THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
12/1/01	SM	Favorable
	FT	

December 1, 2001

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

Re: **SB 28 (2002)** – Senator Al Lawson
Relief of Clyde Kilpatrick

SPECIAL MASTER'S FINAL REPORT

THIS IS AN EXCESS JUDGMENT CLAIM AGAINST ESCAMBIA COUNTY FOR $191,244.59 TO COMPENSATE CLYDE RILEY KILPATRICK FOR INJURIES HE SUSTAINED AS A RESULT OF A FALL WHICH OCCURRED AT THE PENSACOLA CIVIC CENTER.

ACCIDENT SUMMARY:

On September 12, 1991, Clyde Riley Kilpatrick (the "claimant") and his wife, residents of Mobile, Alabama who were on a honeymoon trip, attended a concert at the Pensacola Civic Center (the "Civic Center"). The Civic Center is owned by Escambia County. The headline act that evening was *Huey Lewis and the News* and was promoted by Ogden Entertainment, Inc. ("Ogden").

The claimant and his wife had premium seats on the floor level of the Civic Center. To reach their seats, the claimant and his wife had to walk down steps of fixed, concrete bleachers, followed by wooden, telescopic bleachers. During the second half of the concert, the claimant, on returning from the restroom on the mezzanine level, misjudged a step, fell to the arena floor and was injured.

The claimant returned to his seat, and then sought assistance. He was attended to at the Civic Center by an emergency medical technician (EMT). Prior to leaving, the

claimant signed an American Red Cross Treatment Report that was prepared by the EMT.

PROCEDURAL HISTORY: After first perfecting an administrative claim, the claimant and his wife filed a negligence complaint against Escambia County. The county denied negligence and asserted the defense of comparative fault. The case went to trial without a jury before the Chief Judge of the First Judicial Circuit, the Honorable John P. Kuder. Escambia County was found to be 80 percent negligent and the claimant was found to be 20 percent negligent.

Damages were assessed as follows:

Past Medical Expenses	$ 4,519.34
Future Medical Expenses	$ 8,468.00
Past Lost Earnings	$ 5,814.00
Future Lost Earning Capacity	$270,254.40
Pain and Suffering	$ 75,000.00
Loss of Consortium for Wife	$ 25,000.00

After reducing the claim for comparative negligence, a final judgment was entered against Escambia County on April 16, 2000, in favor of the claimant for $291,244.59 and $20,000 for the claimant's wife. A subsequent judgment for costs in the sum of $4,260.03 was entered on August 16, 1996.

The final judgment notes that ". . . the above-state award in favor of plaintiff Clyde Kilpatrick for future medical expenses and loss of future earning capacity has not been reduced. The court finds that future inflation is offset in its entirety by any future return on present investment."

Escambia County appealed the judgments to the First District Court of Appeal. That appeal was limited to the issue of the admissibility of the American Red Cross Treatment Report and the award for lost future earning capacity. The First District Court of Appeal affirmed the circuit court judgment without comment on March 11, 1997. See, *Escambia County v. Kilpatrick, 697 So.2d 84* (Fla. 1st DCA 1997).

After the appeal, Escambia County paid the statutory limit of $100,000 to the claimant in partial satisfaction of his judgment and satisfied the judgment in favor of the claimant's wife.

After the partial satisfaction of the judgment, the claimant sought to collect the balance owed by suing Ogden, the concert promoter. The court dismissed the complaint, and the claimant appealed the ruling to the First District Court of Appeal which affirmed the judgment. See, *Kilpatrick v. Ogden Entertainment, Inc.*, 745 So.2d 492 (Fla. 1st DCA 1999). The First District Court of Appeal, with one judge dissenting, held that the claimant lacked the requisite legal standing to enforce the indemnity agreement between Ogden and Escambia County as a third-party beneficiary, leaving enforcement to Escambia County.

POSITIONS OF PARTIES: CLAIMANT – The claimant asserts the following:

1. The telescopic bleachers on which the claimant fell were defective because they lacked uniform treads and risers, were not equipped with handrails, and lacked adequate step illumination, in violation of applicable building codes. Further, the county knew the defects because it had paid previous claims for injuries occurring on the same telescopic bleachers.

2. The claimant was seriously and permanently injured due to his fall on the defective telescopic bleachers.

3. The injuries sustained by the claimant as a result of his fall on the defective stairs resulted in past and future medical expenses.

