# THE FLORIDA SENATE

**SPECIAL MASTER ON CLAIM BILLS**

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December 1, 2001

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

Re: **SB 34 (2002)** – Senator Al Lawson
Relief of Elizabeth Linton
as personal representative of the
Estate of Harold Armstrong, deceased

## SPECIAL MASTER'S FINAL REPORT

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.

FINDINGS OF FACT:

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 by truck 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 had an administrative area with a truck scale near the entrance, several covered work buildings midway down a central access dirt road, and five "cells" on each side of that 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.

As part of the post-Alberto federal disaster aid furnished to Gulf County, there were about a half-dozen Florida Panhandle Private Industry Council (JTPA)[1] temporary employees earning $6 per hour doing various jobs including looking through each incoming load and removing metal objects, oil cans, tires, wood that could be recycled, and anything else that could be salvaged that had slipped past the "spotter," or that was prohibited by the applicable environmental regulation from being buried in that landfill. 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 them.

By the terms of the July 26, 1994 contract between Gulf County and JTPA's Florida Panhandle Private Industry Council, the temporary emergency relief workers at the landfill were neither federal employees nor employees of Gulf County.

[1] 29 USCA §§1501 to 1505. The program was repealed by Pub.L. 105-220, Title I, §199(b)(2), Aug. 7, 1998, 112 Stat. 1059.

On Friday morning, 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.

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

a) Skipper's Crew – Tommy Skipper, likewise 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.

*Donna Sue Mathis*, another JTPA temporary employee, was also on Supervisor Skipper's crew. The normal procedure at the landfill required a "spotter" near the entrance to make a cursory inspection of each incoming load and to then direct the driver to the desired location in an open cell. On the day of the incident, she was the "spotter."

Donna Sue Mathis' version of events comes from six different sources: two written investigative statements taken from her and dated the day of the incident, one by Gulf County Deputy Sheriff Dallas Jones, and the other by Tom Godwin, a Gulf County Sheriff's Investigator; a recorded telephone interview by a private investigator on December 28, 1994, and another by an insurance adjuster on October 3, 1995; a pre-trial deposition taken 18 months after the incident; and a telephone interview taken by the undersigned Special Master in November 2001.

Based on the above six sources, after reconciling some of the substantial differences that they contain, and based also on the testimony of "Flip" Gentry, the dozer operator who testified that he saw Donna Sue Mathis and Doug Nunnery leave from behind the pile before he cranked up the dozer, I find that Donna Sue Mathis:

1) was behind the pile, "plundering" it with some co-workers before it was pushed;

2) left from behind the pile before it was pushed and went off toward the crew shed;

3) was not an eyewitness to "Flip" Gentry's pushing of the pile; and

4) actually heard Tommy Skipper earlier that morning tell Harold Armstrong to go to work at the metal pile.

b) Lollie's Crew – William Lollie, also a JTPA employee, supervised a 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 in the cell as necessary.

*William Lollie* testified that moments before the incident 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, Mr. 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 Mr. Armstrong was leaving to go to his assigned area, the metal pile. Supervisor Lollie left the cell. Mr. Armstrong obviously did not.

*Doug Nunnery* made a special appearance at a Special Master's hearing held on November 7, 2001. He testified that he was a plumber by trade who spent a lot of time at the landfill as a general JTPA laborer doing what needed to be done, and part of his time there looking for good, useable, items of value for his personal use. Apparently "plundering" for personal use was a major job benefit associated with working in the landfill environment.

Nunnery was part of Lollie's crew. Nunnery testified that he, Lollie, Donna Sue Mathis, and Mr. Armstrong searched that pile and, except for Mr. Armstrong, all

walked away from the pile about 10 minutes before the incident. Nunnery had his back to, and was about 10-15 feet away from the dozer and the pile when he heard the dozer rev up. Nunnery, like Donna Sue Mathis, did not actually see "Flip" Gentry push the pile over Mr. Armstrong. Nunnery did not tell Mr. Armstrong the three of them were leaving nor did he tell "Flip" Gentry that Mr. Armstrong was still hidden behind the pile. When Nunnery last saw Mr. Armstrong, Armstrong "was squatted down … looking for something … trying to get something out from the end of the pile."

Several factors may affect Mr. Nunnery's reliability as a witness:

1) Although he boasted that he has a photographic memory, his deposition testimony in May 1996 and his Special Master's hearing testimony in November 2001 were diametrically opposed on an important point – namely whether he actually overheard Tommy Skipper tell Mr. Armstrong that morning to work on the metal pile, and

2) He is related to the husbands of several of the potential payees in this case.

c) The Dozer Operator – Philip "Flip" Gentry 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" Gentry 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" Gentry 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" Gentry pushed the final pile of debris, he didn't see Harold Armstrong on the back side of it. At that moment, Harold Armstrong was apparently not standing up and was obstructed from "Flip" Gentry's view. Gentry ran his dozer forward and pushed the pile, including Armstrong, about 37 feet before shifting into reverse and backing 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 the 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. 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 is responsible to collect, consider, and include in the record, any reasonably believable information found to be relevant or persuasive. At the Special Master's level, each claimant has the burden of proof on each required element.

