THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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November 18, 1999

SPECIAL MASTER'S FINAL REPORT	DATE	COMM	ACTION
The Honorable Toni Jennings	11/19/99	SM	Unfavorable
President, The Florida Senate	1/18/00	CA	Fav/1 amend
Suite 409, The Capitol	2/10/00	FR	Favorable
Tallahassee, Florida 32399-1100			

Re: SB 32 - Senator Mandy Dawson
Relief of J.C. Wendehake

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM FOR $1.2 MILLION AGAINST THE CITY OF PORT ST. LUCIE FOR THE INJURIES SUSTAINED BY MR. J.C. WENDEHAKE IN A VEHICLE ACCIDENT INVOLVING A CITY POLICE VEHICLE AND THE VEHICLE IN WHICH MR. WENDEHAKE WAS A PASSENGER. THE JURY VERDICT AWARDED $1,348,066.73, OF WHICH THE CITY HAS PAID $100,000. THIS BILL DIRECTS THE CITY TO PAY THE EXCESS JUDGMENT FROM ITS OWN REVENUES.

FINDINGS OF FACT:

Summary and Background: On January 25, 1991, at about 10:15 p.m., J.C. Wendehake, age 16, was a passenger in the back seat of a vehicle driven by his friend, Lynn Amandro, also 16. A third person was a passenger in the front seat. The Amandro vehicle was headed west on Port St. Lucie Boulevard in the City of Port St. Lucie when she suddenly made a left-hand turn towards Wald Street into the path of an oncoming police car driven by Officer Jeff Ludwick with the City of Port St. Lucie, who was headed east on Port St. Lucie Boulevard. The police car struck the right side of the Amandro vehicle. Both vehicles were traveling at approximately 35 mph at impact. The legal speed limit was 40 mph, but an orange construction sign stating "30 MPH" was posted

immediately before the site of the accident. It was raining at the time of the accident.

J.C. Wendehake suffered extensive and serious injuries, including a closed head injury causing permanent brain damage, a fractured leg and hip, a punctured lung, and lacerated liver.

J.C. Wendehake (claimant) filed a personal injury lawsuit against both Lynn Amandro and the City of Port St. Lucie. The claimant settled his claim against Lynn Amandro for $10,000, the limits of bodily injury liability available under her motor vehicle policy, and she was dismissed from the suit. It is undisputed that Lynn Amandro negligently operated her vehicle by suddenly and without warning turning in front of the oncoming police car.

A jury trial was held on the remaining claim against the City of Port St. Lucie in May of 1997. The jury determined that Officer Ludwick was negligent in operating his vehicle and that such negligence was a proximate cause of the accident and injuries. The jury verdict form did not include Lynn Amandro so no specific percentage of negligence was assigned by the jury to Officer Ludwick.

The jury awarded a total of $1,348,066.73 in damages to J.C. Wendehake, itemized as follows:

- $248,066.73 for past medical expense;
- $700,000 for future medical expense and future lost earning ability (which was not reduced to present value);
- $200,000 for past pain and suffering; and
- $200,000 for future pain and suffering.

The City of Port St. Lucie (respondent) paid $100,000 of the judgment, its limits of liability under s. 768.28, F.S. The respondent did not appeal the decision. The respondent contends that the jury verdict was not supported by the evidence in finding Officer Ludwick at fault.

The primary issue is whether Officer Ludwick was negligent and, if so, whether that negligence was the proximate cause of the injuries to the claimant. There is little disagreement between the parties regarding the facts. However, the parties disagree as to whether these facts reasonably support the jury's finding of negligence by Officer Ludwick that caused the injuries to the claimant.

On Liability: On a rainy night in January, 1991, at about 10:15 p.m., 16-year-old Juan Carlos ("J.C.") Wendehake was a passenger in the right back seat of a Mercury Cougar driven by his girlfriend, Lynn Amandro, also 16, who obtained her driver's license 2 months previously. Ms. Amandro was traveling westbound on Port St. Lucie Boulevard, taking home a friend who was the third occupant of the vehicle. For some unknown reason, Ms. Amandro made a sudden left-hand turn towards Wald Street, which was not where her friend lived. In her deposition testimony, she did not remember making the turn and did not know of any reason why she would have done so. She had no memory of whether she turned on the blinker, saw any vehicle approaching in the other lane, or anything about the accident. The last thing she remembered was traveling west on Port St. Lucie Boulevard and then waking up in the hospital. The claimant and the third passenger also have no memory of the facts related to the cause of the accident or why Lynn Amandro would have been turning left.