4. The injuries suffered by the claimant resulted in lost past wages and lost future earning capacity. The claimant asserts that he is now unable to perform work as a heavy millwright, which pays more per hour than light millwright work and which offers the opportunity for more overtime.

ESCAMBIA COUNTY – The County asserts the following:

1. The telescopic bleachers were not defective, were not in violation of code, and did not create an unreasonable risk of harm.

2. The claimant did not fall because of any defect in the bleachers, but because he tripped over another

patron's foot. The American Red Cross Treatment Report, which includes this statement, should have been accepted into evidence and was crucial to the issue of causation and degree of negligence.

3. The claimant's own inattention was the cause of his fall and he is wholly at fault for his fall.

4. There is insufficient evidence to support the award of future medical care and expenses.

5. There is insufficient evidence to support the award of loss of future earning capacity.

FINDINGS OF FACT:

Liability - The Pensacola Civic Center (the "Civic Center") is a multi-purpose arena that is owned by Escambia County and is located within the city limits of Pensacola, Florida.

On the evening of September 12, 1991, Clyde Kilpatrick (the "claimant") and his wife, Barbara Kilpatrick, residents of Mobile, Alabama who were on a honeymoon trip, attended a concert of *Huey Lewis and the News* at the Civic Center. The claimant and his wife were business invitees.

The concert was promoted by Ogden Entertainment, Inc. ("Ogden"). Ogden and Escambia County entered into a User Agreement dated September 11, 1991.

At the time of the concert, the Civic Center had bleachers of two types: fixed, concrete bleachers and telescopic, portable wooden bleachers. The telescopic bleachers can be folded up and moved under the permanent concrete bleachers for events requiring additional floor space.

The aisles of the permanent and moveable bleachers are aligned. The aisles on the telescopic bleachers are the primary method of ingress and egress for patrons seated on the floor of the arena.

The claimant and his wife had premium seats on the floor level of the Civic Center. They entered the Civic Center on a mezzanine level, walked down steps of fixed, concrete bleachers, through a gate, and then down wooden, portable, telescopic bleachers. The house lights were on at this time and ushers were present on the arena floor.

During intermission, when the house lights were again on and ushers were present, the claimant and his wife went back up to the mezzanine level to use the restroom, then returned to their seats following the same approach that they had initially followed to their seats.

During the second half of the concert, when the house lights were off, the claimant walked up to the mezzanine level to use the restroom again, and on returning to his seat, misjudged a step on the telescopic bleachers, fell to the arena floor and was injured.

The claimant was not intoxicated.

The claimant, who testified that he was in pain but "embarrassed" by his fall, returned to his seat. He testified that he informed his wife that he had just fallen, but that she initially did not take him seriously. The claimant's wife testified that "[w]hen he came back to his seat, he was wobbling or hobbling and he said, Barbara, I fell down. I initially laughed until I saw his leg." The claimant's wife testified that his leg ". . . was huge over his tennis shoe. I couldn't put my hands around it."

Escambia County makes much of the fact that the claimant returned to his seat after the fall. The claimant did sit in his seat for a few minutes after the fall. The claimant's wife testified that the claimant thought at first he had only twisted his ankle. After trying to stand with the crowd during a hit song, the claimant testified that he had to sit back down to "bear with it for a few minutes." Thereafter, he told his wife he needed some help. This delay in seeking help appears reasonable.

The claimant and his wife left through an exit on the arena level. An EMT attended to the claimant at the Civic Center. Prior to leaving, the claimant signed an American Red Cross Treatment Report that was prepared by the EMT.

The claimant and his wife proceeded to the emergency room at Sacred Heart Hospital in Pensacola, Florida, where he was treated and sent home. On September 16, 1991, the claimant was seen by Dr. Andre Fontana.

Applicable Codes – There was considerable argument at the trial level, and before the Special Master, as to whether the location on the telescopic bleachers where the claimant fell was in fact a staircase or merely a platform on a moveable bleacher. In the trial and again before the Special Master, Escambia County contended that the NFPA Life Safety Code 101 did not apply because that code is limited to fire safety concerns. The claimant, however, argued that: (1) although the Life Safety Code's primary purpose relates to fire safety, that code was adopted for all purposes by the City of Pensacola; (2) compliance with the Life Safety Code was required by the contract documents governing the construction of the Civic Center; and (3) even if the Life Safety Code did not apply, the same requirements regarding tread and riser uniformity, handrails and step illumination were imposed by the Standard Building Code, which was also in effect in the City of Pensacola.

