# THE FLORIDA SENATE

**SPECIAL MASTER ON CLAIM BILLS**

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| DATE | COMM | ACTION |
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| 11/27/02 | SM | Fav/1 amendment |
| 03/17/03 | CP | Fav/1 amendment |
| 3/27/03 | FT | Favorable |

November 27, 2002

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

Re: **SB 28 (2003)** – Senator Alex Villalobos
Relief of Jeffrey Akers

## SPECIAL MASTER'S FINAL REPORT

THIS IS AN EXCESS JUDGMENT CLAIM FOR $3,217,029.40 BASED ON A JURY VERDICT RENDERED AGAINST THE CITY OF MIAMI BEACH TO COMPENSATE JEFFREY AKERS FOR INJURIES AND DAMAGES HE SUSTAINED DUE TO THE NEGLIGENCE OF THE CITY OF MIAMI BEACH WHEN IT FAILED TO MAINTAIN ITS PREMISES IN A REASONABLY SAFE CONDITION, THEREBY CAUSING HIM TO FALL 20 FEET FROM A LADDER.

FINDINGS OF FACT:

**LIABILITY**

On May 19, 1995, Jeffrey Akers was a 34-year-old journeyman air conditioning mechanic employed by Spectacor Management Group, Inc. (SMG.) SMG had a Management Services Contract with the City of Miami Beach to provide management and maintenance services at the Miami Beach Convention Center. The contract required SMG to perform routine maintenance and repairs on the air conditioning units that serviced the convention center.

The Miami Beach Convention Center is a large building with multiple additions and levels. Some of the air conditioning units that Mr. Akers serviced are located on the outside of the building and on top of the several roofs, which are situated on different levels. To gain access to some of the

rooftops, workers such as Mr. Akers are required to climb ladders that are permanently attached to the outside walls of the convention center.

On May 19, 1995, Mr. Akers had to climb one of the exterior ladders in order to work on an air conditioning unit. This particular ladder was approximately 20 feet high. When he reached the top of the ladder, Mr. Akers attempted to lift one foot over the top rung of the ladder and place it on the parapet of the roof. While Mr. Akers was lifting his foot over the top rung, he tripped and fell 20 feet to the roof below.

The subject ladder was constructed in 1989 during the course of significant renovations and additions to the convention center. The building plans submitted to the City of Miami Beach, and approved by the city, do not depict the subject ladder. Nevertheless, the plans do depict several other permanently attached exterior ladders.

The 1988 South Florida Building Code governed the 1989 renovation of the convention center. Regarding the subject ladder, there was a substantial amount of evidence indicating the ladder violated provisions of the South Florida Building Code, which incorporated Occupational Safety and Health Administration (OSHA) regulations and standards of both the National Fire Prevention Association Life Safety Code (NFPA) and the American National Standards Institute (ANSI.) More specifically, the evidence showed that the top rung of the subject ladder was four (4) inches above the parapet of the roof while all of the aformentioned code provisions, regulations, and standards required the top rung to be *level with, or below, the parapet.* Importantly, this fact was admitted by the city's building department director, property maintenance director, and safety director.

The evidence also adduced that all of the other similar exterior ladders, which were depicted on the building plans, were all in compliance with the South Florida Building Code, OSHA regulations, NFPA standards and ANSI standards. None of the other similar ladders, which were all constructed at the same time as the subject ladder, had a top rung that was placed above the parapet, roof, or similar landing surface. All of the other similar ladders, unlike the subject ladder, had a top rung that was level with, or below, the parapet, roof, or landing surface.

Testimony from the aforementioned city building officials also established that the city would have inspected the renovation project prior to its completion and prior to its issuance of a certificate of occupancy. Accordingly, the city building officials testified that someone from the city should have been aware of the ladder's existence at that time. Likewise, the city officials admitted that the subject ladder, along with the entire convention center, have been inspected on an annual basis from the time of the completion of the renovations until the date of the accident in 1995 (at least 4 times.) Therefore, the city had at least five (5) opportunities to become aware of the subject ladder and correct the offending top rung.

Several witnesses testified that the purpose of the safety provisions requiring the top rung of the ladder to be at or below the parapet was to prevent climbers from tripping over the top rung as they attempted to place their foot on the landing surface. These witnesses, including those who were employed by the city and charged with enforcing the applicable safety provisions, all testified that the subject ladder's top rung created a tripping hazard. Only one witness, an expert hired by the city (not a city employee), testified that the top rung did not constitute a tripping hazard.