Approaching in the opposite direction, eastbound on the same two-lane road, was Officer Jeff Ludwick of the City of Port St. Lucie, on duty in his police vehicle. Officer Ludwick's car struck the passenger side of the Cougar as it turned into his lane in front of his car.

The posted speed limit on Port St. Lucie Boulevard was 40 mph, but an orange traffic sign visible to eastbound drivers, just before the intersection at Wald Street (the accident site), read, "BEGIN CONSTRUCTION - 30 MPH".

The accident report by the investigating officer attributed the cause of the accident to Lynn Amandro's failure to

yield the right-of-way to the police vehicle. The report stated that three witnesses all said that there was no way the police officer could have avoided a collision. According to the report, Officer Ludwick said that he applied his brakes but could not stop on the wet road. The three occupants of the Amandro vehicle were taken to the hospital and were not interviewed by the investigating officer. A traffic citation was issued to Lynn Amandro.

Lisa Watson was a witness to the accident, driving a car that was two vehicles behind Lynn Amandro's Cougar (with one vehicle between them). In her deposition, she stated that she saw the police vehicle approaching in the opposite direction and there was no indication that it was going too fast. She stated that the Cougar suddenly turned left without putting on its blinker and looked as if it was going to miss the street entirely. She said, "The cop car didn't have time to stop." At trial, Ms. Watson gave the following testimony:

Q: What did you see the white Mercury Cougar do?
A: It looked as if it was going to miss Wald Street and it just turned.
Q: Did it turn slowly or suddenly?
A: Suddenly, no brake lights.
Q: Any turn signal?
A: Not that I recall, no.
Q: Can you give the jury some idea how far away the police car was from this white Mercury when it suddenly turned left across the center?
A: It's been a while, but I'd have to say, estimate maybe two car lengths. It's hard. It was pretty close.
Q: Did it appear to you that there was time for the police officer to avoid this accident?
A: No.

Further testimony from this same witness was that the rain was "medium, light" and that she (the witness) was traveling at about 35 to 40 mph at the accident scene, which she felt was a safe speed for the circumstances. She said she was out of the construction zone at the site where the accident happened.

The driver of the vehicle immediately behind the Cougar did not testify at trial, but her written statement for the accident report estimated her own speed at 35 mph and that the car in front of her "pulled away from me" and "suddenly threw a sharp left." She wrote, "My initial impression was that the car would end up in the Treetop Day Care Center because it was going too fast to make the turn safely . ." She said the vehicle "did not signal an intent to turn nor were any brakes applied before the turn as far as I could see." She also noted, "At the time the accident occurred it was drizzling lightly."

At trial, Officer Ludwick testified that he estimated his speed to be between 35 and 40 mph as he was traveling on Port St. Lucie Boulevard prior to the accident which, in his opinion, was not too fast for the conditions. A construction area was about a quarter of a mile down the road past the construction sign and the site of the accident. Officer Ludwick said he did not notice the Cougar approaching in the opposite direction until its headlights came across the center line into his lane, about three car lengths away. He stated the vehicle made a fast, sudden turn and that he tried to stop but there was nothing he could do to avoid the accident. He estimated that one or two seconds elapsed from the time he saw the headlights cross the center line until the vehicles collided.

The only expert testimony at trial was given by Joseph Wattleworth, offered by the defendant. Mr. Wattleworth is a civil engineer specializing in the field of traffic accident reconstruction, previously a Professor of Civil Engineering for 26 years at the University of Florida, who has about 70 publications in the field of traffic and transportation engineering. He has analyzed about 2,000 accidents as a traffic reconstruction expert, representing both plaintiffs and defendants, including work for both of the law firms representing the parties in this case.

Mr. Wattleworth's opinions, summarized below, are adopted as findings of fact, except where noted otherwise.

