



THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
409 The Capitol

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DATE	COMM	ACTION
1/19/22	SM	Favorable
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January 19, 2022

The Honorable Wilton Simpson
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 70** – Senator Darryl Rouson
HB 6509 – Representative Juan Fernandez-Barquin
Relief of Donna Catalano

SPECIAL MASTER'S FINAL REPORT

THIS IS A SETTLED CLAIM FOR \$3,175,000, SUPPORTED BY THE FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES (DACS). THE CLAIM SEEKS COMPENSATION FROM THE GENERAL REVENUE FUND TO DACS, TO COMPENSATE CLAIMANT FOR PERSONAL INJURIES AND DAMAGES SUSTAINED IN A MOTOR VEHICLE ACCIDENT RESULTING FROM THE NEGLIGENT OPERATION OF A DACS VEHICLE.

FINDINGS OF FACT:

The Accident

On June 26, 2019, at around 3:20 p.m., Claimant, Donna Catalano's vehicle was struck head-on by a DACS pickup truck that was being operated by Donald Gerard Burthe, a DACS employee, acting within the scope of his employment.

Claimant was driving to her home, in Jefferson County, after she finished her shift as an emergency room nurse at Tallahassee Memorial Hospital.¹ As Claimant drove east on U.S. 90/Mahan Drive, in her blue 2015 Chevrolet Equinox, she approached an area with a curve, where she saw a white

¹ Claimant's shift was from 4:00 a.m. - 2:30 p.m.

vehicle drift across the center line and onto her side of the road.

According to the crash report, the weather was clear, it was daylight, and the road surface was dry. The extent of damage to both vehicles was described as disabling and both vehicles were towed. The vehicle that collided with Claimant was listed as owned by "Florida Department of Agricult [sic]," and driven by Donald Gerard Burthe. Both Claimant and the DACS employee are listed as having been wearing shoulder and lap belts. Both vehicles are listed as having had front airbags deploy. Both parties were transported to Tallahassee Memorial.

Prior to the collision, Claimant was traveling at the posted speed limit of 60 miles per hour. Claimant attempted to avert the collision by breaking and turning out of the way. Data downloaded from Claimant's vehicle shows that Claimant reduced her speed from 60 miles per hour down to 43 miles per hour.²

The DACS employee was driving above the posted speed limit of 60 miles per hour. Photographs of the DACS vehicle show that the speedometer froze at just under 70 miles per hour. An affidavit by professional engineer, G. Bryant Buchner, states that the speedometer was electrically powered. When the collision occurred, all electrical power in the vehicle was severed. As a result, the speedometer froze at the time of the collision, indicating that the vehicle was travelling above the posted speed limit at impact.

There was a car traveling in front of Claimant and a car traveling behind Claimant. The car in front of Claimant was driven by Jennifer Washington, with her daughter Teriana Robinson as a passenger. The driver, Washington, states in her deposition that she saw the DACS vehicle drifting into her lane and crossing over the yellow line³ toward her, so she sped up to avoid a collision. Washington witnessed the collision through her rearview mirror and saw the vehicle hit Claimant head-on. The passenger, Robinson, states in her deposition that she saw a white truck going toward

² The data downloaded from Claimant's vehicle was memorialized in an affidavit by G. Bryant Buchner, a professional engineer, recognized in the state of Florida.

³ Photos of the crash scene and the diagram below reflect that the yellow line mentioned in Teriana Robinson's deposition was actually a set of two solid yellow lines (Exhibit G).

Tallahassee and coming into their lane of travel, so Washington slightly swerved off of the road to keep the DACS vehicle from hitting them. Robinson states that she also witnessed the DACS truck hitting the blue car behind them, through the rearview mirror, causing both vehicles to flip in opposite directions.

The car behind Claimant was driven by Marian Simmons. She states in her deposition that she saw a white pickup truck with the driver's side wheels over the center line. She slowed down and saw the truck hit Claimant head-on.

