THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
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April 12, 2001

SPECIAL MASTER'S FINAL REPORT	DATE	COMM	ACTION
President of the Senate Suite 409, The Capitol Tallahassee, Florida 32399-1100	11/16/00	SM CA FR	Fav/2 amend.

Re: SB 24 – Senator Betty Holzendorf
Relief of Elizabeth Linton

THIS IS A VIGOROUSLY CONTESTED EXCESS JUDGMENT WRONGFUL DEATH CLAIM FOR $1,807,185 BASED ON A JURY VERDICT AGAINST GULF COUNTY TO COMPENSATE THE EIGHT ADULT CHILDREN OF HAROLD M. ARMSTRONG FOR THEIR PAST AND FUTURE PAIN AND SUFFERING, LOSS OF COMPANIONSHIP, AND LOSS OF THEIR FATHER'S INSTRUCTION AND GUIDANCE AS A DIRECT RESULT OF A GULF COUNTY EMPLOYEE'S NEGLIGENCE AT A COUNTY LANDFILL WHERE MR. ARMSTRONG WAS WORKING IN 1994. THIS BILL, AS FILED, DIRECTS GULF COUNTY TO PAY THE BALANCE OF THE CLAIM FROM ITS OWN FUNDS AFTER THE INITIAL $1,000,000 OF ITS COMMERCIAL LIABILITY INSURANCE BENEFIT IS PAID FOR WHICH THE COUNTY PAID AN APPROXIMATE PREMIUM OF $28,000.

BASIC OR UNDISPUTED FACTS:

Just before noon on Sunday, July 3, 1994, the eye of Tropical Storm Alberto, with wind gusts up to 66 miles per hour and a 5-foot storm surge, made landfall near Destin, about 75 miles west of Port St. Joe, the county seat of Gulf County. Alberto, with its slow forward motion and meandering looping track, brought rain to inland counties that surpassed the 100-year level. The storm took 33 lives and caused almost 1 billion dollars in property damage. Gulf County was one of the 78 Florida, Georgia, and Alabama counties that were declared to be federal disaster areas.

Slowly, over the next 4 months, a lot of the local storm debris was gathered and transported to the Gulf County Landfill, a public, 40-acre, Class III dump, located at Five Points, several miles inland from Port St. Joe. Five Points landfill was licensed to accept vegetation, construction debris, metal, and tires, but no household garbage.

The landfill is made up of an administrative area with a truck scale located near the entrance, and several covered work buildings about midway down a central access road. There are five "cells" on each side of that dirt road, each one about the size of a football field. Over a period of about 10 years, the cells will be scooped out and gradually filled with debris until, when fully settled and compacted, they will be about 10-12 feet high, leveled, covered over with a layer of dirt, and topped with grass.

The normal procedure at the landfill required an employee to make a cursory inspection of each incoming load near the entrance to the landfill. This "spotter" would then direct the driver of the incoming vehicle to the desired location in an open cell.

As part of the post-Alberto cleanup effort, there were about a half dozen Job Training Partnership Act-Private Industry Council (JTPA) temporary employees assigned to the landfill to hand-pick through each incoming load to remove metal objects, oil cans, tires, wood that could be recycled, and anything else that had slipped past the "spotter" that could be salvaged, or that was prohibited by the applicable environmental regulation from being buried in that landfill.

By the terms of the July 26, 1994 contract between the county and the JTPA Private Industry Council, these temporary emergency relief workers were neither federal employees nor employees of Gulf County.

On Friday, November 11, 1994, there were about a half dozen loads to be processed, including, in particular, one truck load of stumps, branches, and pine straw that had been brought in by a City of Port St. Joe dump truck.

Harold Armstrong, a respected and beloved member of his local community, a City Commissioner of Wewahitchka at the time of his death, the widowed patriarch of an extended

family of 8 adult children, 29 grandchildren, and 19 great-grandchildren, and just a few days short of his 73rd birthday, was one of the JTPA temporary employees assigned to work at the landfill. He was apparently trying to earn some extra money to buy Christmas presents for his family.