The traffic reconstruction expert estimated the most likely speed of the police vehicle to be 35 mph and that the speed of the left-turning Mercury Cougar was also about 35 mph. These estimates were first calculated by using a momentum analysis which determines how far the vehicles travel from their impact position to final rest. The analysis also compared the crush damage of the vehicles and ran computer simulation models and the speeds were consistent. It calculated out to be 28 to 35 miles an hour for the police vehicle and the same for the Cougar. This rate of speed for a left-turning vehicle "was a very high speed left turn," which would normally be made at 15 to 20 mph for this type of roadway. The expert testified that he did not believe the Cougar would have completed the left turn if the accident had not occurred, and that it would have gone off on the grass on the far side of the roadway. He determined that the Cougar was turning in a southwest direction at about a 45 degree angle at impact, so that its forward speed contributed to the damage caused. The point of impact was between the front door and the rear door and then the damage moved down the Cougar to the right rear passenger area.

With regard to the issue of whether Officer Ludwick had any opportunity to avoid the accident, the expert testified that there is a one and a half second "perception reaction time" from the time a vehicle becomes a hazard. In a left-turning case, the time should begin about when the left-front corner of the oncoming vehicle gets to the center line or begins to come into the wrong lane of the roadway. This one and a half second reaction time is the amount of time the driver of the oncoming car has to apply his brakes -- not the time to stop.

The expert estimated that from the time the Cougar was centered in its lane and began to turn, until the moment of impact, was 1.8 seconds, including about half a second (0.5 seconds) for the vehicle to move three feet to reach the center line and another 1.3 seconds that the vehicle is in the eastbound lane. This 1.3 seconds was the time that Officer Ludwick had to do something to avoid the accident, which is less than the 1.5 second reaction time. The expert concluded, "[S]o there's

absolutely no way he can do anything to avoid the collision."

It was the expert's opinion that even if Officer Ludwick had been traveling at 25 mph, he could not have avoided the accident and that the accident would have occurred even if it was not raining:

Q: . . . In your analysis, do you see the condition of this road as playing any role in explaining why this accident happened?
A: No.

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Q: If the road is dry does that help him get to the brake pedal any faster?
A: No.
Q: If he's going 25 rather than 35, does that help him get to the brake pedal any faster?
A: No.
Q: Either of those situations would this accident still happen?
A: The accident still happens, sure.

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Q: You testified that the first thing that happened that put him on notice that he was going to have a problem was seeing the left front headlight coming across the center line?
A: Right, that's my perception point.
Q: Is that seeing the other vehicle too late?
A: He had 1.3 seconds at that point in time.
Q: Did he get any notice or any idea or anything that this vehicle was turning left before then?
A: No.
Q: Now he's got 1.3 to try to do something?
A: That's correct.
Q: Is that enough time?
A: It's not enough time to even get your foot on the brake.

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Q: Even in arguing, you know that Mr. Watson's [claimant attorney] suggesting if he's traveling at 25 the moment that the vehicle puts his left front headlight across the center line, he's 25 rather than 35, can you still get to the brake pedal?
A: No.
Q: Can he avoid this accident at that speed?
A: I don't believe so.

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Q: Given the factual scenario then, Jeff Gordon, Mario Andretti or any race car driver in the world couldn't avoid this accident?
A: No, absolutely not.

The claimant offered no expert testimony and did not challenge the findings of the defense expert. However, when asked, "[Y]our figures were not inconsistent with officer Ludwick going 40 mph, right?", the expert answered, "Not completely inconsistent, no."

Claimant's Argument: The claimant emphasizes that Officer Ludwick testified that he may have been traveling at 40 mph, which the traffic reconstruction expert witness testified was "not completely inconsistent" with his 35 mile per hour estimate. It is the claimant's contention that this speed was too fast for the conditions -- a rainy night on a road on which a sign instructed drivers to travel at 30 mph due to construction -- and that further fault is indicated by Officer Ludwick's statement that he did not notice the oncoming vehicle until it was crossing into his lane. The claimant further argues for the integrity of the jury determination, based on these facts, that Officer Ludwick was negligent and legally caused the damages to J.C. Wendehake.

