Special Master

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<sup>5</sup> The Department of Veteran Affairs has a lien for about \$181,000 and Medicaid has a lien for about \$42,000 (reduced from \$335,000).

<sup>6</sup> Senate Bill 54 (2018) seeks the full \$2,813,536.09 but does not state that any liens are to be extinguished.

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