THE PARTICIPANTS: There were two JTPA crews on site that morning:

a) Skipper's Crew – Tommy Skipper, himself a JTPA temporary employee, was in charge of the crew that included Harold Armstrong. As he had done for the prior several days, Skipper had assigned Mr. Armstrong to work at the metal pile, a huge tangle of metal construction debris, home appliances, and vehicle and bicycle parts, located at the edge of the landfill, away from the dusty cell that was being filled with the incoming debris. This was an apparent accommodation for Mr. Armstrong's breathing problems that were exacerbated when he worked in or around the dusty cell.

   Donna Sue Mathis, another JTPA temporary employee, was on Supervisor Skipper's crew. On the day of the accident, she was the "spotter" inspecting the incoming trucks of debris, and directing the drivers where to dump each load. However, Mathis' exact whereabouts just before the accident is not clear. The dozer operator testified that he saw her leave from behind the pile at the time Doug Nunnery, another JTPA employee left; however, Donna's own testimony was that she didn't remember going to the cell at all that morning before the accident.

b) Lollie's Crew – William Lollie, also a JTPA employee, directed his three-man JTPA carpenter crew. Their primary jobs were to separate and remove usable scrap wood from the cell, to repair wooden pallets, to build trash bins, and to work the cell as necessary.

   Lollie testified that moments before the accident he had seen Mr. Armstrong "sitting on the ground behind the pile of debris . . . going through something in the debris." Lollie testified that he had spoken with Mr. Armstrong for about a minute and asked him what he had found. According to Lollie, Armstrong commented

on finding an empty wristwatch case. Lollie testified that he then saw Mr. Armstrong roll up onto his hands and knees. Lollie assumed that Armstrong was leaving to go to his assigned area, the metal pile. Supervisor Lollie left the cell. Mr. Armstrong obviously did not.

Doug Nunnery was also a member of Lollie's carpentry crew. He testified that he had been in the cell with Mr. Armstrong that morning and left it about 10 minutes before the accident. When Nunnery last saw Mr. Armstrong, Armstrong "was squatted down ... looking for something . . . trying to get something out from the end of the pile."

c) The "Operator" – Philip "Flip" Gentry apparently was the only Gulf County employee working in the cell area at Five Points that morning.

His job was to operate the Caterpillar 953 track-loader assigned to the landfill. This unit, with its rear-mounted diesel engine and an industrial size, hydraulically operated, general-purpose scoop bucket mounted in front had a Plexiglas enclosed cab. When "Flip" was in the cab, pushing an 8-10 foot high pile of debris, he could not see anyone or anything at the base of the leading edge of a moving pile.

At about 9:30 a.m., "Flip" had finished pushing all the piles except one. It was almost break time. He decided to move the one remaining pile of stumps, vegetation, and pine straw before going on his break.

d) The Victim – The bottom line is that when "Flip" pushed the final pile of debris, he didn't see Harold Armstrong on the other side of it. At that moment, Harold Armstrong was probably not standing up and certainly was obstructed from "Flip" Gentry's view. "Flip" ran his dozer forward and pushed the pile, including Armstrong, about 37 feet before shifting the dozer into reverse and backing it out of the cell.

Within minutes, Mr. Armstrong's co-workers were running around looking for him. They searched the obvious locations: the metal pile, the scale house, and his car, until Donna Sue Mathis heard Mr. Armstrong

moaning and discovered him buried in the cell, under a semi-flattened pile.

The remaining (and final) several hours of Harold Armstrong's life were spent in what must have been excruciating pain. He had suffered massive crushing chest injuries in which virtually all of his ribs were broken. The EMTs, following their normal procedure, uncurled Armstrong in order to carry him on a backboard. This must have raised Mr. Armstrong's pain to intolerable levels. Mr. Armstrong was transported first to the hospital in Port St. Joe, and then to Bay Pines Hospital in Panama City. He expired in the emergency room of Bay Medical Center at 10:47 a.m. Central Daylight Time. That morning, some of his eight children got there in time to see him alive and suffering. Others did not.

