STORAGE NAME: h0373.cla
DATE: January 3, 2002

January 3, 2002

SPECIAL MASTER'S FINAL REPORT

The Honorable Tom Feeney
Speaker, The Florida House of Representatives
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: HB 373 - Representative Kendrick
Relief of Jacob P. Darna

THIS IS A CONTESTED, EXCESS JUDGMENT CLAIM FOR $168,750 BASED ON A JURY VERDICT RENDERED AGAINST LEE COUNTY SCHOOL BOARD TO COMPENSATE JACOB P. DARNA FOR INJURIES HE SUSTAINED DURING A SCHOOL ASSEMBLY.

FINDINGS OF FACT:

Jacob P. Darna ("claimant") was a 10-year-old 5th grader who, on May 23, 1995, accompanied his elementary school class to Trafalgar Middle School in Cape Coral, Lee County, Florida. This was an orientation trip to prepare the students for attending Trafalgar Middle School in the fall. Claimant and his classmates finished their orientation program with a presentation in the school gymnasium. The students were seated in accordion-style bleachers. The bleachers were divided into sections with each section containing seven rows. Each row of bleacher seats had seams spaced 18 inches apart. The claimant presented evidence that the National Fire Protection Association Life Safety Code, NFPA 101, required that the students be spaced at 18-inch intervals. Claimant testified that students from his elementary school were seated in the first four rows of the bleachers, and that he was seated in the fourth row. Claimant testified that he did not know the students seated in the rows behind him as they were from other elementary schools.

The Trafalgar physical education teacher, Ms. Janet Davis, supervised the gymnasium presentation. At the end, Ms. Davis dismissed the students stating, "You all may go." Following her instruction, the students proceeded to dismount the gymnasium bleachers. Claimant alleges that as he was stepping to the bottom bleacher row, he was accidentally pushed or bumped

from behind and fell to the floor. Claimant told Ms. Davis, who was at the accident scene, and Ms. Jill Books, the school nurse who arrived on the scene a few minutes later, that he had tripped on the last bleacher step and fell to the floor. In recounting the accident for purposes of medical attention to the various medical personnel involved in treating the claimant, he again indicated that he tripped on the bleacher. The record indicates that the first reference to the claimant being pushed or bumped from behind was two weeks after the incident during a recorded statement to the School Board's claims adjuster. There is no evidence in the record that claimant's fall resulted from a defect in the physical condition of the bleacher.

As a result of claimant's fall, he suffered a grade III slipped capital femoral epiphysis of his left hip. Essentially, the head, or ball, of the femur that fits into the socket of the hipbone sheared almost completely away from claimant's femur. Claimant was admitted to the Cape Coral Hospital's Emergency Room on May 23, 1995. Due to the serious nature of the injury, he was transferred to Nemours Children's Clinic on May 24, 1995. Claimant's was treated with traction and on May 26, 1995, the attending surgeon at Nemours, Dr. Brett Shannon, performed surgery to secure claimant's ball joint and femur with pins and screws.

As a result of the accident, blood vessels were damaged causing a condition known as avascular necrosis, which limited the flow of blood to the head of the femur. Concerned that further collapse of the femur head could occur because of the avascular necrosis, Dr. Shannon removed a screw that protruded from that area. The avascular necrosis also decreased the regular growth of claimant's femur.

On June 3, 1999, Dr. Shannon attempted to equalize the growth rate of claimant's legs by inserting screws into the growth plates of his right leg. Those screws remain in claimant's leg today.

Claimant's injury left him with a permanent limp. The evidence indicates that claimant will require at least one hip replacement during the remainder of his life. Medical evidence indicates that the current cost of a hip replacement is $40,000. Claimant enjoyed playing baseball and fishing. His injuries prevent him from engaging in rigorous physical activity, and will continue to do so for the remainder of his life.

LEGAL PROCEDINGS:

Claimant's parents filed suit on his behalf against the Lee County School Board ("School Board") on January 20, 1999. Claimant's attorney offered two proposals for settlement: one on April 29, 1999, for $50,000; and a second proposal on March 17, 2000, for $20,000. The Lee County School Board's final offer to settle was for $5,000. The case went to trial on May 31, 2000, and ended with a jury verdict in favor of the

claimant on June 2, 2000. The judge split the verdict into two final judgments: the claimant's parents were awarded past medical bills in the amount of $32,100.91, costs of $4,931.43, and attorney's fees of $8,025.23, for a total of $45,057.57. The second final judgment awarded the claimant the following:

• Past pain and suffering	$40,000
• Future pain and suffering	$100,000
• Future medical expenses	$75,000
• Attorney's fees	$53,750
TOTAL	$268,750

The School Board paid claimant's parents $45,057.57, to compensate them for past medical bills, costs and attorney's fees. The School Board also paid claimant $100,000, of which his attorney received $25,000.