Respondent's Argument: The respondent argues that the facts do not support the conclusion reached by the jury on the liability issue. The police officer was traveling about 35 mph, as determined by the expert witness. A witness to the accident and the police officer both believed this to be a safe speed. The official speed limit was 40 mph and the 30 mph orange construction sign

was merely advisory. Officer Ludwick had not yet entered the actual construction area, which was about a quarter mile beyond the site of accident, and no construction work was ongoing at the time. Even if the officer was traveling at 40 mph and even if this constitutes some degree of negligence, this did not proximately cause the damage. The uncontroverted expert testimony was that even at 25 mph , the officer could not have avoided the accident. The left-turning vehicle was too close and moving too fast, with only 1.3 three seconds elapsing from the time the vehicle reached the center line until impact. This is less than the 1.5 second normal reaction time to even hit the brakes, let alone stop the car. The claimant offered no expert testimony to counter this conclusion.

On Damages: The claimant, J.C. Wendehake, suffered severe and life threatening injuries as a result of the accident, including a closed head injury, broken leg and pelvis, punctured lung, lacerated liver, and severed septum. He was in a coma for approximately one week after which he spent nearly 3 months at an inpatient rehabilitation clinic. The closed head injury has resulted in permanent brain damage, causing severe memory loss.

The claimant has documented past medical bills of $248,066.73, incurred between the dates of January 25, 1991 and February 1, 1995. The bulk of these medical bills were incurred during the first few months after the accident. All of these expenses had been incurred prior to the trial in 1997 and the jury verdict itemized this exact figure as compensation for past medical expense. The respondent stipulates to these expenses.

No additional medical expenses have been incurred by the claimant since February 1, 1995. The claimant testified that medical care that had been recommended (described below) was not obtained due to his not having any health insurance or other financial resources to cover the expense.

The evidence regarding the need for future medical care is limited to the December 1997 trial testimony of Dr. Erik

Kurtz, board certified in physical medicine and rehabilitation, who oversaw the claimant's in-patient rehabilitation from February 8, 1991 until April 26, 1991. After that time, Dr. Kurtz periodically examined the claimant on an outpatient basis until his last examination on December 8, 1993, about 4 years prior the 1997 trial. The respondent does not refute any of Dr. Kurtz conclusions.

Dr. Kurtz's testimony, summarized below, is adopted as findings of fact.

Dr. Kurtz testified at trial that the claimant suffered permanent brain and hip injuries due to a moderate residual cognitive deficit from the traumatic brain injury, as well as the extensive trauma to the right pelvis acetabular region. He determined that the claimant reached his point of maximum medical improvement on May 2, 1992.

With regard to the brain injury (for which no neurosurgery was performed or recommended), Dr. Kurtz determined that the claimant had a moderate residual disability because he would never be able to pursue higher education and that employment would require "a very sympathetic employer or perhaps a vocational counselor or training" to get him employed on a full time basis.

With regard to the hip injury, which required extensive surgery of the pelvis, Dr. Kurtz testified that the trauma to the hip will result in discomfort, physical limitation in performing higher levels of sports activity, an acceleration of degenerative arthritis of the hip joint, possibly requiring a whole hip replacement as the claimant reaches his 40s or 50s.

Dr. Kurtz's testimony was difficult to follow regarding his estimate of the percentage impairment resulting from both the brain and hip injury, but the Special Master understands his conclusion to be that the claimant has between a 40 to 55 percent impairment of the whole person.

The cost of a hip replacement, that may be needed in the future, is estimated to be between $30,000 and $45,000.

Additional future medical care, as recommended by Dr. Kurtz, includes an annual examination by a physical medical rehabilitative specialist to address both cognitive and functional issues. This physician would triage to other consulting physicians, which would include an annual neurologic assessment. The claimant should also see a psychologist or psychiatrist who would need to recommend a course of future treatment. Each office visit is estimated to be about $125.

The claimant also has a severed septum resulting from the accident. No estimate has been made for the repair of this injury.

The claimant has had a series of mainly minimum wage jobs since the accident, including work at Blockbuster, Wendy's, and Radio Shack. His memory loss has caused tardiness, absence from work, and inability to remember certain job assignments, resulting in the termination of employment from some of these jobs. But, for the last 2 months he has been employed as a rover bank teller for First Union and is currently earning $680.00 bi-weekly.