LEGISLATIVE CLAIMS POLICY: Current legislative policy and procedures require a Special Master's redetermination of liability and damages in each claim bill from the first dollar primarily because the expenditure of public funds is involved.

Findings of fact must be supported by a preponderance of evidence. The Special Master may collect, consider, and include in the record, any reasonably believable information that the Special Master finds to be relevant or persuasive. At the Special Master's level, each claimant has the burden of proof on each required element and the burden of going forward.

Each respondent has the opportunity to raise again all the defenses and arguments it had at trial, as well as any others it might have discovered or developed after trial.

After the Master's report and recommendation are filed, a claim bill can be lobbied in the Legislature, just as any other measure. Objections to the Special Master's findings, conclusions, and recommendations can be addressed by either party directly to the members of the Senate, either in committee, or individually, as the parties or their agents choose.

ELEMENTS OF NEGLIGENCE: To get a favorable Special Master's recommendation on a claim bill such as this one, the claimant must prove, to the satisfaction of the Special Master, all four of the required elements of negligence.

Duty: The applicable operator's safety manual for tractor loaders, published in 1991 by EMI, a trade group comprised of the major manufacturers of track-mounted front-end loaders including Caterpillar, is peppered with general admonitions such as "Safety is your business"; "Understand the special hazards of your work area"; and "Look out for others." Specifically, the manual states that it is the equipment operator's duty to "Assure yourself that the work area is clear of all persons."

Based on the accepted industry standard, and on the general common law duty of an operator of a dangerous instrumentality to use the equipment with care for others, I find that "Flip" Gentry, and, consequently, Gulf County as his employer, had the legal duty to take care that the way was clear and that there was no person, authorized or not, in the blind spot, before pushing the load of debris in question.

Additionally, there was some evidence that it was part of Tommy Skipper's job to walk out into the cell to make sure that the area was totally clear before any debris was pushed.

Breach: I find sufficient evidence that "Flip" Gentry breached the industry standard of care when he assumed that the two JTPA workers that he says he saw leave the area behind the pile were the only two there.

Proximate Cause: I find that Harold Armstrong's injuries and death, several hours after the incident, were the proximate result of crushing injuries he sustained while being pushed about 37 feet in an 8 foot high pile of debris.

Damages: Ben Turner, a board certified pathologist with 19 years of experience, testified in a pretrial deposition that upon autopsy, he found Harold Armstrong's emphysema was a "7" on a 1–10 severity scale and that Mr. Armstrong's coronary arteries were 75 percent plugged up. While this finding is not unusual for a 72-year-old male who has had a history of tobacco smoking, and the pathologist opined that Armstrong's condition indicated a shortened life expectancy,

he was not asked, nor did he offer his opinion on how many years of Mr. Armstrong's 10-year remaining life expectancy were cut short.

In addition to reimbursing the family for the $7,000 funeral bill, the jury returned a verdict awarding $250,000 to each adult child for past and future pain, suffering, and loss of companionship and instruction. Gulf County and its insurance carrier argue that the total amount of damages awarded to Mr. Armstrong's adult children was "blatantly and patently excessive and bore no reasonable relationship to the general trend of prior decisions in such cases," especially those in the legislative claim bill context.[1] Gulf County and its carrier further argue that none of his children was living with Mr. Armstrong; none was dependent on him financially; and that $2 million is just too much to pay for adult children's grief and loss of companionship and instruction.

The family responds, in effect, that although there were plenty of tears at the trial, the jury was given sufficient evidence on which to base the verdict; that the trial judge refused to reduce the jury award; that the county has to take Mr. Armstrong "as it found him," namely a widower with eight adult children, not one or two; and finally, that if Mr.

