THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
11/27/02	SM	Unfavorable
	ED	
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November 27, 2002

The Honorable James E. "Jim" King
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 20 (2003)** – Senator Burt L. Saunders
Relief of Jacob P. Darna

SPECIAL MASTER'S FINAL REPORT

THIS IS A SETTLEMENT OF A CONTESTED, EXCESS-JUDGMENT CLAIM WHEREBY THE LEE COUNTY SCHOOL BOARD AGREES TO PAY JACOB P. DARNA $75,000 FOR INJURIES SUSTAINED DURING A SCHOOL ASSEMBLY. THE SCHOOL BOARD PREVIOUSLY PAID $100,000, PURSUANT TO THE SOVERIGN IMMUNITY CAP SPECIFIED BY LAW.

FINDINGS OF FACT:

On May 23, 1995, Jacob P. Darna was a 10-year-old fifth-grade student who accompanied his elementary school class on a trip 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. At the end of the day, Mr. Darna and his classmates attended a presentation in the school gymnasium. The students were seated in pull-out style bleachers. The bleachers are designed to fold up against the gymnasium wall during storage. The bleachers are divided into sections or blocks. Each section contains seven rows. There are seams, or lines, that run from the back to the front of each row. There is a seam every 18 inches down the length of the row. Mr. Darna's attorney presented evidence that the National Fire Protection Association Life Safety Code, NFPA 101 (Life Safety Code), required that the students be spaced at 18-

inch intervals. Mr. Darna testified that students from his school were seated in the first four rows of the bleachers, and that he was seated in the fourth row. Mr. Darna testified that the students in the last two or three rows were from other schools.

The Trafalgar physical education teacher, Ms. Janet Davis, supervised the presentation. At the end of the presentation, Ms. Davis dismissed the students stating, "You all may go." Following her instruction, the students proceeded to walk down the gymnasium bleachers to the floor. When Mr. Darna was standing on the bleacher closest to the floor he was accidentally pushed or bumped into from behind and fell to the floor. There is no evidence in the record that Mr. Darna's fall resulted from a defect in the physical condition of the bleachers.

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

Mr. Darna required two follow-up surgeries. 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 a future 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 resulted in a slow-down in the growth of Mr. Darna's femur. On June 3, 1999, Dr. Shannon attempted to equalize the growth rate of Mr. Darna's legs by inserting screws into the growth plates of his right leg. Those screws remain in Mr. Darna's leg today. There is no evidence that Mr. Darna's condition resulted from negligent medical treatment.

Mr. Darna's injury left him with a permanent limp. The evidence also indicates that Mr. Darna will require at least one and possibly two hip replacements during the remainder of his life. Mr. Darna enjoyed playing baseball and fishing. Evidence also suggests that Mr. Darna was interested in joining the U.S. Navy. Mr. Darna's injury prevents him from engaging in rigorous physical activity, and will continue to do so for the remainder of his life.

STANDARDS FOR FINDINGS OF FACT:

Findings of fact must be supported by a preponderance of the evidence, although the Senate's Special Master is not bound by the formal rules of evidence or procedure applicable in the trial of civil cases. The claimant has the burden of proof on each required element.

LEGAL PROCEEDINGS:

On January 28, 1999, Mr. Darna's parents filed suit on his behalf against the Lee County School Board in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Case No. 99-448-CA-LG. claiming that the School Board was negligent and thus caused the claimant to trip and fall on the bleachers.

The Defense argued that the School Board was not negligent, claiming that Mr. Darna caused his own accident, because he caught his foot on the bleachers and fell. The School Board also alleged that Mr. Darna had a preexisting condition that would have resulted in his injury had he not suffered his accident.

The trial occurred during the final few days of May 2000 and ended on June 2, 2000, when the jury returned a verdict in favor of Mr. Darna. Two separate awards were made. The jury awarded Mr. Darna's parents past medical bills in the amount of $32,100.91 plus costs of $4,931.43, and attorney's fees of $8,025.23, for a total of $45,057.57. The jury awarded Mr. Darna 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 Mr. Darna's parents the full amount of their award. The School Board paid Mr. Darna $100,000, of which his attorney received $25,000.