In the eleventh grade at the time of the injury, the claimant could be described as an average student, who had musical ability (singing and guitar), had many friends, and an outgoing personality. After the accident, he was able to achieve good grades and complete his G.E.D, but no longer sings or plays guitar, has few friends, and a very poor self-image. The claimant testified at trial that he feels he is retarded and that he considers himself a huge disappointment to his family. He currently lives with a girlfriend, which has added meaning and enjoyment to his life.

CONCLUSIONS OF LAW: **On Negligence:** The weight of the evidence leads to the conclusion that Officer Ludwick did not operate his vehicle in a negligent manner. Based on the testimony of all witnesses, giving particular weight to the traffic reconstruction expert, Officer Ludwick was traveling at

about 35 mph at the time of the accident. He was in a 40 mph zone but had just reached a construction sign with a 30 mph limit. The expert witness testified that an orange traffic sign is merely advisory in terms of speed and is not the speed limit, which must be posted on a black and white sign. But, s. 316.183, F.S., makes it unlawful for a person to drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. This statute also prohibits a driver from exceeding the posted maximum speed limit in a work zone area.

Even if the legal speed limit was 30 mph, Officer Ludwick's speed slightly in excess of this is not necessarily negligence, given that the actual construction area was about a quarter of a mile away, there was not construction activity ongoing at that time, and the two witnesses were also driving at about 35 mph and did not consider this unsafe.

Despite the Special Master's independent determination of the weight of the evidence, there was evidence that supported the jury's determination of negligence. The jury's determination that Officer Ludwick was negligent may have been based on a determination that he was traveling as fast as 40 mph, based on his own testimony and the expert witness statement that this speed was not entirely inconsistent with his conclusions. Given the 30 mph sign and the rainy, dark conditions, it was not wholly unreasonable for the jury to make a finding of negligence.

However, even if Officer Ludwick was negligent, there must also be a finding that the negligence was a proximate cause of the injuries.

On Proximate Cause: Officer Ludwick's operation of the vehicle, even if negligent, was not a proximate cause of the claimant's injuries.

It is undisputed that the negligence of Lynn Amandro, the driver of the vehicle in which the claimant was riding, was negligent in suddenly turning in front of Officer Ludwick's vehicle and was a proximate cause of the injuries.

As determined by the expert witness and adopted as a finding of fact, Officer Ludwick did not have sufficient time to even apply his brakes during the estimated 1.3 seconds that the Amandro vehicle reached the center line until impact. More importantly, and critical to the issue of proximate cause, the expert determined that even at 25 mph and even if it was not raining, Officer Ludwick could not have avoided the accident. The claimant offered no expert testimony to counter this conclusion, adopted as a finding of fact. The aspect of the jury's determination that the negligence of the officer was the legal (proximate) cause of the accident, is not supported by any evidence.

On Joint and Several Liability: The above conclusions make the issue of joint and several liability moot, but addressing this issue may be helpful. If there is a determination that Officer Ludwick was negligent, the Legislature should determine a percentage of fault.

In this case the jury verdict form did not include Lynn Amandro, an original defendant who settled with the claimant. Although it would have been proper for the defense to request that Lynn Amandro be listed on the verdict form and to instruct the jury to assign a percentage of negligence to her and/or Officer Ludwick, the defendant's attorney determined not to do so. This was a tactical decision to require the jury to only determine whether Officer Ludwick was negligent or not, rather than giving the jury the option of assigning a small percentage of fault to him.

Under the law in effect at the time of the accident, s. 768.81, F.S. (1991), for a case with a non-negligent plaintiff and damages in excess of $25,000, a negligent co-defendant was jointly and severally liable for 100 percent of the economic damages, but his liability for non-economic damages was limited to his percentage of fault.

Under the current law, as amended in 1999, s. 768.81, F.S., for a case with a non-negligent plaintiff, whether a co-defendant is jointly and severally liable for damages is dependent upon his degree of negligence. A

defendant who is found less than 10% at fault is not subject to joint and several liability. For a defendant who is found at least 10 percent but less than 25 percent at fault, joint and several liability does not apply to that portion of economic damages in excess of $500,000. (Other examples do not appear to be relevant.)