[1] The Legislature considered and passed a claim bill fourteen years ago that has many parallel facts with this one. In September 1985, Daniel Sullivan, a 71-year old retired shoe salesman who had wintered in Florida since 1979 and then retired here, was sunbathing, face down on a lounge chair on Clearwater Beach. That day, a crew of city employees was working with jackhammers and a front-end loader to remove some old concrete pilings from the beach. Earlier that morning, Mr. Sullivan had been watching the workers in the same way that people at leisure often stand around construction sites as "sidewalk superintendents." The construction area had not been roped off; there was no lookout assigned to insure that the area was cleared of sunbathers; the "automatic" back-up buzzer on the front-end loader was broken; and due to the noise of the engine, the operator didn't hear a last-second warning shout from a nearby sunbather when the operator backed the front-end loader directly over Mr. Sullivan, then heading forward and still unaware of what happened, drove over him again. Mr. Sullivan sustained massive crushing injuries to his chest and abdomen. He remained conscious at the scene and was attended to by paramedics who took him to a local hospital where, despite heroic emergency procedure, he died within an hour, ending a life that had a statistical expectancy of 11.1 years. The evidence was that Mr. and Mrs. Sullivan lost about $53,000 in projected social security benefits.

Mr. Sullivan was survived by his widow and three adult children. The evidence was that the Sullivans also were a very close-knit family. In the 49 years of their marriage, Mrs. Sullivan had become very dependant on her husband who had taken care of all the family finances, and was the sole driver of the family car. After her husband's death, Mrs. Sullivan moved to Coral Springs to live with one of their children and to receive needed medical care for her own advancing medical problems. Although there are many parallel facts in the two cases, the method of handling of the Sullivan claim was quite different. A claim was filed with the City of Clearwater pursuant to the provisions of s. 768.28(6)(a), F.S. Prior to the filing of a lawsuit, the city commission formally entered into a settlement agreement with Mr. Sullivan's estate under which the city agreed to pay the $100,000 limit of s. 768.28(5), F.S. less approximately $6,000 that the City had previously paid in medical and funeral expenses, and an additional $50,000 pursuant to passage of a claim bill.

Armstrong had had only one surviving adult child and the jury had awarded the same proportionate amount, namely $250,000 to that one child, then the Legislature wouldn't be hearing a single peep out of the county and its carrier. The county's attorneys argue that a total of $207,000 is the appropriate level of damages to be awarded to this family.
The proper test, as enunciated by the appellate courts of this state and restated as recently as several months ago, is that a verdict must be set aside if it was "a product of passions and emotions rather than a result of the evidence presented." MBL Life Assurance Corp., et al., v. Guillermo Suarez, et al., 25 Fla. L. Weekly D2009a. And, as the Supreme Court of Florida Stated in Florida Patients Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985), "[m]ere sympathy cannot sustain a judgment. A juror is charged with the duty to weigh evidence and to find fact. The jury system should not function on emotion, but on logic."

I have studied the entire record in this case, both at the trial and appellate levels, and conclude that although the verdict was generous, there was sufficient evidence presented to the jury on which to base it. The verdict was not outside the realm of reason, or based primarily on emotion. In short, this was not, in my view, a runaway jury. I accept the evaluation of total damages as established by 6 local Gulf County citizens and taxpayers who were sitting on the first circuit civil trial jury that Gulf County had seen in about 15 years.

JUDICIAL HISTORY:

The incident occurred on November 11, 1994. The Complaint was filed in Circuit Court in Gulf County on February 8, 1996. An Amended Answer was filed on March 15, 1996. In March 1996, the plaintiff made a pre-trial Offer of Judgment to settle the case for $1,000,000, the total amount of commercial liability insurance coverage. The defendant filed a Motion for Summary Judgment based on the argument that the case was barred by the workers' compensation law. The Circuit Judge determined that Gulf County was a "statutory or special employer" as defined in the Florida's workers' compensation law and dismissed the case on September 9, 1997. The claimant appealed. On July 1, 1998, the First District Court of Appeal reversed the Summary Final Judgment and concluded that there was a genuine issue of material fact whether Harold Armstrong was an employee of Gulf County, Florida.

A 3-day trial occurred on April 26-28, 1999, upon which the jury rendered a verdict. Gulf County filed motions for a new trial, for reduction of the amount of the reward, and for entry of judgment contrary to the verdict. These motions were all denied. Final Judgment was entered on September 21, 1999. Gulf County filed its Notice of Appeal on October 14, 1999, and on September 11, 2000, the District Court of Appeal upheld the entire case, without comment.