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 made by formal written exception, or addressed by either party directly to the members of the Senate, either in committee, or individually, as the parties or their attorneys or their lobbyists choose.

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

**Duty**: At the Special Master's hearing, the attorney for the claimant suggested that there was no established specific standard of care for operation of a tractor loader such as a Caterpillar 953; however, there is an 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. That manual is peppered with 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 this generally 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 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.

**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 direct and 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 that Harold Armstrong's emphysema was a "7" on a 1–10 severity scale and that Mr. Armstrong's coronary arteries were 75 percent clogged. While these findings are not unusual for a 72-year-old male who has had a history of smoking tobacco, the pathologist was not asked, nor did he offer his opinion on how much Mr. Armstrong's 10-year remaining life expectancy was cut short.

In addition to reimbursing the family for the $7,185 funeral bill and final medical expenses, 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.[2] 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

[2] The Legislature considered and passed a claim bill 15 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.

too much to pay for adult children's grief and loss of companionship and instruction.

The family responds, in effect, that although there were tears shed 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. 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 Gulf County and its insurance carrier would not be putting up this level of resistance. The county's attorneys suggested 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 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., 768 So.2d 1129 (Fla. 3d DCA 2000). 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" entitled to tort immunity, and dismissed the case on September 9, 1997. The claimant appealed. On July 1, 1998, the First District Court of Appeal set aside 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, after 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 second 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:

Senator W. D. Childers initially filed SB 34 (2000) for consideration at the 2000 regular session. No Special Master's hearing was held because the Final Judgment was then 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.

For the 2001 regular session, Senator Al Lawson refiled the claim as SB 24. This case was twice agendaed for consideration by the Committee on Comprehensive Planning, Local and Military Affairs and twice temporarily postponed. SB 24 (2001) died in committee on sine die.

The current version of the claim, Senate Bill 34 (2002) has again been filed by Senator Al Lawson. It is a local bill, and the required notice was properly published on June 14, 2001, in a newspaper of general circulation in Gulf County.

OTHER ISSUES:

**Comparative Negligence**:

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, "plundering" through the pile for something that was personally usable (variously described as Christmas tree ornaments, or a wristwatch case); and

c. Mr. Armstrong should have heard the diesel engine of the approaching dozer and gotten out of the way as it came barreling down on the pile.

The family responds by saying:

a. Don't try to divert "Flip" Gentry'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 several changes to the operation of the Five Points landfill. Instead of filling each cell from front to back, there is some evidence that they are now normally filled back to front. There is also some evidence that orange safety vests are now issued to all 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 under circumstances where the dozer operator's view of the leading edge of a moving pile is obscured.

But subsequent repairs or post-accident modifications are generally not admissible to prove negligence in connection with an event, and furthermore, even if considered in this case, they would 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 which 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 $807,185 over $1 million if this claim bill becomes law as filed. Gulf County is arguing that it has built up a cash balance after many years of scrimping and saving, and to make a $1 million hit on this account would take over 16 percent of the entire savings of the county.

Note 17 in the auditor's notes to the Gulf County Financial Statement for the year ending September 30, 2000, acknowledges the $2,007,000 verdict and states, based on last session's Special Master's Report that "The Senate Special Master has recommended the claims bill favorably, but has substantially reduced the claims bill to the sum of $1,007,183. The County has in place insurance in the amount of one million dollars to provide coverage for this claim. In the event that the legislature concurs with the proposed reduced claims bill, there will be no significant adverse impact to the County given the level of insurance coverage available for this claim."

Based on Gulf County's audited Combined Balance Sheet as of September 30, 2000, obtained from its independent auditor, the Board of County Commissioners of Gulf County had $4,968,237 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 will be 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 in Port St. Joe, 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.

At the Special Master's follow-up hearing on November 7,

2001, Doug Nunnery recounted a similar statement he said that he himself had heard directly from "Flip" Gentry.

When questioned about this issue at the Special Master's hearing in Port St. Joe, "Flip" Gentry denied making any such admission and he further denied smoking any marijuana on or around the relevant dates.

At my request, the county attorney produced a copy of a urine-based drug screen test that had been administered to "Flip" Gentry 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.

**Chapter 440 issue**: Section 440.11(1), F.S., a part of the workers' compensation law, provides that workers' compensation benefits are the sole and exclusive remedy for an employee injured in a work-related accident. If Mr. Armstrong had been an employee of Gulf County there would be no legal basis for this claim bill.