Escambia County proposed that NFPA 102, a code which addresses mass seating facilities, prevails over NFPA 101 and that NFPA 102 does not impose the same requirements as NFPA 101 for tread and riser uniformity, handrails and step illumination. The claimant countered that NFPA 102 defers to NFPA 101 for means of egress when the former code does not cover a particular standard.

As noted above, the telescopic bleachers were the primary means of ingress and egress for patrons seated on the arena floor. Thus, NFPA 102 yields to the specific provisions of NFPA 101 regarding tread and riser uniformity, handrails and step illumination.

Further, the Special Master finds that telescopic bleachers where the claimant fell to be a staircase governed by standard building requirements for a staircase. The Special Master makes this finding on two independent grounds. The first is that the special codes for bleachers state that, on any issue not specifically covered by the special code, the standard building code applied. Second, the claimant was sold floor seats and the means of ingress and egress to and from those seats was by walking down telescopic bleachers that served as a stairway.

The treads on the telescopic bleachers vary in width from 11 inches to 21.5 inches and the risers vary in height from

5 inches to 10.5 inches. As such, the treads and risers are not uniform. Uniformity of treads and risers is important because persons traversing a stairway quickly adopt a cadence. If that cadence is broken by an uneven or inconsistent rise or run, the potential for falls increases. Escambia County asserts that the claimant had walked up and down the telescopic bleachers twice before falling and should have become aware of the inconsistent treads and risers, and that it was the claimant's own negligence that caused the fall. In fact, the claimant testified that he noted on his first trip down the bleachers "something was wrong." Nevertheless, in each previous instance that the claimant traversed the bleachers prior to falling, the house lights were on. The circumstances when the claimant fell were different in that the house lights were off and stage lights were on, two factors that can markedly affect perception of the environment.

While evidence of candle readings was not entered into evidence by either party, testimony was received at the trial by Mr. Grey Jewett, risk manager, concerning the adequacy of the step illumination on the telescopic readings. Mr. Jewett testified that the telescopic bleacher steps created a "shadow" effect that was like "stepping into a pail of water instead of a step" and caused an "optical problem." The claimant also testified that, "[t]hen I descended down. I noticed it got a little dark and then I got near the bottom and then I stepped on this big step and when I stepped there, I thought I was on some stationary ground. Then I stepped onto a next step and missed part of it and fell." Given the "optical problem" with the steps, the fact that the claimant testified that he could ". . . see a step or two in front . . ." is not persuasive.

Further, there are no handrails on the telescopic bleachers.

The Special Master also takes note of at least one prior fall on the telescopic bleachers. In 1986, another Pensacola Civic Center patron, Lera Stone, fell down the telescopic bleachers, though apparently at a higher level on the stairs. Mrs. Stone sued Escambia County and jury returned a verdict in her favor for damages. In that case, the trial judge determined that the NFPA Life Safety Code 101 and the Standard Building Code provisions regarding tread and riser uniformity, handrails, and step illumination applied to the

telescopic bleachers. The First District Court of Appeal upheld the trial judge's interpretation of the applicable building codes without comment. See, *Escambia County v. Stone*, 563 So.2d 636 (Fla. 1st DCA 1990). Thus, while Escambia County had prior knowledge that the telescopic bleachers were defective, it did not correct the deficiencies.

Thus, the Special Master finds that the negligent design, construction, and maintenance of the moveable bleachers were a proximate cause of the injuries sustained by the claimant. The Special Master, however, also finds some fault on the part of the claimant in that the claimant had traversed the same stairs a number of times prior to the fall and admitted that he felt "something was wrong with them." The Special Master affirms the courts' apportionment of fault at 80 percent for the County and 20 percent for the claimant.

American Red Cross Treatment Report – In its defense, Escambia County at trial and at the Special Master hearing, attempted to introduce into evidence an American Red Cross Treatment Report completed on the night of the accident by an emergency medical technician (EMT).

Mr. Donald Lee, an EMT with the American Red Cross, assisted the claimant and recommended that he visit the hospital. Prior to leaving the Civic Center, the claimant signed an American Red Cross Treatment Report. That report, which was filled out by the EMT, stated under "nature of illness and injuries – how caused," the following: "ankle (left) swollen; tripped and fell down two steps." Under "location of accident," the EMT wrote: "descending wooden steps – tripped over patron's foot and tripped down two steps, landed on left foot and fell."