LEGISLATIVE HISTORY: This claim was filed initially by Senator W. D. Childers for the 2000 session. The case was assigned to another Special Master. No Special Master's hearing was held on SB 34 (2000) because the Final Judgment was under appeal and the claim bill had to be held in abeyance under the provisions of Senate Rule 4.81. The bill was reported unfavorably and placed on the table.

The current version of the claim, Senate Bill 24 (2001) has been filed by Senator Betty Holzendorf. It is a local bill, and was properly noticed on June 15, 2000, in a newspaper of general circulation in Gulf County.

OTHER ISSUES: **Comparative Negligence**:

1. The degree, if any, that Mr. Armstrong's own activities that morning contributed to his death, and the comparison of his activities with those of "Flip" Gentry, has been one of the most vigorously contested issues in this case, at each level.

Gulf County argues:

a) Armstrong had been told by Skipper, his supervisor, to move away from the cell and to work at the metal pile hundreds of feet away;

b) Mr. Armstrong apparently was down on his hands and knees, or lower, out of the line of sight of the dozer operator, looking through the pile for something that was usable (variously described as Christmas tree ornaments, or a wristwatch case); and

c) Mr. Armstrong should have heard the diesel engine of

the dozer and gotten out of the way as it came barreling down on the pile.

2. The family responds by saying:

   a) Don't try to divert "Flip's" negligent conduct to our father;

   b) Because Supervisor Lollie had the authority to override Supervisor Skipper's instructions concerning the specific work locations of each JTPA employee, part of Mr. Armstrong's assigned job was to look through the piles of debris and that is what he was doing at the moment he was pushed.

Post Accident Practices: Armstrong's death brought at least one specific change to the operation of the Five Points landfill. Instead of filling each cell from front to back, they are now normally filled back to front. This tends to avoid long forward movements of debris toward the back of a cell. There is also some evidence that orange safety vests are now issued to the employees working in the landfill. However, there still appears to be no failsafe procedure requiring a lookout to go out in front of the dozer where the view of the leading edge of a moving pile is still obscured, even on short pushes.

Subsequent repairs or post-accident modifications are generally not admissible to prove negligence in connection with an event, and furthermore, in this case, even if considered, they would only support, not detract from the jury's conclusion that "Flip" Gentry was negligent.

Ability to Pay: In November 1994, Gulf County had in effect a $1 million commercial liability insurance policy for whether it had paid an approximate premium of $28,000. Although Gulf County has only about 13,000 residents and a meager tax base, the county is not arguing that it cannot pay that portion over $1 million if this claim bill becomes law as filed. Gulf County is arguing that it has built up a cash balance of $7 million, but only after many years of scrimping and saving; and to make a $1 million hit on this account would take about 15 percent of the entire savings of the county.

Note 18 in the auditor's notes to the Gulf County Financial Statement for the year ending September 30, 1999, acknowledges the $2,007,000 verdict but states, erroneously, that "the county has paid $200,000 through its insurer on the case . . . ." The auditor's notes further acknowledge the claim bill exposure and conclude that if the appeal is lost (which now has occurred), "and the claim bill becomes law, then the county could be liable for amounts awarded in excess of existing insurance."

Based on Gulf County's audited Combined Balance Sheet as of September 30, 1999, as filed with the Auditor General and as confirmed by its independent auditor, the Board of County Commissioners of Gulf County, had $5,490,848 of undesignated, unreserved, general funds to call on as the source of payment of the uninsured portion of this claim, if it is enacted into law.

While it is a substantial "hit" on this small county, it is my view that it will not bankrupt Gulf County or require its citizens to forego any essential services.

ALCOHOL OR DRUG USAGE: All parties tested negative for alcohol involvement.

As for drugs, at the Special Master's hearing one of Harold Armstrong's sons-in-law testified, under oath, that at the hospital, several hours after the incident, the dozer operator personally apologized and admitted that he had smoked two marijuana joints that morning.

When questioned about this on the day of the Special Master's hearing, "Flip" denied making that admission, and he denied smoking any marijuana on or around the relevant dates.