The responding Florida Highway Patrol Trooper, N.A. Hagedorn, confirmed in his crash report:

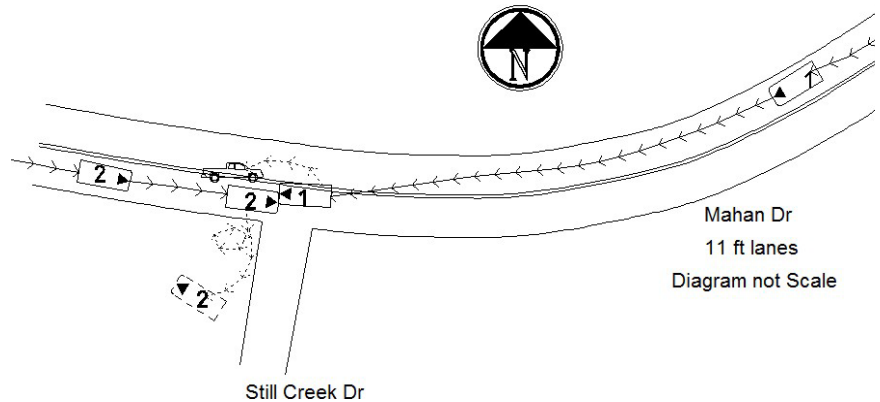
The [DACS vehicle] failed to maintain his lane of travel and crossed the centerline onto the eastbound lane and into the path of [Claimant's vehicle]. [Claimant's vehicle] was unable to react in time to avoid a collision with [the DACS vehicle]. [The DACS vehicle's] front left struck the front left of [Claimant's vehicle]. After the [DACS vehicle] struck [Claimant's vehicle], [the DACS vehicle] began to overturn where it came to rest on the eastbound lanes on its right side, partially on its roof. [Claimant's vehicle] traveled onto the south shoulder where it overturned before coming to rest. [The DACS vehicle] came to final rest between the centerline and eastbound lane of Mahan Drive facing east on its right side, partially on its roof. [Claimant's vehicle] came to final rest facing west on the south shoulder of Mahan Drive.⁴

The DACS Employee was cited for violating s. 316.089, F.S., relating to driving on roadways laned for traffic.⁵

⁴ Trooper N.A. Hagedorn, Florida Highway Patrol Crash Report (Jun 26, 2019) (Exhibit A).

⁵ "A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Section 316.089 (1), F.S.

Crash Report Diagram



Damages

The Leon County Emergency Medical Services records show that after the crash Claimant could not exit the vehicle and paramedics had to cut her out. She was placed in a cervical collar awaiting extrication. The windshield was compromised, the A-pillar was pushed back and the driver's door was folded. The steering wheel was against Claimant's chest and the dashboard pinned her legs. All airbags were deployed. The wreckage had to be pried back from Claimant's torso. She was extracted, and placed on a backboard, immobilized and transported to Tallahassee Memorial Hospital.

Claimant underwent multiple surgeries in the days after the collision. X-Rays compared to demonstrative medical illustrations show bone grafts, plates, cables, and screws used to repair fractures in Claimant's left arm and both femurs.

Emergency Center Records from Tallahassee Memorial hospital reflect the following medical injuries:

- acute post hemorrhagic anemia;
- left hand abrasions;
- contusions diffusely across left side of body;
- left distal skin laceration;
- right hemotympanum;
- trace left basilar pneumothorax;
- displaced comminuted fracture of shaft of radius, left arm (surgical repair);
- displaced comminuted fracture of shaft of ulna, left arm (surgical repair);
- displaced comminuted fracture of all the humeral head and neck, left arm (surgical repair);

- placement of external fixator, left femur (surgical repair);
- placement of external fixator, right, femur (surgical repair);
- displaced supracondylar fracture with intracondylar extension of lower end of left femur (surgical repair);
- displaced supracondylar fracture with intracondylar extension of lower end of right femur (surgical repair);
- hypomagnesemia;
- multiple displaced fractures of ribs;
- displaced left L2, L3, L4 transverse process fractures;
- traumatic pneumocephalus.