One can only speculate what percentage of negligence the jury in this case may have assigned to Officer Ludwick had this instruction been given. Under the 1991 law, which would have applied, if the jury determined that Officer Ludwick was 10% at fault, the defendant city would have been liable for 100% of the economic damages of $948,066.73 ($248,066.73 past + $700,000 future) and for 10% of the non-economic damages (10% of $400,000, or $40,000), resulting in a total liability of $988,066.73. A determination that Officer Ludwick was 5% at fault, rather than 10% at fault, would reduce this liability by $20,000 (5% of $400,000), to a total of $968,066.73.

Under the current 1999 law, the results would vary greatly between a determination that the officer was either 5% or 10% at fault, due to the significant break at the 10% level. With a finding of 10% negligence, the defendant would be liable for 100% of the first $500,000 of economic damages, plus 10% of the economic damages in excess of $500,000 (10% of $448,066.73, or $44,806.67), plus 10% of the non-economic damages (10% of $400,000, or $40,000), resulting in a total liability of $588,806.67. However, if the jury determined that the officer was only 5% at fault, there would be no joint and several liability, and the defendant would be liable for only 5% of the total damages of $1,348,066.73, or $67,403.34.

On Damages: The conclusions on liability and proximate cause make the matter of damages moot, but the following conclusions would be relevant if it is determined that the respondent is liable.

The portion of the jury's verdict that awarded $248,066.73 for past medical expenses was reasonable,

that being the exact amount incurred and documented by the claimant.

The portion of the jury's verdict that awarded $700,000 for future medical expenses and future lost earning ability is excessive, due to failure of the jury to reduce this figure to present value. The jury answered on the verdict form that these damages were to provide compensation over 50.5 years. However, the jury also answered that the present value of these future damages was $700,000, indicating that the jury failed to reduce its award to present value.

The claimant has not incurred any medical bills since February 1, 1995. Certain medical care that was recommended was not obtained. He may need a hip replacement sometime in the future at a cost of $30,000 to $45,000. He also should have an annual examination by a physical medical rehabilitative specialist, including an annual neurologic assessment, and see a psychologist or psychiatrist who would need to recommend a course of future treatment. Each office visit is estimated to be about $125. It is reasonable to estimate total future medical expense at $100,000.

It is difficult to determine the impact of the injury on the claimant's earning ability. He received average grades as an eleventh-grade student prior to the injury. After the injury and reaching maximum medical improvement, he has held a series of minimum wage jobs, but is currently earning $680.00 bi-weekly as a bank teller, which equates to about a $16,000 annual salary. But, the claimant has only recently begun this job and it is unknown whether he will be able to retain it, given his past job history of losing jobs due to missed job assignments, apparently caused by his brain injury.

In 1998, the median income for a male age 25 to 35 was $23,147.

If the claimant's earning abilities were reduced by $15,000 per year for 40 years, which is a reasonable assumption, this would total $600,000, without reduction to present value.

The award by the jury of $700,000 for future medical expenses and loss of wage earning capacity is reasonable ($100,000 for medical expense plus $600,000 for wage earning capacity), except for the failure of the jury to reduce this amount to present value.

The portion of the jury verdict awarding $200,000 for past pain and suffering and $200,000 for future pain and suffering is reasonable.

ATTORNEYS FEES: The attorney for the claimant has provided an affidavit stating that the attorney fees in this case are limited to 25 percent of the recovery in accordance with s. 768.28, F.S.

FISCAL IMPACT: According to the City of Port St. Lucie, there is no insurance covering this claim. The claim would be paid from the City's general funds.

COLLATERAL SOURCES: The claimant's attorney states that all of the claimant's past medical bills have been paid and the health insurer lien has been waived by the insurer's failure to assert it. Health insurance covering the claimant was in effect at the time of the accident which paid for about 80 percent of the expenses, plus the claimant was paid $10,000 in PIP benefits, a $10,000 settlement from Lynn Amandro (the limits of liability under her auto policy), and $100,000 of the judgment paid by the respondent. The claimant does not currently have health insurance but expects to obtain group health coverage through his current employer beginning in January, 2000.

RECOMMENDATIONS: Based on the foregoing conclusions related to liability and proximate cause, I recommend that Senate Bill 32 be reported UNFAVORABLY.

Respectfully submitted,

Brian Deffenbaugh
Senate Special Master

cc: Senator Mandy Dawson
Faye Blanton, Secretary of the Senate
Leonard Schulte, House Special Master