Although the top rung of the subject ladder violated several safety provisions and, in the opinion of several witnesses, constituted a tripping hazard, there was absolutely no evidence of any prior tripping incidents on the subject ladder. There was evidence that, in addition to Mr. Akers, SMG had two other air conditioning mechanics working at the convention center who were required to climb the subject ladder. Testimony from Mr. Akers established that the SMG workers likely climbed the subject ladder 180 times per year. On none of these occasions did any of the SMG workers trip on the subject ladder.

Mr. Akers testified that he was aware of the existence of the ladder's top rung as he had climbed the subject ladder on at least 30 occasions prior to the accident. Additionally, Mr. Akers had climbed the subject ladder at least 3 or 4 times on the actual day of the accident. Mr. Akers testified that he never experienced any problems while climbing the subject ladder, until the time of the accident.

Regarding the accident, Mr. Akers testified that he climbed the ladder in the same fashion that he always climbed the ladder. Mr. Akers always lifted one foot at a time until he had both feet on the same rung before ascending to the next rung. When he reached the top rung, Mr. Akers placed his left foot on the rung and was in the process of lifting his right foot over the rung to place it on the parapet when he caught his right foot on the rung. Mr. Akers then fell straight down, approximately 20 feet to the roof below, and landed on both feet. Mr. Akers did not actually see his right foot contact the top rung but he believes it did so. There were no eyewitnesses to the accident.

**DAMAGES**

Mr. Akers was taken from the accident site by ambulance to Mt. Sinai Hospital, where he was admitted and subsequently discharged the following day. He was diagnosed as sustaining fractures of the heels in both feet, as well as suffering a compression fracture of the vertebral disc located at the L1 level of his spine. The heel fractures were treated with casts on both feet.

Mr. Akers subsequently underwent a series of surgeries on his heels and ankles. Specifically, the fractures in both feet were initially reduced in a surgical procedure in June of 1995 wherein internal fixation of the fractures was accomplished with the insertion of pins in the bones. In February of 1996, Mr. Akers underwent a subtalar arthrodesis, i.e., a fusion, of the right foot and heel bones wherein a portion of his hipbone was removed and fused together with the foot and heel bones. In September of 1998, Mr. Akers' right ankle was fused in a fashion similar to the fusion of the right foot and heel. This fusion failed and Mr. Akers subsequently was required to undergo surgery again in September of 1999, wherein the right ankle was re-fused with bone grafts as well as rods and pins that remain in place.

Mr. Akers' health care related expenses incurred as a result of the accident have totaled more than $275,000. Mr. Akers has received opinions from his doctors that he may need future surgery on his right ankle and his low back. A lifecare plan submitted by a rehabilitation expert hired by Mr. Akers reflects a present value amount of $239,402 for future necessary medical bills.

The evidence reveals that after the May 1995 accident, Mr. Akers underwent surgical procedures and several extended periods of rehabilitation that left him confined to a wheel chair and/or bed for approximately 1½ years. He has a complete loss of motion in his right foot and ankle and walks with a noticeable limp. He also has very limited motion in the left foot and ankle, which contributes to his walking problems. Mr. Akers' right foot is visibly deformed and he has numerous scars on his right foot, left foot, and hip areas as a result of his several surgeries. Mr. Akers difficulties with walking have also caused him to suffer from severe back pain. It is undisputed that Mr. Akers suffers from severe pain on a daily basis. Mr. Akers testified that he does not intend to have any future surgeries.

As the result of his injuries and resulting pain and physical limitations, Mr. Akers has been assigned a 40 percent permanent impairment rating to the body as a whole. His physical limitations have left him unable to return to work as an air conditioning mechanic. Mr. Akers is currently classified as permanently and totally disabled by the Social Security Administration.

Although Mr. Akers is classified as permanently and totally disabled, he currently operates two small businesses. One business is a residential air conditioning service and the other business is an entertainment venture that involves the use of a karaoke machine. Mr. Akers does not engage in any physical labor in the air conditioning business as he hires subcontractors to do that part of the job. Likewise, Mr. Akers' wife helps him with the physical aspects of the karaoke business, as well as helping him with administrative matters in both businesses.