Claimant spent nine days in Tallahassee Memorial Hospital from her admittance on June 26, 2019, until her discharge on July 5, 2019. The Discharge Summary Final Report shows that Claimant was transferred to inpatient rehabilitation at Tallahassee Memorial Hospital Rehabilitation where she spent 77 days. After, she was transferred to her home and underwent 42 days of outpatient rehabilitation.

Medical Expenses

A summary of Claimant's past medical expenses, detailing the provider, dates of service, and charges, reflects a total of \$676,935.36 in medical bills resulting from the collision.

A life care plan, prepared for Claimant, based on a life expectancy of 85 years, anticipates her future medical requirements to total \$861,325.⁶

Ms. Catalano's Future Medical Expenses	Amount
Physician Services	\$21,151.82
Routine Diagnostics	\$11,244.62
Medications	\$146,746.40
Laboratory Studies	\$11,265.76
Rehabilitation Services	\$36,678.36
Equipment & Supplies	\$59,044.97
Environmental Modifications & Essential Services	\$52,800.00
Nursing & Attendant Care	\$275,244.48
Acute Care Services	\$247,149.50
TOTAL	\$861,325.91

⁶ The *Life Care Plan* was prepared by Dr. Christopher Leber, a Physical Medicine & Rehabilitation specialist, who has practiced medicine in Florida since 1995. Dr. Leber is a Board Member of the American Academy of Physician Life Care Planners, and a member of the American Academy of Physician Life Care Planners Educational Committee.

Lost Wages

Due to her life altering injuries, Claimant can no longer perform her job as a nurse and was discharged from her employment with Tallahassee Memorial Hospital.

An economic loss report,⁷ prepared for Claimant, based on her life expectancy at the time of the accident of 84.74 years, calculate Claimant's loss of earnings and benefits to be \$669,363.⁸ Her loss of household production is calculated to be \$211,615.⁹

Loss of Enjoyment of Life; and Pain and Suffering

Before the collision, Claimant was a member of the Tallahassee Memorial Hospital team where she worked as an emergency room nurse. She lived an active lifestyle and enjoyed deep sea fishing, hunting, hiking, fishing, and gardening with her family.

Since the collision, Claimant has pain on a daily basis. She can no longer walk normally. She is limited to standing for about fifteen to twenty minutes before needing to sit. She uses a cane when she walks. She mostly uses a wheelchair at home. Her right arm no longer straightens out and she cannot raise it above her head. As a result, she has cut her hair short since she can no longer brush it herself. She periodically suffers from incontinence and depression.

Claimant can no longer perform basic functions required of a nurse such as kneeling; performing CPR; lifting, pulling and turning patients; or pushing stretchers and wheelchairs. As a result, she cannot serve as a nurse or personally perform such functions for her loved ones when they are in need. During her recovery, Claimant's partner of over 30 years fell ill and had to be put into hospice care. Similarly, Claimant's father was placed into hospice care just days before the special

⁷ The Economic Loss Report was prepared by Benjamin S. Shippen, Ph.D., of Secretariat Economists, who has a Ph.D. in Economics. Mr. Shippen has worked as an economic consultant and expert witness in statistical analysis of employment practices since 2000.

⁸ Claimant briefly worked in a temporary OPS position with the State of Florida Department of Health in Leon County from August 12, 2020 to June 30, 2021. This position paid \$25 an hour. The earnings from this position partially mitigated the earnings loss.

⁹ The Economic Loss Report estimates that Claimant will be unable to perform 694 hours of household production per year that she would have otherwise performed herself.

master hearing. Claimant otherwise would have performed these functions herself.

LITIGATION HISTORY:

Litigation and Settlement

On July 10, 2020, Claimant filed suit in the Second Judicial Circuit, in and for Leon County. On July 15, 2021, the parties completed mediation in the matter and reached an agreement.

On July 16, 2021, the parties entered into a settlement agreement. DACS agreed to have the Florida Division of Risk Management pay the \$200,000 statutory cap prescribed by section 768.28, Florida Statutes, and to support a claim bill for the excess amount of \$3,175,000.