CLAIMANT'S MAIN ARGUMENTS:

The claimant made the following arguments at trial and at the Special Masters hearing:

- Claimant and the other students from his elementary school were accustomed to walking in lines and were inexperienced in walking on bleachers.
- The Life Safety Code established minimum standards requiring one child to be seated for every 18 inches. The faculty was not aware of that requirement and negligently overcrowded the bleachers by "packing in" the students.
- The faculty negligently discharged the students by instructing them, "You may go." The students should have been dismissed one row at a time.

RESPONDENT'S MAIN ARGUMENTS:

The respondent raised the following points and arguments:

- The School Board has no insurance coverage that would pay the balance of claimant's judgment.
- The School Board is not liable for claimant's accident and the medical bills stemming from the accident because he caused himself to fall as he was stepping off the bleachers. Further, claimant's pre-existing weakened condition of his left femoral epiphysis or growth plate would have eventually resulted in a slipped capital epiphysis requiring the same medical care and causing the same injuries, damages, and suffering even if the claimant had not fell from the last step of the school's bleachers.
- Claimant's evidence was insufficient to prove negligence or liability on the part of the School Board, and the damages and medical bills arise out of wholly

or mostly his pre-existing condition.

- The jury verdict was based on prejudice against the School Board and sympathy for the claimant due to his age and injuries.
- Claimant's counsel is not entitled to an award of attorney's fees on the basis that the claim has not been proven by a preponderance of the evidence.

CONCLUSION OF LAW:

Some see the Legislature's role in claim bills against government agencies as merely rubber stamping and "passing through" for payment those jury verdicts that have been reduced to judgment, as this one has. Other see the Legislature's role as a *de novo* responsibility to review, evaluate, and weigh the total circumstances and the type of the public entity's liability, and to consider those factors that might not have been perceived by or introduced to the jury or court.

Whichever of these two views each lawmaker holds, at the Special Master's level every claim bill, whether based on a jury verdict or not, must be measured anew against the four standard elements of negligence: duty, breach of duty, proximate cause, and damages. If, and only if, all four elements are satisfied, can liability be found. The claimant has the burden to prove each of these elements.

The claimant alleges the Lee County School Board was negligent in the supervision of school children participating in the orientation at Trafalgar Middle School. This negligence, claimant contends, is based on the school board's violation of the Life Safety Code; by putting too many students on a bleacher and dismissing them with the instruction, "you may go", rather than dismissing the students one row at a time.

Teachers have a general duty to supervise the activity of students when the school is entrusted with their care. *Rupp v. Bryant*, 417 So.2d 658 (Fla. 1982). Where negligent supervision is alleged, "a teacher's duty of care is described as reasonable, prudent and ordinary care, or that care that a person of ordinary prudence, charged with those duties, would exercise under the same circumstances." *La Petite Academy, Inc. v. Nassef*, 674 So.2d 181, 182 (Fla. 2nd DCA 1996). In this case, I find that the School Board had a duty to supervise the students at the Trafalgar Middle School orientation program. The next element of negligence the claimant must establish is that the School Board breached its duty to supervise students entrusted to their care.

NEGLIGENCE PER SE: The claimant contends that the School Board breached its duty of care by violating the Life Safety Code. A violation of a code or statute that protects a particular class of persons from a particular type of injury constitutes negligence per se. *deJesus v. Seaboard Coast Line R.R. Co.*, 281 So.2d 198 (Fla. 1973). Under a negligence per se theory, the claimant must establish that the following

three-pronged test is met:

1. that claimant is a member of the class sought to be protected;
2. that claimant suffered the injury the code or statute was designed to protect against; and
3. that the violation was the proximate cause of claimant's injury.

The facts of this case do not support a negligence per se theory.

The Life Safety Code ("Code") governs the maximum occupancy of certain buildings for purposes of egress and relocation during times of emergency. Mr. Darab, the safety specialist for the School Board, testified at trial that the Code governs "[t]he occupant load for determining egress requirements of . . . gymnasiums . . . used for assembly purposes by more than 50 persons" and that the occupant load for bleachers is one person per 18 linear inches. He further testified that the purpose of the one student per 18 inches standard is "[s]o you don't go over the occupancy load of the room."

The students at Trafalgar Middle School were not exiting the gymnasium bleachers during an emergency evacuation. Therefore, claimant does not fit the particular class the Code is designed to protect and he has failed to establish negligence per se.