Mr. Akers currently receives $860 per month in social security disability benefits.

Dr. Dimbath, an expert economist hired by Mr. Akers, testified that Mr. Akers has a lost future earning capacity, reduced to present value, valued at $781,069. This figure is based on the difference between what Mr. Akers would have been earning had he not been injured and the amount he currently earns from his two businesses, then factored through 26 years (when Mr. Akers turns 67 years-old.)

Dr. Dimbath also testified that Mr. Akers has the additional economic losses: past lost earnings of $237,678; past and future lost social security earnings of $66,873; past and future lost fringe benefits of $436,599; and future medical expenses of $239,402. All of the future expenses are reduced to present value. According to Dr. Dimbath, Mr. Akers' past and future economic damages total $1,761,621.

The city disputes many of Dr. Dimbath's conclusions. First, the city contends that Mr. Akers has no lost earning capacity because he currently works just as many hours in his two jobs and other activities as he worked before the accident. Also, the city contends that Mr. Akers can earn just as much money as he did before by working in another occupation that he is qualified and capable of doing. Further, the city argues that Mr. Akers' current gross income from his two businesses actually exceeds the annual amount of his pre-accident earnings. The city notes that Mr. Akers testified that he had always planned on leaving his job with SMG and forming his own business, which is just what he has done. Therefore, he has no lost earning capacity and also should not be entitled to any damages for the related loss of fringe benefits and social security earnings since he would be responsible for those as a business owner anyway.

The city retained Dr. William Landsea as its expert economist. Dr. Landsea offered the aforementioned opinions, but also calculated figures that assumed some loss of earnings. Dr. Landsea examined Mr. Akers' tax returns for the years after the accident and determined that Mr. Akers was earning $16,199 less per year. The present value of that figure, calculated for 26 years, is $390,774. Dr. Landsea then reduced that figure by the present value of the social security disability benefits Mr. Akers will receive until age 67 ($249,415.) Accordingly, Dr. Landsea testified that the present value of Mr. Akers' lost future earning capacity is $141,359.

The city stipulates that Mr. Akers' past medical bills and related expenses total $275,000. The city disputes Dr. Dimbath's calculations for future medical bills because those calculations include costs for future surgeries which Mr. Akers testified he will not have. The city also disputes

the inclusion of amounts for future prescription medicines since Mr. Akers only takes over-the-counter medications and does not intend to take prescription medications. (Mr. Akers testified that, during his rehabilitation, he became addicted to pain medication but he has since conquered that addiction.) The city further disputes Dr. Dimbath's inclusion of charges for housekeeping and lawn care services.

PROCEDURAL HISTORY:

Mr. Akers' lawsuit was tried in circuit court in Miami in August and September of 2001. The jury returned a verdict finding both Mr. Akers and the City of Miami Beach negligent and it assigned 25 percent of the fault to Mr. Akers and 75 percent of the fault to the city. The jury awarded Mr. Akers past and future economic damages in the amount of $2 million and past and future non-economic damages in the amount of $2.5 million, for a total of $4.5 million. The trial court denied the city's motions for new trial and remittitur. The trial court, after reducing the verdict for collateral sources and Mr. Akers' percentage of fault, entered a final judgment on November 16, 2002, for the amount of $3,317,029.40. Mr. Akers did not seek a judgment for costs.

The city did not pursue an appeal. Pursuant to the provisions of s. 768.28, F.S., the city has paid Mr. Akers $100,000.

MISCELLANEOUS MATTERS:

Since Mr. Akers was injured while he was on the job, he has received the benefit of workers compensation insurance. The workers compensation insurance carrier has paid most of Mr. Akers' medical bills and related expenses, as well as statutory wage loss benefits. Mr. Akers reached a lump sum settlement with the insurance carrier for all past and future medical, rehabilitation, vocational, and wage loss benefits, which was approved by a Judge of Compensation Claims on May 19, 1999. Pursuant to Florida law, the insurance carrier has lien rights for the total amount of benefits paid to, or on behalf of, Mr. Akers, which totals $820,269.85.

Medicaid has paid some of Mr. Akers' medical bills and has a current lien in the amount of $13,211.24.