On August 6, 2021, the Division of Risk Management paid \$200,000 to Claimant's attorney which was disbursed as follows:

- Claimant's attorney's fees: \$50,000 (25 percent);
- Claimant's attorney's fees deferred on the uninsured motorist settlement: \$2,500;¹⁰
- Costs advanced: \$23,494.50;¹¹
- Medical care providers: \$25,488.57;
- Claimant: \$98,516.93.

CLAIM BILL HEARING:

On December 8, 2021, a half-day virtual hearing was held before the House and Senate special masters.

Both parties stipulated to all of the exhibits submitted into evidence. It was made clear that both parties fully cooperated throughout the entire matter and responded to all requests for documentation.

Claimant's Case-in-Chief

Claimant's mother, Loretta Catalano; Claimant's son, Tony Grimes; Claimant's neighbor, Dr. David Greene; and Claimant's former colleague and nurse, Rebecca Berhalter provided live testimony via WebEx.¹² The parties gave

¹⁰ Reduced from 33.33 percent (\$3,333.33) to 25 percent.

¹¹ Claimant's Settlement Statement, signed on October 8, 2021, reflects that that the total costs advanced equal \$46,988.99, of which \$23,494.49 are deferred.

¹² All witnesses who provided live testimony at the Special Master Hearing are also included in a documentary produced by Claimant detailing the events and depicting the impact of the collision on Claimant's life (Exhibit Z6).

testimony that spoke to Claimant's life before and after the collision.

Claimant also testified as to the day of the accident, the collision, her quality of life before and after the event, injuries, and recovery.

Respondent's Case-in-Chief

DACS did not admit liability but waived its case-in-chief. Therefore, the respondent did not present or contest any evidence, theories, or arguments at the hearing.

Counsel for DACS asked one clarifying question as to whether Claimant was on the phone with her partner at the time of the accident. Claimant admitted she was on the phone and reiterated that she was hands-free and utilizing the OnStar feature on her vehicle.

When questioned as to the whereabouts and condition of the DACS employee who was driving the vehicle, both counsel for Claimant and counsel for DACS explained that Burthe had passed away as a result of the accident. Counsel for DACS could not confirm whether an investigation was conducted. It is unknown what caused the DACS employee to drift out of his lane and into Claimant's lane.

CONCLUSIONS OF LAW:

Section 768.28, Florida Statutes, waives sovereign immunity for tort liability for a claim or judgment by one person up to \$200,000. Sums exceeding this amount are payable by the State through further act of the Legislature.

Regardless of any jury verdict or settlement, claim bills are reviewed de novo when assigned to a special master, and each element of negligence must be found within the evidence.

Negligence

Florida jury instructions define negligence as "the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances;"¹³ and "a legal cause of loss, injury or damage if it directly and in natural and continuous sequence produces or contributes

¹³ Florida Civil Jury Instructions, 401.4 – Negligence.

substantially to producing such loss, injury or damage, so that it can reasonably be said that, but for the negligence, the loss, injury or damage would not have occurred.”¹⁴

There are four elements to a negligence claim: (1) duty – where the defendant has a legal obligation to protect others against unreasonable risks; (2) breach – which occurs when the defendant has failed to conform to the required standard of conduct; (3) causation – where the defendant’s conduct is foreseeably and substantially the cause of the resulting damages; and (4) damages – actual harm.¹⁵

Vicarious Liability

“An agent is a person who is employed to act for another, and whose actions are controlled by his employer. An employer is responsible for the negligence of its agent if such negligence occurs while the agent is performing services which he was employed to perform.”¹⁶

Vicarious liability for the acts of the DACS employee is undisputed and admitted by DACS. The vehicle that collided with Claimant was owned and registered to the Florida Department of Agriculture and Consumer Services. The signed and notarized affidavit by Joey Hicks, the Administrator for DACS, admits that at the time of the collision Burthe was employed by DACS, was operating the DACS vehicle with express permission, his actions were controlled by DACS, and that he was in the course and scope of his employment with DACS. Therefore, DACS is vicariously liable for the collision.¹⁷

Duty

The operator of a motor vehicle has a duty to use reasonable care, in light of the attendant circumstances, to prevent injury to persons within the vehicle's path.¹⁸

The DACS employee had a statutory duty, under section 316.089, Florida Statutes., to maintain his lane. This duty required the DACS employee to drive the vehicle “as nearly as practicable entirely within a single lane.” The

¹⁴ Florida Civil Jury Instructions, 401.12(a) - Legal Cause, Generally.