At trial, the claimant denied tripping over a patron's foot and denied making the statement to the EMT. Although the claimant acknowledged signing the report, he testified he was in severe pain and signed so he could expedite medical treatment. The claimant's wife also denied making the statement. Further, the EMT testified that he had no independent recollection of the incident, could not recall who reported the disputed information, and stated that it could have been furnished by the claimant, his wife or a member of Civic Center management who came in with them.

At trial, Judge Kuder excluded the report from evidence, holding that it did not conform to any exception to the hearsay rule. The judge ruled specifically that: (1) the report lacked sufficient trustworthiness to be admitted under the business records exception to the hearsay rule; and (2) the entry in the report that the claimant "tripped over a patron's foot" was not a statement necessary for the purpose of the EMT's medical diagnosis and treatment; and (3) the evidence failed to demonstrate a credible basis to charge the statement to the claimant as an "adoptive admission." The First District Court of Appeal affirmed this ruling.

Even if the American Red Cross Treatment Report is considered, the Special Master finds Escambia County's defense that it is not liable because the claimant tripped on an unknown patron's foot, to be unpersuasive. Had there been sufficient lighting, the claimant might have seen a patron's misplaced foot. Further, had there been uniform treads and risers and a handrail, the claimant could have righted himself more easily and avoided the fall. Accordingly, the Special Master finds the report and the argument that blame lies in the owner of the errant foot to be unpersuasive.

In sum, there is clear evidence that Escambia County, as owner of the Civic Center, was negligent and liable to the claimant. The Special Master affirms the trial and district court apportionment of fault at 80 percent for the County and 20 percent for the claimant.

Damages – The Special Master finds that the claimant suffered multiple fractures to the posterior malleolus of the left tibia (ankle) and a fracture of the left fibula. This finding is undisputed and is based on the testimony and medical records of Dr. Andre Fontana, the board certified orthopedic surgeon who treated the claimant.

Past Medical Expenses - The claimant's past medical expenses of $4,519.34 also are undisputed. Based upon the evidence presented, the Special Master finds that the claimant's past medical expenses totaled $4,519.34.

Future Medical Expenses - Future medical expenses of $8,468 for the claimant were disputed. Escambia County noted that the claimant asserted at trial that he would incur

medical expenses of $204.06 per year, but that his actual medical expenses from 1997 through 2000 averaged only $57.50 per year. As such, Escambia County asserts that the claimant's medical expenses should be reduced to $2,386.25. The claimant, however, noted that the county's analysis did not include $357 in medical expenses incurred during 1996 and allowed nothing for prescriptions and over-the-counter medications.

Escambia County further relies upon testimony of Dr. Fontana in which he stated that, "I think Mr. Kilpatrick *may* need an occasional visit to the office, that might mean just once a year, and he *may* need to continue with some medication over time (*emphasis added*)." Escambia County also disputes that subsequent office visits or medications were related to the fall. Specifically, the county refers to testimony of Dr. Fontana in which he thought "the original fracture has healed okay." Escambia County also refers to testimony of the doctor stating that the fracture "has healed as much as it is going to heal."

Escambia County, however, ignores other testimony by Dr. Fontana regarding the continuing problems associated with the claimant's injury. For example, when asked whether the claimant's condition could worsen, Dr. Fontana testified that "[i]t could become worse and likely when he is a very old man, he will have some arthritis in that ankle, and he does have traumatic arthritis at the present time. . . . Traumatic arthritis is arthritis that occurs from trauma, basically joint injury that occurs with trauma that results in arthritis." Dr. Fontana continued, "I think he'll probably continue to have some problems with the ankle." When asked if there would be any improvement in the loss of motion, the doctor stated that he did not foresee any improvement.

At the Special Master hearing, the claimant testified that the range of motion in his foot is still limited; that he has to turn it to the side and that it "won't go down all the way either." He further testified that he still limps at the end of the day and that the pain in his ankle still causes him difficulty sleeping.