At my request, the county attorney then produced a copy of a urine-based drug screen test that had been administered to "Flip" by the nurse at a local doctor's office on the morning of the incident. The test report was negative. I have no basis to doubt either the validity of the drug test, the identity of either the donor of the sample, or the chain of custody of the report. In short, I conclude that alcohol or illegal drugs played no part in the circumstances leading up to Mr. Armstrong's death.

ATTORNEYS FEES: The claimants' contract with their attorney is for a contingent percentage fee in excess of 25 percent. The attorney has filed an affidavit stating that he and his firm have reduced attorney's fees to 25 percent of the gross award, as required by §768.28, F.S.

CONCLUSIONS: There are about a half dozen versions of what occurred at the Five Points landfill just before 9:45 a.m. on the day that Mr. Armstrong died. Each participant viewed the scene from his or her own perspective. I have attempted to reconcile the various sworn and unsworn witness statements and reports, pretrial deposition testimony, sworn testimony, and the other evidence, exhibits, and arguments of counsel. I have supplemented these with my independent investigation and a personal inspection of the Five Points Landfill.

I find that "Flip" Gentry violated the standard of care and was negligent in the operation of the Caterpillar tractor-dozer in the county landfill on the morning of November 11, 1994, and that Harold Armstrong's death was the immediate and proximate result of that negligence.

However, I disagree with the finding of the jury on the issue of comparative negligence.

While I am willing to accept the jury's determination on the measure of the total amount of damages, I do not accept the jury's conclusion on allocation of fault and the assignment of comparative negligence to Harold Armstrong. It is my view that Mr. Armstrong's actions, as innocent or authorized they may have seemed to him at the time, substantially contributed to his own death.

Aside from whether Mr. Armstrong should have been somewhere else on the landfill, the fact is that he wasn't. By essentially burying his head in a pile of debris, in a pit in which he had to know he was a target, and where he should have heard the diesel engine roaring down on him, he had the last clear chance to get out of the way. In my opinion, his actions warrant a substantial reallocation of comparative liability.

My recommendation does several things:

1. It gives full recognition to the jury's determination of the

total amount of damages;

2. It calls on 100 percent of the $1 million commercial liability insurance policy that the county had in place; and

3. It acknowledges the role of a Senate Special Master to use his or her best judgment in allocating the relative degree of fault between the parties to a case.

Accordingly, I recommend overriding the conclusions of the jury on this point and allocating comparative negligence as follows:

To Gulf County . . . . . one-half
To Mr. Armstrong . . . . . one-half

RECOMMENDATION: Based on the above, and because the claimants have not been paid the underlying $200,000, I recommend that Senate Bill 24 (2001) be amended to require a payment of $807,182.92, without interest, plus the underlying, unpaid $200,000, for a total of $1,007,182.92, and that the bill be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

D. Stephen Kahn
Senate Special Master

cc: Senator Betty Holzendorf
Faye Blanton, Secretary of the Senate
House Claims Committee

April 12, 2001

SUPPLEMENT TO SPECIAL MASTER'S FINAL REPORT

The Honorable John M. McKay
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: SB 24 – Senator Betty Holzendorf
Relief of Elizabeth Linton

THE ATTORNEYS FOR GULF COUNTY AND ITS LIABILITY INSURANCE CARRIER, TITAN INDEMNITY COMPANY, HAVE FILED EXCEPTIONS TO SEVERAL OF THE FINDINGS AND CONCLUSIONS IN MY SPECIAL MASTER'S FINAL REPORT DATED NOVEMBER 16, 2000.

Exception #1: In the bottom paragraph on page 10 of my report, I stated that note 18 of the most current Gulf County Financial Statement (for the fiscal year ending September 30, 1999) reported *erroneously* that the county paid $200,000 through its insurer on the case. At the time of the Special Master's hearing on September 14, 2000, the funds had NOT been tendered. Titan's $200,000 check was mailed to the claimant's attorney on September 29, 2000.