The City of Miami Beach has an insurance policy with Transamerica Insurance Company that provides coverage for this accident. The policy has $1 million in primary coverage and $5 million in excess coverage. Accordingly, if

the Legislature passes this claim bill the City of Miami Beach will not have to designate any taxpayer funds for the payment of this claim.

CONCLUSIONS OF LAW:

**LIABILITY**

Under Florida law, the City of Miami Beach had a duty to maintain the convention center in a reasonably safe condition. The city can be held liable if it negligently failed to maintain the convention center in a reasonably safe condition or negligently failed to correct a dangerous condition of which the city either knew, or should have known by the use of reasonable care, and such negligence was the legal cause of Mr. Akers' accident, injuries, and damages. Florida law defines negligence as the failure to use reasonable care, which is that degree of care that a reasonably careful person would use under similar circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under similar circumstances or in failing to do something that a reasonably careful person would do under like circumstances.

Mr. Akers contends that the placement of the top rung of the subject ladder created a dangerous condition, that is, a tripping hazard. The top rung violated provisions of the South Florida Building Code, OSHA, NFPA, and ANSI, which under Florida law constitutes evidence of negligence. Mr. Akers further contends that the city was negligent because it should have known that the ladder violated code and it should have corrected this dangerous condition. The fact that there had been no prior accidents with the subject ladder does not mean the city was not negligent, according to Mr. Akers, as the ladder was an accident waiting to happen.

The city argues that the code violation is a "red herring" because the ladder does not constitute a dangerous condition. The city contends that the law only requires it to maintain the premises in a reasonably safe condition, not make the premises "accident proof." The city claims that the ladder was reasonably safe because Mr. Akers had climbed it on at least 30 prior occasions without having any problems. Additionally, other workers had climbed the ladder over 180 times without incident. In the 6 years the ladder had been in place there had never been an accident

prior to Mr. Akers' accident. Moreover, the city points out that no matter where the rung of a ladder is placed, a tripping hazard will always exist as the climber will always have to place a foot on a rung or lift a foot over a rung when climbing or descending a ladder. Accordingly, the city contends that Mr. Akers is the sole cause of the accident.

I conclude that the greater weight of the evidence supports the jury's determination that the city was negligent. I also conclude that the greater weight of the evidence supports the jury's apportionment of 75 percent of the fault to the city. Specifically, the following evidence supports the finding of negligence on the city's behalf:

- Testimony from the city building officials that the ladder violated the applicable codes;
- Testimony from the city building officials that the ladder was a tripping hazard;
- Testimony from the city building officials that it was the city's responsibility to enforce the applicable codes;
- Testimony from the city building officials that the city should have known the ladder violated the applicable codes because the city should have inspected the ladder on at least five occasions during the 6 years it had been in place prior to the accident;
- Testimony from the city building officials that, had they been aware of the ladder, they would have had the top rung brought in conformance with the applicable codes, thereby eliminating the tripping hazard.

The aforementioned evidence leads to three possible conclusions. First, the city inspected the ladder on five occasions and knew it violated the applicable codes, yet failed to correct the dangerous conditions. Second, the city failed to inspect the ladder when it was required to do so, thereby allowing the dangerous condition to exist because it did not know it existed. Third, the city performed the required inspections but failed to understand the applicable code provisions, thereby allowing the dangerous condition to exist. Any of these three types of action or inaction constitutes negligence.

Moreover, it should be noted that the trial court did not disturb the jury's findings. Also, the city chose not pursue an appeal of these issues.

**DAMAGES**

The claims bill filed on Mr. Akers' behalf seeks $3,217,029.40. This amount represents the final judgment entered by the trial court, after reducing the $4.5 million jury award with collateral sources and Mr. Akers' 25 percent allocation of fault. Mr. Akers contends the jury verdict is supported by the devastating impact the severe injuries have had on his life, his lifestyle, and his earning capacity. He has suffered a tremendous amount of pain, suffering, and mental anguish in the past during the course of his surgeries and rehabilitation periods. Additionally, he will be forced to live with excruciating pain on a daily basis for the remainder of his 33-year life expectancy. He has numerous scars and a noticeable altered gait. Finally, he has significant physical limitations that negatively impact every aspect of his daily activities.