Escambia County also characterizes Dr. Fontana as being "reluctant" to relate a bone spur to the original ankle injury. At trial, however, Dr. Fontana testified that he diagnosed the

claimant with plantar fascitis in April of 1992. When asked to describe what that meant, Dr. Fontana stated: Plantar fascitis is a term we usually describe as heel pain on the bottom of the heel, and patients get it for some different reasons." After describing some alternative causes for plantar fascitis, including inadequate shoe wear, Dr. Fontana states: "Sometimes it's due to where the foot is under a little bit of an abnormal stress, which might be the case with him in that he had lost a little motion in his ankle because of his injury. And it may have been producing a little extra strain in that area of his foot." On cross-examination, Dr. Fontana stated that "there is a possibility, maybe even a probability" that the plantar fascitis developed as a result of the original ankle twisting.

The claimant's medical records since trial indicates continued, if infrequent, treatment of his accident related injury by an orthopedic surgeon. Given the likelihood of arthritis in the ankle as the claimant ages and the claimant's testimony regarding pain in the ankle, the Special Master finds the award for future medical damages is reasonable.

Past Lost Wages – The trial judge awarded the claimant past lost wages of $5,814. The calculations for past lost wages were based on the claimant's complete inability to work from the date of the accident, September 12, 1991, until the date he was released by his physician to return to light duty employment, November 7, 1991, and upon his pay rate on the date of the accident of $11.15 per hour, plus $50 per week tool allowance, and overtime of 20 to 40 hours per week. Those calculations, including the overtime, were not challenged. The Special Master finds that past lost wages of $5,814 is reasonable.

Future Lost Earning Capacity – The trial court awarded the claimant $270,254.40 for loss of future earning capacity.

Escambia County asserts that there is insufficient evidence to support the method used to calculate future lost earning capacity, as well as the actual assessment. Escambia County notes that the calculation is based on a $1.27 difference in wages prior to the accident and after the accident and that the calculation is vague. Further, Escambia County asserts that the 10 hours of overtime per week for the rest of the claimant's working life that were

calculated into the damages is not supported by the evidence and is speculative.

The claimant, however, argues that his future lost earning capacity was diminished as a result of the restrictions placed upon him by his treating physician as a result of the injuries he sustained at the Civic Center.

Specifically, Dr. Fontana testified at trial that the claimant sustained permanent impairment to the lower extremity and permanently restricted the claimant from climbing heights in excess of 10 feet. The doctor testified: "I felt like with the loss of range of motion in the ankle and the pain he had usually at the end of the day could result in him possibly suffering a severe injury from a fall if I allowed him to climb." Further, Dr. Fontana permanently limited the claimant from walking, standing and sitting more than 8 hours per day.

Dr. Fontana also gave the claimant a 10 percent permanent physical impairment and loss of physical function to the left foot, which equated to an 8 percent loss of function to his left lower extremity, the left leg, which related to a 3 percent impairment of the dysfunction to the person as a whole.

The claimant asserts that these medical restrictions prevented him from returning to heavy millwright work on a regular basis because heavy millwright work requires climbing heights in excess of 10 feet. The claimant testified that heavy millwright work pays more per hour than light millwright work. Further, the claimant testified that heavy millwright work often entails more overtime and that the medical restriction on the number of hours he may stand, walk or sit, prevents him from earning the overtime pay he made prior to being injured.

The claimant was the only person to testify regarding the type of work that millwrights perform, the distinctions that are made among millwrights based upon their work, and the differences in pay that may occur based upon the heights at which they work. His testimony on this point, however, was uncontroverted at the trial and at the Special Master hearing. The Special Master finds that the claimant's testimony on these points is credible and reasonable.

The claimant provided the court with two alternative means to calculate future lost earning capacity:

1. A comparison of the claimant's earnings at the time of the accident and millwright positions that existed at the time in the local economy, which were calculated to pay an average of $13 per hour. With a work life expectancy of 24 years, this was determined to result in a loss of income earning potential of $249,600.

2. A comparison of the claimant's post-accident, non-millwright earnings with his pre-accident earnings as a millwright, which was calculated to be a differential of $1.27 per hour. The hourly rate differential until age 60, excluding overtime, equaled $63,398.40. Ten hours per week of overtime at time-and-a-half were also calculated until age 60, for an additional $206,856.00. The total sum using this method was $270,254.40.

The trial court chose the second method for calculating future lost earning capacity. The First District Court of Appeal affirmed the calculation without opinion.