CLAIMANT"S POSITION:

- Mr. Darna and the other students from his school were inexperienced in walking on bleachers and were used to walking in lines.
- The Life Safety Code established a minimum standard requiring that one child be seated between each pair of 18-inch lines on the bleachers. The faculty was not made aware of that requirement and negligently overcrowded the bleachers by "packing in" the students.
- The faculty negligently discharged the students by simply instructing "You may go." The faculty should have discharged the students one row at a time.

RESPONDENT'S POSITION:

- The Lee County School Board has no insurance coverage that would pay the balance of Mr. Darna's judgment.
- The Lee County School Board is not liable for the Mr. Darna's accident or the medical bills associated with his slipped capital femoral epiphysis, because he caused his own accident or caused himself to fall from the first bleacher because he caught his right foot on the final bleacher when he was stepping off onto his left foot. Further, Mr. Darna'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 slipped on the bleacher.
- Mr. Darna'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 in favor of the claimant due to his age and injuries.

CONCLUSIONS OF LAW:

Negligence has four elements: duty; breach; cause and damages. The claimant has the burden of proof on each of these elements. The claimant did not specifically set forth the School Board's duty; however, case law provides that teachers have a duty to supervise students. Doe v. Escambia County School Board, 599 So. 2d 226 (Fla. 1st DCA 1992). In carrying out that duty, teachers must use the care that a person of ordinary prudence, charged with the duties involved, would exercise under the same circumstances. A breach of the supervisory duty exposes a school to liability for reasonably foreseeable injuries caused by the failure to use ordinary care. Wyke v. Polk County School Board, 129 F. 3d 360 (11th Cir, 1997). Therefore, I find that the Lee County School Board did have a duty to supervise the students who were attending the presentation at issue.

The question then becomes whether the School Board breached its duty based upon the manner in which it seated and then dismissed the students. The claimant alleges that the Life Safety Code limited seating to one student between each pair of lines on the bleachers. Section 11-1.7.4 of the Code requires that occupant load for determining egress requirements of gymnasiums shall be determined in accordance with s. 9-1.7 of the Code. Section 9-1.7 of the Code limits the occupant load for bleachers to one person per 18 linear inches. As previously discussed, the width between the seams on the bleacher tops at Trafalgar Middle School is 18 inches. There are 11 seams on each row, which leaves spaces for 12 persons per row.

Evidence was presented at the trial and Special Master's hearing regarding the seating of the students in the bleachers. Mr. Darna testified that the students from his school were seated on the first four rows of bleachers. He also testified that students from other schools were sitting on the top two or three rows. There was no evidence presented regarding the total number of students on the bleachers. The evidence indicated that there were 60 students from Mr. Darna's school; however, no conclusive evidence

regarding the number of students in attendance from other schools was presented. Therefore, the only substantial evidence regarding overloading applies to the rows in which Mr. Darna's school was seated.

The claimant relies heavily upon a statement made by Janet Davis that the adults in charge "packed them in there." Ms. Davis clarified, however, that by "packing them in" she meant that the students were guided to the top row and seated from the top row down. She testified that the purpose in seating the students in that manner was to avoid having to make the students climb over occupied bleachers. Ms. Davis also testified that, based upon her observations, the bleachers were not overloaded.

A violation of a fire code or a statute that protects a particular class of people from a particular injury or type of injury, constitutes negligence per se. Del Risco v. Industrial Affiliates, LTD, 556 So. 2d 1148 (Fla. 3DCA 1990), DeJesus v. Seaboard Coast Line Railroad Company, 281 So. 2d 198 (Fla. 1973). It is up to the claimant, however, to establish that he is of the class sought to be protected, that he suffered injury of the type the code or statute sought to protect, and that the violation was the proximate cause of the injury. DeJesus. The full name of the Code is the NFPA 101 Code for Safety to Life from Fire in Buildings and Structures. The Life Safety Code website, states that the Code intends for the occupant load "to assure the egress system adequate capacity to accommodate everyone at times of emergency egress." http://www.nfpa.org/Codes/Interpretations/FAW101/FAQ101.asp. Therefore, it does not appear that the Code applies to Mr. Darna's class or injury, because the students were not in the process of emergency egress at the time of the accident.