The city does not deny the serious nature of Mr. Akers' injuries, nor does it deny that Mr. Akers undoubtedly experienced a great deal of pain and suffering. Nevertheless, the city argues that the accident has not left Mr. Akers with a lower earning capacity as he is still physically working just as many hours as he did before the accident, thereby leaving him capable of earning just as much. Even if Mr. Akers is actually earning a net income lower that before the accident, the city claims that the present value of that lower earning capacity is only $141,359. Unlike Mr. Akers' expert economist, the city contends Mr. Akers should not be compensated for past and future lost fringe benefits, lost social security earnings, and certain medical bills and related expenses. Regarding non-economic damages, the city argues that Mr. Akers' pain, suffering, mental anguish, disability, physical impairment, disfigurement, inconvenience, and loss of capacity for the enjoyment of life should only be valued at a maximum of $1 million.

Similar to my conclusion on liability, I also conclude that the greater weight of the evidence supports the jury's awards on economic damages and non-economic damages. Regarding the economic damages, both parties' experts

provided numerous differing opinions about the values of lost earnings, lost earning capacity, fringe benefits, social security earnings, offsets for social security disability benefits, and medical bills and related expenses. Coupling Mr. Akers' injuries and physical limitations with any of the many different scenarios could lead to total economic damages lesser than, equal to, or greater than the jury's award. Therefore, I find that competent, substantial evidence exists to support the figure awarded by the jury.

Turning to non-economic damages, a respondent that assails a jury verdict as being excessive has the burden of showing the Legislature that the verdict was unsupported by sufficient credible evidence; or that it was influenced by corruption, passion, prejudice, or other improper motives; or that it has no reasonable relation to the damages shown; or that it imposes an overwhelming hardship on the respondent that is out of proportion to the injuries suffered; or that it obviously grossly exceeds the maximum limit of a reasonable range within which a jury may properly operate. I find that the city did not present evidence sufficient to overturn the jury verdict in this case.

The claimant, Mr. Akers, is also seeking post-judgment interest and costs, even though he did not request separate amounts for these items in the claim bill. Regarding post-judgment interest, under the sovereign immunity doctrine governmental agencies cannot pay any judgment in excess of the statutory cap of $100,000 set forth in §768.28, F.S. Generally, it has been legislative policy not to award interest on money awarded in excess of the cap. Accordingly, I conclude that no post-judgment interest should be awarded.

Regarding costs, Mr. Akers submitted a cost affidavit, which was supplemented at the final hearing, requesting costs in the amount of $84,618.41. He did not obtain a cost judgment at the trial court level and admitted that he did not even file a motion or otherwise request the court to award costs. Additionally, the claim bill itself does not make a request for costs in addition to the net, unsatisfied judgment amount.

The city contends that Mr. Akers should not be entitled to any amount for costs since he did not seek a cost judgment in court and did not specifically request it in the claims bill.

The city argues that many of the costs for which Mr. Akers seeks reimbursement are costs that are not taxable under the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions and, accordingly, should not be awarded here. The city also disputes the amount of most of the costs that are taxable under the Guidelines, but suggests that the proper amount falls within the range of $32,969.28 to $35,469.28.

The claimant has the burden of proof in the claims bill hearing process. Since the claimant did not seek a cost judgment at the trial court level, and the parties cannot agree on an appropriate amount, I conclude that the claimant has not met his burden of proof in his request for costs. Therefore, I conclude that no additional award for costs should be made.

ATTORNEYS FEES:

The claimant's attorney has submitted an affidavit indicating his attorney's fee will be limited to 25 percent of any recovery.

RECOMMENDATIONS:

Based on the foregoing, I recommend that the bill be amended to specify that Mr. Akers be paid $3,217,029.40 under the following conditions:

- Prior to the distribution of any payment to Mr. Akers, the Medicaid lien is to be satisfied from the proceeds.
- After satisfaction of the Medicaid lien, Mr. Akers' attorney must satisfy any other pending liens before distribution of the proceeds to Mr. Akers.

Accordingly, I recommend that Senate Bill 28 (2003) be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

John A. Forgas, III
Senate Special Master

cc: Senator Alex Villalobos
Faye Blanton, Secretary of the Senate
House Subcommittee on Claims

Amendment: Amendment #1 by the Comprehensive Planning Committee directs the City to pay the Agency for Health Care Administration for medical payments paid by Medicaid before paying the claimant.