Gulf County raised the issue of whether Mr. Armstrong was an employee of Gulf County as an affirmative defense in its answer to the complaint. As noted above, Gulf County also filed a Motion for Summary Judgment seeking dismissal of the complaint based on workers' comp immunity. The trial court granted that motion, but that decision was overturned on appeal. The appellate court did not rule on the merits, it simply decided that the county had not met the requirements for obtaining a summary judgment.

Certainly, Mr. Armstrong did not have a typical employer-employee relationship with Gulf County. His paychecks were not drawn on the county account. He was not hired by the county personnel office.

A "special employer" (Gulf County) is one to whom the general employer (JTPA) has loaned an employee. There is a presumption in the law that the employee continues to work solely for the general employer (JTPA). In order to overcome this presumption, three elements must be shown:

1) a contract for hire, express or implied, *between the employee* and the alleged special employer (Gulf County);

2) the employee was doing the special employer's (Gulf County's) work at the time of the injury; and

3) the special employer (Gulf County) had the power to control details of work at the time of the incident.

The existence of the contract is of primary weight and importance among the three factors.

And, in establishing the existence of a contract between the special employer (Gulf County) and Mr. Armstrong, there has to be a showing of the employee's deliberate and informed consent before the special employment becomes a bar to action by the claimant against the special employer for common law negligence. Sagarino v. Marriott Corp., 644 So.2d 162 (Fla. 4th DCA 1994).

As already noted at the top of page 3 of this report, there was an express contract *between JTPA and Gulf County* that contained a recital that specifically stated that Mr. Armstrong was **not** an employee of the county and **not** an employee of the federal government, the ultimate source of the payroll funds.

There was no evidence produced that Mr. Armstrong was told or that he believed that he was working for Gulf County.

I find that Harold Armstrong's sole employer was the Florida Panhandle Private Industry Council, a Florida nonprofit corporation at the time, with its own separate legal significance.[3]

Although not determinitive of this issue, it is supportive that the EMS provider, the ambulance charges, both hospital bills, the attending physician's charges, and Mr. Armstrong's funeral bill were all paid by Wausau/Liberty Mutual, the workers' compensation carrier for the Florida Panhandle Private Industry Council.

[3] Articles of Dissolution filed with the Florida Department of State on January 27, 1998, voluntarily dissolved the Florida Panhandle Private Industry Council, Inc. This was around the time that the Congress repealed the entire JTPA program.

Accordingly, I find no Chapter 440 bar to payment of this claim by Gulf County or its carrier, if payment is otherwise required by act of the Legislature.

**Respondent's Exceptions**: Gulf County has taken 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 argues 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 apparent 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" Gentry push the last pile;

b) because the last 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 pile;

d) he didn't walk beside the tractor/loader as "Flip" pushed the last 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 or practical 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.**

b) Even though the contract between Gulf County and JTPA provided that the Florida Panhandle Private Industry Council would hold Gulf County harmless from any claim arising out of the work, that hold harmless was counterbalanced by the jury finding that none of JTPA's employees were at fault. And even if the jury had tagged JTPA with a percentage of the fault, it is unlikely that the Florida Panhandle Private Industry Council ever had assets with which to pay. It certainly doesn't now, almost 4 years after its dissolution.

c) 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.

ATTORNEYS FEES:

The claimant's contract with her 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.

At the Special Master's hearing on November 7, 2001, the claimant's lobbyist, also a member of the Florida Bar, participated briefly in questioning the witness. The firm with whom the lobbyist/attorney is associated takes the position that its contingent compensation, calculated as a percentage of the total award, is a "cost" and not an attorney's fee, and is thus excepted from, and not part of, the 25 percent limitation on attorney's fees contained in §768.28, F.S. Neither house of the Legislature has formally addressed this issue.

CONCLUSIONS:

There are about a half dozen versions of what occurred at 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 and on its exoneration of JTPA, 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 while "plundering" for items for his personal use, 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 compel 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 re-allocating comparative negligence as follows:

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

RECOMMENDATION:

The following recommendation reflects the balance due after the re-allocation of fault; a credit for the September 2000 payment of the initial $200,000; and a further set-off of $7,182.92 in order to avoid double payment of that amount that was paid by JTPA's workers' compensation carrier.

Accordingly, I recommend that Senate Bill 34 (2002) be amended to require a payment of $800,000, without interest, and that the bill be reported FAVORABLY, AS AMENDED.

Titan Indemnity Company, Gulf County's general liability insurance carrier, will pay this sum with no direct impact on the county treasury.

A conforming amendment is attached.

Respectfully submitted,

D. Stephen Kahn
Senate Special Master

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