¹⁵ Williams v. Davis, 974 So.2d 1052, at 1056-1057 (Fla. 2007).

¹⁶ Florida Civil Jury Instructions, 401.12(a) - 401.14(b)(1) Vicarious Liability – Agency, Master and Servant.

¹⁷ See Florida Civil Jury Instructions, 401.14(a) - Preliminary Issues — Vicarious Liability - Owner, Lessee, or Bailee of Vehicle Driven by Another.

¹⁸ Gowdy v. Bell, 993 So. 2d 585, 586 (Fla. 1st DCA 2008).

statute further requires that a driver not move from their lane until after they have ascertained that this movement can be made safely.¹⁹

Breach

As the evidence demonstrates, the DACS employee violated section 316.089, Florida Statutes, and breached the required standard of care when he drifted out of his lane and into Claimant's oncoming lane of travel. With at least three vehicles traveling in the oncoming lane of traffic, it was clearly not safe for the DACS employee to move from his lane of travel.

Causation

Negligence is "a legal cause of loss, injury or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury or damage, so that it can reasonably be said that, but for the negligence, the loss, injury or damage would not have occurred."²⁰

The DACS employee's negligence is the legal cause of Claimant's loss, injury, and damages. The collision and Claimant's damages are a reasonably foreseeable result in the sequence of events caused by the head-on collision, at a speed over 60 miles per hour, which was unavoidable even with Claimant's ability to reduce her velocity. A collision was a foreseeable outcome from the risk produced by the DACS employee's failure to maintain his lane; and but for the DACS employee's failure to maintain his lane, the accident would not have occurred.

Comparative negligence was not a defense raised during the special master hearing, nor does the undersigned find any evidence of comparative negligence in the record. Although Claimant was on the phone at the time of the collision, she was hands free and still managed to reduce her speed, which likely minimized the impact of the collision.

Damages

Lost earnings and benefits	\$669,363
Loss of household production	\$211,615
Life care plan value	\$861,325

¹⁹ Section 316.089(1), F.S.

²⁰ Florida Civil Jury Instructions, 401.12(a) - Legal Cause, Generally.

Past and present economic loses (not including past medical bills)	\$1,742,203
TOTAL	\$2,623,181

CONCLUSION:

Claimant has demonstrated negligence by the DACS employee and vicarious liability of DACS for the employee's negligence. A reasonably careful driver traveling down a two-lane road would maintain their lane, so as to not drift into the other lane with oncoming traffic. Under these facts, it can reasonably be said that but for the DACS employee drifting out of his lane, the collision would not have occurred, and Claimant would not have experienced the loss, injury, and damages that are detailed in the findings of fact above.

The damages sought in this bill, \$3,175,000, are reasonable given the outcome of the accident and Claimant's pain, suffering, loss of enjoyment of life, medical bills, lost wages, 85 year life expectancy, and future medical needs which are still developing.

ATTORNEY FEES:

Section 768.28(8), Florida Statutes, limits a claimant's attorney fees to 25 percent of any judgment or settlement. Claimant's attorney has agreed to this limit and included related lobbying fees within the limit, as follows:

- Attorney fees: 20 percent (\$635,000); and
- Lobbyist fees: 5 percent (\$158,750).

RECOMMENDATIONS:

Based upon the foregoing, the undersigned recommends that SB 70 be reported FAVORABLY.

Respectfully submitted,

Shirley Sharon
Senate Special Master

cc: Secretary of the Senate