The Special Master finds that, if examined carefully, the record discloses a reasonable basis for computing the wage differential. Before the accident, the claimant earned $11.50 per hour as a millwright for BE&K Industrial Paper Company and $10.50 per hour for Industrial Services, which generates an average of $11.00 per hour for pre-accident millwright employment.

When the claimant's post-accident non-millwright employment wages are calculated, excluding his jobs at H.B. Zachary Company and BE&K where the claimant was performing more strenuous work as a millwright and working overtime, the average hourly wage is $9.73. The difference between the $11 pre-accident wage and the $9.73 wage is $1.27.

The record shows that, after the accident, the claimant was making $11.50 per hour at H.B. Zachary as a millwright and that he made $14.50 per hour at BE&K as a millwright for a 1-week period. At trial, the claimant's attorney asked: "Now, the obvious question is here you got two millwright jobs in a

row. You've told the Court that you're not capable of handling that. Did you learn anything by those experiences. . . ?" The claimant responded: "Yes. I learned that I couldn't perform my task like I used to could. After I got back from the paperwork company, I had to lay up about a week, week and a half to rest and recuperate from that job. Then I found a job around Mobile that was less strenuous on my body." Thus, the calculation used by the court excluded two higher paying jobs held by the claimant after the accident because those jobs were too strenuous for the claimant, as expected by Dr. Fontana.

Escambia County also asserts that the number of overtime hours that were used by the court were speculative. The testimony of the claimant, however, shows that heavy millwright jobs at times may require much overtime when certain jobs must be completed quickly. The claimant testified that when he was employed by International Systems prior to the accident, he worked ". . . sixty to maybe eighty hours a week." These 20 to 40 hours of overtime were not continuous the entire time that the claimant worked there as the testimony of the claimant states that by the time he returned to work there ". . . the projects they had were already finished and they went back to a forty hour week or sometimes a forty-eight hour week." The trial court, in its award did not provide the claimant with 20 to 40 hours of overtime per week, but reduced the overtime to only 10 hours of overtime per week. Given the sporadic but regular nature of overtime in the claimant's profession, 10 hours of overtime per week appears reasonable.

At the Special Master hearing, Escambia County argued that the award was excessive in light of the claimant's earnings history since the 1996 trial. The county noted that the claimant's injuries had been expected to limit his yearly salary to $26,780 per year for the 24 remaining years of his life expectancy. Based upon the W-2 forms provided by the claimant at the Special Master hearing (income tax forms had not been filed for a number of years but were filed post-hearing), the claimant can be shown to have averaged approximately $40,000 per year during the last 2 years, which is $13,000 more per year than he argued at trial.

The claimant presented evidence indicating that he in fact presently earns $15.50 per hour working for a company that

manufactures and installs sawmill equipment. The claimant testified that his duties with that company do not entail heavier millwright work. He further testified, without contradiction, that if he were physically capable of performing the work, heavy millwright positions are available in the Mobile, Alabama area at $18 to $20 per hour. The claimant noted that in the years after the accident and before the trial his income typically ranged between $23,000 and $28,000. In 1991, however, the year that he was injured, he earned about $37,000. When this figure is compared to annual earnings in recent years of approximately $40,000, the claimant argued that he had not realized any significant gains in real earnings (earnings adjusted for inflation) and in fact had suffered a decline in real earnings.

As a result of the foregoing, the Special Master finds the amount awarded for lost future earning capacity to be reasonable and supported by the preponderance of the evidence.

Pain and Suffering/Loss of Enjoyment of Life – The sum for pain and suffering was undisputed at the hearing, but post-hearing the respondent disputed the amount. Given the nature and type of the injury sustained, the amount is within the bounds of what a reasonable jury might award. There is clear and substantial evidence in support of the award in that the claimant is unable to perform many of the sports and other recreational activities that he previously performed and the Special Master finds the award of $75,000 for this category appropriate.

CONCLUSIONS OF LAW:

Liability -- The parties stipulated that the claimant was a business invitee while attending the concert at the Civic Center. Under Florida law, the premises owner owes a business invitee the duty to use reasonable care in maintaining the premises in a reasonably safe condition and to give the invitee timely notice and warning of latent and concealed perils known to the owner and which are not readily apparent to the invitee with the exercise of reasonable care. *See*, *Moultrie v. Consolidated Stores International Corp.*, 764 So.2d 637, 639 (Fla. 1st DCA 2000).