So, I stand corrected on this point, and any award enacted by the Legislature should reflect a reduction of the $200,000 that has already been paid.

Exception #2: Gulf County takes exception to my failure to attribute any share of the total liability in this case to JTPA. Gulf County's theory seems to be that Supervisor Skipper, as he was walking along the flank of the tractor/loader, had a duty to, but failed to see Mr. Armstrong as Flip Gentry, the only Gulf County employee on site that morning, was pushing the last pile of pine straw that obscured and contained Mr. Armstrong.

Gulf County implies that Mr. Skipper's (and therefore JTPA's) liability was at least equal to that of Flip Gentry and

Gulf County, and that because JTPA also breached its duty to Mr. Armstrong, it should share 50/50 the liability for damages with Gulf County.

Gulf County points to several places in the circuit court trial record where there is some testimony that Mr. Skipper walked along side the tractor/loader; however, the trial testimony is ambiguous. At the Special Master's hearing, Mr. Skipper testified and was cross-examined under oath. It became clear to me that his earlier references to walking along beside the tractor/loader involved other piles of debris at other times.

Skipper testified unambiguously at the Special Master's hearing that:

a) he didn't watch Flip push the last (pine straw) pile;

b) because the last (pine straw) pile had no boards or other obvious contaminants in it, there was no need for him to walk immediately beside the tractor/loader;

c) he was facing away from and walking away from Flip as Flip pushed the last (pine straw) pile;

d) he didn't walk beside the tractor/loader as Flip pushed the last (pine straw) pile; and

e) when he turned around and looked back, Flip had already pushed and half-flattened the pile, and was backing up toward the edge of the pit.

I find that there is no factual basis for tagging JTPA with half of Gulf County's responsibility in this case.

But even assuming that there was, there are several equitable reasons not to do so:

a. The jury apparently recognized that Flip Gentry and Gulf County had an explicit duty. On the same verdict form, the jury exonerated the JTPA (and Skipper) of all responsibility in this incident; and

b. The 1993 Florida Supreme Court decision in *Fabre v. Marin,* 623 So.2d, 1182 (Fla. 1993) that interpreted

§768.81(3), F.S., to clearly limit a particular defendant's liability to that defendant's percentage of fault, whether other responsible persons were named as co-defendants or not, does not seem to apply here for several reasons:

1. JTPA was not an unnamed co-defendant; an empty chair, or a potential co-defendant made immune by sovereign immunity. In fact, JTPA was a named co-defendant and as noted above, was specifically exonerated by the jury on the verdict form.

2. The *Fabre* doctrine applies in the courts, before a case gets to the legislative claim bill stage. Presumably, all the *Fabre* arguments could have been, should have been, or were made within the judicial system. *Fabre* holds that judgment should be entered against each party liable on the basis of that party's percentage of fault. 623 So.2d, 1182 (1185). The "judgment" was entered in this case in August 1999. Presumably all the *Fabre* considerations had already been argued and applied.

3. Gulf County and its carrier see the passage of this claim bill, in any amount, as a windfall to the Armstrong family and a hardship to Gulf County because of Mr. Armstrong's advanced age and deteriorating general health just before the incident; the non-dependent status of his adult children; the lack of egregious conduct by Flip Gentry; and the argument that if Mr. Armstrong had been employed by Gulf County, his benefits and Gulf County's liability would have been limited by the workers' compensation law.

These arguments were made to, considered, and rejected by Circuit Judge Glenn L. Hess.

Judge Hess found no compelling reason to disturb the jury's evaluation of the family's loss.

Neither do I.

RECOMMENDATION: Accordingly, I am again recommending passage of SB 24 FAVORABLY, but in the AMENDED amount of $807,184.92. The sum will be paid by Gulf County's insurance carrier with no direct impact on the county treasury.

A corrective amendment is attached.

Respectfully submitted,

D. Stephen Kahn
Senate Special Master

cc: Senator Betty Holzendorf
Faye Blanton, Secretary of the Senate
House Claims Committee
Vince Bruner, Esq.
Fred Parker, Esq.
Joe Flood, Esq.
Sarah Blakely, Esq.