Even if the Code did apply to Mr. Darna, he would still have to establish that a violation of the Code was the proximate cause of the accident. Given Mr. Darna's testimony regarding the seating of his school, and given that there were 60 students from his school, it does appear that the first four rows of bleachers were overloaded thus creating a violation of the Code. Mr. Darna, however, was seated in the fourth row of the bleachers, and at the time of the accident, he was standing on the bottom row of the bleachers. Therefore, there is no evidence that the overcrowding of the

first four bleachers was a factor relating to his accident. Mr. Darna was pushed or bumped into from behind. As indicated earlier in this report, the greater weight of the evidence does not support that the students seated behind Mr. Darna were overloaded onto the bleachers. Therefore, the claimant did not establish by a preponderance of the evidence that a violation of the Code was the proximate cause of the accident.

That still leaves the question of whether or not the School Board negligently dismissed the students. The claimant argues that the students should have been dismissed one row at a time. It must be determined, however, whether Ms. Davis, in dismissing the students all at once, acted in the same manner as any prudent person would have acted under the circumstances.

The evidence indicated that the School Board had no oral or written policy regarding dismissal from bleachers under ordinary, i.e., non-emergency, circumstances. There is no evidence that Ms. Davis violated any School Board policy or procedure in seating or dismissing students. Additionally, the evidence indicated that the orientation day was an annual event, and there was no evidence of prior accidents or anything else to indicate that students needed to be dismissed on a row-by-row basis. Further, the students gave no indication of trouble climbing the bleachers, despite the claimant's assertion that the students had no prior experience using bleachers. In fact, the evidence indicated that Mr. Darna's school was equipped with choir risers for music class, and Mr. Darna testified that he did not believe that he needed special instructions on how to walk on bleachers. Ms. Davis testified numerous times that the students did not appear to her to be overcrowded, and she also testified that the students were well behaved. Therefore, the greater weight of the evidence does not indicate that the students should have been dismissed one row at a time.

It also appears that the manner in which the students actually exited gave Ms. Davis no reason to believe that an accident might occur. She testified that the students exited the bleachers quietly, with no indication of disorderly conduct. She also testified that if she would have observed any sign that the students needed guidance on the way down the bleachers, she would have provided it. On the

other hand, Mr. Darna testified that the students did not exit in an orderly manner. His testimony, however, was inconsistent on this point, and I found Ms. Davis' testimony more credible.

Some witnesses did opine, however, that it would have been preferable or safer to have the students exit row by row. Other methods of dismissing the students could have been safer, but the real issue is whether Ms. Davis acted reasonably under the circumstances. I find that the greater weight of the evidence indicates that she did so.

Based upon the foregoing, I find that the claimant did not conclusively establish by a preponderance of the evidence that the Lee County School Board breached its duty of care in this case. Therefore, I do not make any findings regarding to causation and damages.

LEGISLATIVE HISTORY: During the 2002 Legislative Session, SB 72 was filed, seeking the remainder of Mr. Darna's verdict. The Senate Special Master recommended SB 72 unfavorably; however, it was approved by the Senate with an amendment to reflect the parties' settlement of the claim for $75,000. Senate Bill 72 was not passed by the House of Representatives.

ATTORNEYS FEES: Claimant's attorney attested on the record during the Special Master's hearing that any recovery of fees would be limited to 25 percent of any award received by the claimant in this matter.

OTHER ISSUES: The parties' settlement requires the Lee County School Board to make payment of $75,000 to Michelle Darna and Jacob Darna to be placed in a guardianship account for Jacob P. Darna. Subsequent to the entry of the settlement agreement, Mr. Darna reached the age of 18. Therefore, in the event the Senate votes to approve this claim bill, it should be amended to require payment directly to Mr. Darna. The parties have indicated that they will enter a new settlement agreement to provide for payment directly to Mr. Darna.

RECOMMENDATIONS: Based upon the findings stated herein, I recommend that Senate Bill 20 be reported UNFAVORABLY.

Respectfully submitted,

Tim Vaccaro
Senate Special Master

cc: Senator Burt L. Saunders
Faye Blanton, Secretary of the Senate
House Subcommittee on Claims