Applying this standard, the Special Master finds that competent substantial evidence in the record supports Judge Kuder's finding that ". . . the stairs upon which plaintiff

Clyde Kilpatrick fell were unsafe in that a handrail was lacking, the treads and risers were not of uniform dimension and the stairs were inadequately illuminated. The record also supports Judge Kuder's conclusions ". . . that the above-stated deficiencies in the subject stairs resulted from the negligence of Escambia County and constitute a legal cause of loss, injury or damage. . . " to the claimant.

The Special Master also concurs that the NFPA Life Safety Code 101 and the Standard Building Code provisions controlling the construction and maintenance of stairs apply to the telescopic bleachers at the Civic Center upon which the claimant fell. The telescopic bleachers were constructed and maintained by Escambia County in violation of the provisions of those codes which require uniform tread and riser dimensions, handrails and adequate step illumination. Further, the record indicates that Escambia County possessed actual knowledge of these building code violations several years before the claimant's fall but did not correct the deficiencies.

The Special Master concurs with the exclusion of the American Red Cross Treatment Report from evidence as hearsay for which no exception to the hearsay rule applies. Further, the Special Master is also persuaded by the fact that Escambia County challenged the exclusion of the report on appeal and that the First District Court of Appeal affirmed the exclusion without comment. Finally, even had the report been admitted into evidence at trial and considered by the Special Master, the disputed statement in the report, if true, only underscores the necessity for uniform treads and risers, handrails and adequate step illumination.

Damages – At the hearing before the Special Master, Escambia County did not question the awards for past medical expenses of $4,519.34, past wage loss of $5,814 and pain and suffering/loss of ability to enjoy life ($75,000). These awards are supported by competent substantial evidence and appear reasonable.

Future Lost Earning Capacity – The award for lost future earning capacity is supported by competent substantial evidence based on an analysis of the claimant's pre-accident and post-accident employment and earnings history and physical condition. The Special Master does not

recommend a reduction in the award for lost future earning capacity. This finding is based on an analysis of the claimant's present and past earnings history and a comparison of Kilpatrick's present hourly wage and the more lucrative hourly wages available for heavy millwright positions. It is further noted that under Florida law, a claim for future lost earning capacity can be sustained even when the claimant is earning as much as or more than he earned before the accident. See, *Long v. Publix Super Markets, Inc.* 458 So.2d 393, 394 (Fla. 1st DCA 1984). The Special Master is also persuaded by the fact that Escambia County challenged the award for future earning capacity on appeal and that the First District Court of Appeal affirmed the award without comment.

COLLATERAL SOURCES: The claimant received collateral source payments totaling $1,968.22 from health insurance companies. Kilpatrick's health insurer, Blue Cross and Blue Shield of Alabama, claimed a lien, which has been fully satisfied. There are no outstanding liens.

ATTORNEY'S FEES: Section 768.28(8), F.S., limits attorney's fees to 25 percent of the total recovery by way of judgment or settlement obtained pursuant to §768.28, F.S. The claimant's attorney has furnished an affidavit attesting to his compliance with this limitation.

LEGISLATIVE HISTORY: Senator Mitchell filed a claim bill after the required local advertisement was made on June 23, 2000, in the Pensacola News Journal. Proof of advertisement was filed with the Secretary of the Senate. Senate Bill 72 (2001) was filed by Senator Mitchell on August 1, 2000, and referred to the Senate Special Master on Claim Bills, the Senate Comprehensive Planning, Local and Military Affairs Committee, and the Senate Finance and Taxation Committee. The undersigned Special Master recommended that SB 72 (2001) be reported favorably. Senate Bill 72 was reported favorably in the Senate Comprehensive Planning, Local and Military Affairs Committee. The bill was scheduled for hearing by the Senate Finance and Taxation Committee, but was not considered. Thereafter, Senator Lawson filed a claim bill after the required local advertisement was made in the Pensacola News Journal on June 7, 2001. Proof of advertisement, which was notarized June 8, 2001, is on file with the Secretary of the Senate.

No further Special Masters' hearings have been held. Both parties have been given the opportunity to supplement the record for this claim. Neither party submitted any supplemental information.

RECOMMENDATION: Based upon the foregoing, I recommend that Senate Bill 28 be reported FAVORABLY.

Respectfully submitted,

James Rhea
Senate Special Master

cc: Senator Al Lawson
Faye Blanton, Secretary of the Senate
Nathan Bond, House Special Master