Alternatively, if the Code is viewed as a building code designed to protect the public, rather than a particular class of individuals negligence per se is not a viable tort theory. In these circumstances, courts have held that a violation of a statute, code, or ordinance designed to protect the general public, and not a particular class of persons, constitutes evidence of negligence and not negligence per se. *See Lindsey v. Bill Arflin Bonding Agency, Inc.*, 645 So.2d 565, 567 (Fla. 1st DCA 1994) (a building code requiring handrails for stairs was merely evidence of negligence); *Cadillac Fairview of Florida, Inc. v. Cespedes,* 498 So.2d 417 (Fla. 3d DCA), *review denied*, 479 So.2d 117 (Fla.1985)(South Florida Building Code that was violated was enacted for the protection of the general public, not for the protection of a particular class of persons, therefore such violation was only evidence of negligence and not negligence per se.). Thus, under either approach, the first prong of the negligence per se test is not established.

Further, even if the claimant established that the first two prongs of the negligence per se test are met, he still fails under this theory because he is unable to show that the School Board's violation was the proximate cause of claimant's injury. The claimant testified that there were 60 students from his elementary school, and all of these students were seated on the first four rows of the bleacher. Thus, the evidence supports

a finding that the Code was violated as pertaining to the first four rows. However, the record contains no evidence of overcrowding on the rows behind the claimant. At the time of the claimant's accident, he was stepping off of the bottom row of the bleacher. There is no evidence that the Code violation, i.e., the overcrowding of the first four rows (with the students in the first three rows in front of claimant having already exited the bleacher), was a factor relating to his accident. Claimant alleges that he was pushed or bumped from the students behind him. The claimant failed to establish that the rows behind him were overcrowded in violation of the Code. Therefore, he is unable to show that the Code violation was the proximate cause of his injury. Thus, any evidence indicating a violation of the Code may only be considered as evidence of negligence; not negligence per se.

NEGLIGENCE: Even though the claimant failed to establish negligence per se, the issue of whether the School Board was negligent in this matter does not end there. The question still remains whether the School Board negligently supervised the dismissal of the students from the gymnasium bleachers, i.e., would a reasonable and prudent person have dismissed the students all at once rather than one row at a time.

Ms. Davis was the teacher in charge of the orientation program in the school's gymnasium. At the conclusion of the program she dismissed the students by telling them, "you all may go." She testified at the hearing that she was just a few feet in front of the bleacher as the students were dismissed. She testified that all of the students were quiet and orderly as they exited the bleachers; there were no students racing off the bleachers, or pushing or acting out in any manner. Ms. Davis had conducted similar orientation for 16 years, there was no evidence of prior accidents or anything to indicate that the students should have been dismissed one row at a time. She testified that had there been any rough housing amongst the students while they were exiting the bleachers she would have seen it and been able to stop it. Ms. Davis testified that at the time of the accident the claimant never asserted that he was pushed, nor did he blame his accident on another student.

The school nurse, Ms. Jill Books in her deposition, testified that upon arriving in the gym shortly after the claimant's accident, she asked the claimant how he was injured. He explained to her that while stepping off of the bleacher he had hooked his right foot on the bottom bleacher and fell. The Claimant never said he was pushed or that another student bumped into him causing his fall from the bleacher.

The School Board had no policy regarding the proper manner to dismiss students from bleachers under non-emergency situations. Thus, there is no evidence that Ms. Davis violated any School Board policy or procedure in seating or dismissing students from the bleachers. Additionally, the claimant testified that he did not believe that he needed special instructions on

how to walk on bleachers.

Considering all these factors, the greater weight of the evidence does not indicate that the students should have been dismissed one row at a time. Moreover, I find that Ms. Davis' supervision of these students during their exiting of the bleachers to be reasonable and the claimant has not proven by a preponderance of the evidence that the School Board breached its duty of care toward him.

In light of the above findings regarding breach of duty, I do not make any findings on the issue of causation and a discussion of damages seems unnecessary. However, should the Legislature make the policy decision to compensate this claimant, several issues regarding damages should be addressed:

- The School Board has paid $45,057.57 to the claimant's parents to compensate them for past medical expenses;
- The School Board, in accordance with the statutory limit of liability in § 768.28, F.S., has paid $100,000 to the claimant. This is a sufficient amount to cover claimant's future hip replacement which Dr. Otis testified currently costs $40,000; and
- The School Board has no insurance coverage that would pay the balance of claimant's judgment.

ATTORNEYS FEES: The claimant's attorney has submitted an affidavit that his fees will be, and have been, limited to the statutorily prescribed amount of 25 percent as provided in § 768.28, F.S.

RECOMMENDATIONS: Based on the foregoing, I recommend that House Bill 373 be reported UNFAVORABLY.

Respectfully submitted,

Randy L. Havlicak
House Special Master

Stephanie Birtman
Staff Director

cc: Rep. Kendrick, House Sponsor
Sen. Diaz de la Portilla, Senate Sponsor
Tim Vicarro, Senate Special Master
House Claims Committee